

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Chapter 11
EMERGE ENERGY SERVICES LP, *et al.*,¹ Case No. 19-11563 (KBO)
Debtors. (Jointly Administered)

Obj. Deadline: Extended to October 14, 2019 @ 4:00 p.m.

**OBJECTION OF MARKET AND JOHNSON, INC.; STOUT EXCAVATING
GROUP LLC; AND A-1 EXCAVATING, INC. TO DEBTORS'
FIRST AMENDED JOINT PLAN OF REORGANIZATION**

Pursuant to 11 U.S.C. §§ 1123 and 1129 and Fed. R. Bankr. P. 3018 and 3020, Market and Johnson, Inc. (“M&J”), Stout Excavating Group LLC (“Stout”), and A-1 Excavating, Inc. (“A-1” and, collectively with M&J and Stout, the “Creditors”), who are creditors in this case, through their undersigned counsel, file this objection (the “Objection”) to the *First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (the “Plan”) (Doc. No. 362). In support of their Objection, the Creditors assert as follows:

BACKGROUND

1. The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), including Superior Silica Sands, LLC (“Superior”), each filed for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) on July 15, 2019 (the “Petition Date”). Each of the Debtors has continued to operate its respective business

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors’ address is: 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.



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and manage its respective properties as debtors-in-possession in accordance with 11 U.S.C. §§ 1107(a) and 1108.

2. On July 30, 2019, the Office of the United States Trustee for the District of Delaware appointed an Official Committee of Unsecured Creditors (the “Committee”) in this case.

3. The Creditors have not waived and may not be deemed to have waived any rights to have final orders in non-core matters and/or matters entitled to adjudication by a judge authorized under Article III of the U.S. Constitution entered only after *de novo* review by a District Court Judge.

4. The Debtors, through the operations of Superior, engage in the mining, processing, and distribution of silica sand for use in hydraulic fracturing (or “fracking”) of oil and gas wells. Superior has silica mining facilities in Wisconsin, Texas, and Oklahoma.

5. M&J, Stout, and A-1 are each creditors of Superior and have asserted statutory and/or constitutional lien rights under relevant state law. M&J holds statutory lien rights on real property and improvements on Superior’s mines in Bexar County, Texas (the “Bexar Facility”), and Kingfisher County, Oklahoma (the “Kingfisher Facility”). Stout holds mining lien rights against the Bexar Facility. A-1 holds certain mining lien rights against the mining assets (both real and personal) of Superior in Wisconsin (the “Wisconsin Mining Assets”). The Creditors assert that at least some of these liens or lien rights constitute unavoidable priority liens on certain assets of Superior.²

6. The Creditors believe the total amount of statutory lien claims (consisting of construction liens, mechanics’ or materialmen’s liens, or mining liens) filed in this case is roughly

² Each of the Creditors filed a timely proof of claim. Each creditor also filed a notice of perfection of lien pursuant to 11 U.S.C. § 546(b)(2). M&J has asserted liens in the total amount of \$8,707,175; Stout has asserted liens in the amount of \$3,274,933.93; and A-1 has asserted liens in the amount of \$1,195,911.89.

\$25 million. Of that amount, the Creditors' secured claims total \$13,278,020.82, or slightly more than 50%.³

PROCEDURAL HISTORY OF THE CASE

7. On the Petition Date, the Debtors filed a variety of so-called "First-Day Motions," including a *Motion (I) Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364 Authorizing the Debtors to (A) Obtain Senior Secured Priming Superpriority Postpetition Financing, (B) Grant Liens and Superpriority Administrative Expense Status, (C) Use Cash Collateral of Prepetition Secured Parties, and (D) Grant Adequate Protection to Prepetition Secured Parties; (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c); and (III) Granting Related Relief* [Doc. No. 20] (the "Financing Motion").

8. In the Financing Motion, Superior and the other Debtors asserted that they were parties to certain first and second lien obligations with HPS Investment Partners LLC as administrative and collateral agent on behalf of the "First Lien Prepetition Lenders" and the "Second Lien Prepetition Noteholders." Financing Motion, ¶ 5.

9. In the Financing Motion, Superior and the other Debtors (except for Emerge Energy Services GP LLC and Emerge Energy Services Finance Corporation) asserted they owed the First Lien Prepetition Lenders "not less than \$66,710,000, plus accrued and unpaid interest and fees with respect thereto." *Id.*

10. In the Financing Motion, Superior and the other Debtors (except for Emerge Energy Services GP LLC and Emerge Energy Services Finance Corporation) asserted they owed the Second Lien Prepetition Noteholders "not less than \$215,755,307, plus accrued and unpaid interest and fees with respect thereto." *Id.*

³ The Creditors each also asserted separate unsecured claims against Superior. It appears only A-1 received a ballot of any sort.

11. In the Financing Motion, Superior and the other Debtors asserted that the First Lien Prepetition Lenders and the Second Lien Prepetition Noteholders (collectively, the “Pre-petition Lenders”) were secured creditors holding liens on the “Pre-petition Collateral” identified in the respective loan documents. Financing Motion, ¶ 6.

12. In the Financing Motion, the Debtors asserted that the Pre-petition Collateral “comprises **substantially all** of the Debtors’ assets.” [Emphasis added]. Financing Motion, ¶ 7.

13. In the Financing Motion, the Debtors sought approval of debtor-in-possession financing from the Pre-petition Lenders who would, as to the post-petition loans, be identified as the DIP Lenders.

14. The Creditors filed an objection to the Financing Motion. [Doc No. 134]. In their objection, the Creditors asserted that their liens were superior to those of HPS on certain assets and reserved all rights associated with their assertion of “Senior Liens” or “Prior Permitted Liens” as those terms were defined in the DIP financing agreement and order.

15. The final order granting the Financing Motion and approving the DIP financing agreement (the “Final DIP Order”) provided that HPS, on behalf of the DIP Lenders, would receive junior liens on any collateral that was subject to “valid, perfected and unavoidable liens senior to the Prepetition Liens in existence immediately prior to the Petition Date.” Final DIP Order, ¶ 13(a)(iii).

16. The DIP Financing Agreement, as approved, recognizes the possible existence of “Prior Permitted Liens” which would include certain valid, perfected, and unavoidable liens in favor of third parties. See § 7.2 of the DIP financing agreement; and definitions of “Permitted Encumbrances” and “Prior Permitted Liens.”

17. The Creditors' objection to the Financing Motion specifically preserved and reserved all issues as to lien priority and the extent or validity of their lien rights, as well as any valuation issues.

18. Under the Final DIP Order, the Debtors' stipulations as to the validity and priority of the liens of the Pre-petition Lenders are not binding upon the Creditors for a period of 75 days after entry of the order approving DIP financing (the "Challenge Period") so as to permit certain so called "Challenges" to be lodged. These Challenges would include objections to the stipulated valuation of assets as well as issues of lien priority. Final DIP Order, ¶ 26.

19. Under the Final DIP Order, the Debtors' stipulations as to the validity and priority of Pre-petition Liens in the Pre-petition Collateral are subject to Challenge if brought within the Challenge Period; otherwise, the stipulations become binding on third parties, including the Creditors.

20. The Final DIP Order was entered on August 14, 2019. The Challenge Period therefore expires on October 28, 2019.

21. On September 11, 2019, the Debtors filed their Plan.

22. The Plan defines "Secured Claim" as a Claim that is secured by a Lien on property in which any of the Debtors' Estates have an interest or that is subject to setoff under section 553 of the Bankruptcy Code, to the extent of the value of the Claim holder's interest in such Estate's interest in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code or, in the case of setoff, pursuant to section 553 of the Bankruptcy Code. See Plan Art. I.C.

23. The Plan defines “Other Secured Claim” as “any Secured Claim other than an Administrative Claim, DIP Credit Agreement Claim, Secured Tax Claim, or Prepetition Debt Claim.” Id.

24. The Plan, as currently proposed, classifies Other Secured Claims as “Class 2.” See Plan Art. III.B.2.

25. The Plan provides that each holder of an allowed Class 2 Claim shall receive, at the election of the Debtors or Reorganized Debtors:

(A) Cash equal to the amount of such Allowed Class 2 Claim; (B) such other less favorable treatment as to which the Debtors or Reorganized Debtors, as applicable, and the Holder of such Allowed Class 2 Claim shall have agreed in writing; (C) the Collateral securing such Allowed Class 2 Claim; or (D) such other treatment such that it will not be impaired pursuant to section 1124 of the Bankruptcy Code.

26. On September 11, 2019, the Debtors filed the solicitation version of the *Disclosure Statement for First Amended Joint Plan of Reorganization for Emerge Energy Services LP and Its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Doc No. 363] (the “Disclosure Statement”). In regard to the treatment of construction or mechanics’ or materialmen’s liens, the Disclosure Statement provides as follows:

In some cases, vendors have asserted liens (“M&M Liens”) to secure allegedly accrued and unpaid amounts owing under prepetition contracts with the Debtors. The Debtors are aware of the assertion of M&M Liens filed against various of the Debtors’ properties at which the subject work and/or services were allegedly supplied. These properties include Debtor-owned property at Kingfisher, Oklahoma, Kosse, Texas, San Antonio, Texas, and Chippewa County, Wisconsin. The Debtors continue to examine the validity and perfection of such liens and their related claims, as well as the relative priority of any such valid and perfected liens relative to other valid and perfected liens on the affected properties. To the extent any valid and perfected M&M Liens enjoy a priority in respect of the affected property sufficient to render the related claims secured, those claims will be treated as Other Secured Claims under the Plan, while any deficiencies will be treated as General Unsecured Claims. The Debtors continue to reserve all rights in respect of the asserted M&M Liens.

Disclosure Statement, Article II.C.3.

27. The Disclosure Statement further acknowledges and provides that as to the Kingfisher Facility, the Debtors are “not aware of the existence of any mortgage” in favor of the Prepetition Lenders. Disclosure Statement, Article IIC.1, 2, and 3.

28. In addition, the real estate records of Barron County, Wisconsin reflect that Superior owned the following properties on which no lien or encumbrance in favor of HPS or its principals appears of record as of the Petition Date:

- a. 1512 E. Division Avenue, Barron WI 54812, Tax ID No. 206-8045-75-000 (the “Division Property”).
- b. Vacant land on County Highway SS, New Auburn, WI 54757, Tax ID No. 022-3500-29-000 (the “Vacant Land”).
- c. 807 6th Street, Clayton, WI 54004, Tax ID No. 004-1900-18-010 (the “Clayton Property”).

29. According to the Barron County property tax records, the current tax-assessed fair market value of these three properties is \$857,900.

30. Based upon information and belief, the Division Property, the Vacant Land, and the Clayton Property are all connected with Superior’s mining business, and as such are subject to A-1’s properly perfected statutory mining lien on Wisconsin Mining Assets.

31. Under Wisconsin’s mining lien statute, A-1’s mining lien on Wisconsin Mining Assets is also a superior lien upon all personal property connected with Superior’s mining industry, including the ores or products of the mine, insofar as the statute provides the lien is superior to all other debts, judgments, decrees, and liens, except for (i) taxes, fines, and penalties and (ii) judgments or mortgages against real property which were entered before the labor was performed.

32. M&J and Stout also assert that their liens against the Bexar Facility are Other Secured Claims.

33. The liquidation analysis attached to the Disclosure Statement estimates “Other Secured Claims” at a “low” of \$17.3 million (and does not specifically project a “high”). The analysis also projects a potential recovery on these claims in liquidation of between 2.5% to 22.9%.⁴

34. The Creditors are prepared to file adversary proceedings to assert Challenges within the Challenge Period to determine the validity, extent, and priority of their lien interests in their collateral as “Other Secured Claims” within the meaning of the Plan.

35. The Creditors also submit, however, that the Plan as presently formulated should not be confirmed as it fails to meet the requirements of the Bankruptcy Code.

BASIS FOR OBJECTION

Impairment

36. Confirmation of a chapter 11 plan is governed by 11 U.S.C. § 1129. A plan may only be confirmed if it meets various requirements. For example, a plan may only be confirmed if, with respect to each class of claims or interests, such class has either (i) accepted the plan or (ii) is not impaired under the plan. See 11 U.S.C. § 1129(a)(8). To the extent a class is not impaired under a plan, that class, and each holder of a claim within that class, are conclusively presumed to have accepted the plan. See 11 U.S.C. § 1126(f); In re Energy Future Holdings Corp., 540 B.R. 109, 112 (Bankr. D. Del. 2015). The Creditors submit the Plan does not leave their rights unaltered.

⁴ These projections appear to be based upon a vague valuation of the assets of the Kingfisher Facility only. It does not account for valuation of *other* assets which the Creditors believe secure their claims. However, the Creditors join the objections of other creditors regarding the valuation of the Kingfisher Facility, which the Creditors believe to be worth substantially more than the amounts asserted by the Debtors in the Disclosure Statement.

Lien Retention

37. The Debtors contend “Other Secured Creditors” are unimpaired, and thus deemed to have conclusively accepted the plan. Under 11 U.S.C. § 1124(1) a class of claims is impaired unless the plan “leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.” Here, the Plan fails to address retention of liens, and the Creditors submit that the Plan’s failure to include retention of their liens means their “Other Secured Claims” are in fact impaired within the meaning of § 1124.

38. Under the Plan, the Debtors give themselves several options as to how they will pay “Other Secured Claims”: (i) cash; (ii) “other less favorable treatment” the creditor might accept; (iii) via the collateral; or (iv) “other treatment such that it will not be impaired pursuant to section 1124 of the Bankruptcy Code.” Facially, this might seem as if it complies with the Bankruptcy Code. Dig deeper, however, and the shortcomings become evident.

39. The Debtors blandly assert that the Creditors will be “Other Secured Claims” to the extent they are ultimately determined to be such. See Disclosure Statement, Article II.C.3 (any “M&M Lien” determined to have priority will be treated as an Other Secured Claim in the amount ultimately allowed). But the Plan fails to propose a specific mechanism to establish the extent of the Creditors’ allowed secured claims (as required under 11 U.S.C. § 506(a) insofar as a claim is a secured claim to the extent of the value of the creditor’s interest in the estate’s interest in the property in question).⁵

40. Instead, the proposed treatment of Class 2 “Other Secured Claims” is expressly subject to Article VIII of the Plan. That Article affords the Debtors the right to object and seek to determine any claim after confirmation (and even after the Effective Date). Given that the Plan

⁵ The Creditors contend that ultimate determination of their secured claims will result in allowance of a substantial portion of the claims, if not in full.

does not anticipate fixing or determining the Creditors' secured claims as of the date of confirmation, lien retention becomes a crucial issue. By failing to provide that Class 2 Claimants retain their liens, the Plan does not leave their rights unaltered.

Best Interest Test

41. Given that the claims are not unimpaired, the Creditors cannot be deemed to have accepted the Plan. Because they have not accepted the Plan, under the "best interest of creditors" test they must "receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." See 11 U.S.C. § 1129(a)(7); Energy Future Holdings, 540 B.R. at 112.

42. The Debtors bear the burden of demonstrating the Plan satisfies the "best interest" test. In re Ditech Holding Corp., 2019 WL 4073378, *46 (Bankr. S.D.N.Y. Aug. 28, 2019). In a chapter 7 liquidation, the Creditors would retain their liens. It is appropriate for the Court to consider that fact in connection with the "best interest" test. *Id.*, at *48 (rights available to creditor in chapter 7 are relevant to determination of whether debtors have met burden under best interest test). Because the Creditors would clearly retain their liens in chapter 7, the Plan as proposed fails the best interest test as the Plan does not clearly provide them with the same rights.⁶ The Plan should clearly and unequivocally provide that the treatment of the Other Secured Claims includes the retention of liens to avoid any concerns about the manner in which the Debtors are authorized to use or dispose of the assets which serve as the Creditors' collateral pending any final determinations as to allowance of their claims.

⁶ To the extent the Debtors seek to confirm the Plan under § 1129(b), it also fails to meet the requirements of § 1129(b)(2)(A), insofar as it does not provide "that the holders of such [secured] claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims."

Feasibility: No Disputed Claim Reserve

43. In addition, under 11 U.S.C. § 1129(a)(11), the Court must determine that confirmation of the Plan “is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.” Essentially, the code requires the Plan to be feasible. Feasibility does not require that success be guaranteed, but there must be a “reasonable assurance” of compliance with plan terms. In re Abeinsa Holdings, Inc., 562 B.R. 265, 276 (Bankr. D. Del. 2016) (citation omitted).

44. In Abeinsa Holding, the court determined that feasibility was supported by establishment of a disputed claim reserve, even though the reserve did not contain the full face amount of the claims. *Id.* Article VIII of the Plan provides, however, that the debtors “may, in their respective sole discretion, establish such appropriate reserves for Disputed Claims . . . in the applicable Class(es) as it determines necessary and appropriate.” See Article VIII, Section 4D. The Plan stands Abesinsa on its head. It proposes that *if* a reserve is established, such reserves shall equal “an amount of property equal to 100% of distributions . . . if such Disputed Claims . . . were allowed in their respective Face Amount.” *Id.* In other words, the Plan does not require the Debtors to actually set aside anything to pay “Other Secured Claims” once their disputed claims are allowed.

Return of Collateral

45. Meanwhile, the Plan says the Debtors have the option to give the Creditors their collateral in “satisfaction” of their secured claims, once allowed. But providing for the return of collateral is not the same as clearly providing that the Creditors retain all lien rights in the collateral pending a final decision on the merits of their claims. The Plan provides no specifics as to how

collateral would be returned (i.e., surrender, relief from the automatic stay, quitclaim deed or bill of sale, etc.). The likely result? The Creditors' claims are allowed after an appropriate determination, there is no money to fund a distribution because there is no reserve established for payment of such claims, and the Creditors are required to somehow compel the Debtors to deliver "the collateral" in satisfaction of their claims.

46. The Creditors contend that the failure to establish an actual reserve for the payment of Other Secured Claims – in any amount – means the Plan is not feasible. Collectively with the uncertainty as to how the Creditors would "receive" their collateral if the Debtors elect that option, there is no "reasonable assurance" the Debtors can comply with the Plan terms. *Id.*

RESERVATION OF RIGHTS

47. The Creditors reserve all of their rights, claims, defenses, and remedies, including the ability to supplement or amend this Objection, to request any needed discovery, and to raise additional objections during confirmation should the evidence as presented warrant such objections. The Creditors also join in any other objections to the Plan to the extent such objections are not inconsistent with this Objection.

CONCLUSION

For the foregoing reasons, the Creditors request that the Court enter an Order: (i) sustaining their Objection, (ii) denying confirmation of the Debtors' Plan unless and until it is modified to conform with the substance hereof, and (iii) granting to the Creditors such other and further relief as the Court deems just and proper.

Date: October 14, 2019
Wilmington, DE

SULLIVAN · HAZELTINE · ALLINSON LLC

/s/ E.E. Allinson III

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CERTIFICATE OF SERVICE

I, Elihu E. Allinson III, do hereby certify I am not less than 18 years of age and that on this 14th day of October 2019, I caused copies of the within *Objection of Market and Johnson, Inc., Stout Excavating Group LLC, and A-1 Excavating, Inc. to Debtors' First Amended Joint Plan of Reorganization* to be served upon the parties listed below via U.S. Mail, First Class, postage pre-paid and Electronic Mail. All other parties who have signed up for electronic filing in this case will receive electronic notice via CM/ECF.

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October 14, 2019

Date

/s/ E.E. Allinson III

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