

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

EMERGE ENERGY SERVICES LP, *et al.*,¹

Debtors.

Chapter 11

Case No. 19-11563 (KBO)

(Jointly Administered)

Hearing Date: October 24, 2019 at 1:00 p.m. (*prevailing Eastern Time*)
Objection Deadline: October 11, 2019 at 4:00 p.m. (*prevailing Eastern Time*).
The objection deadline has been extended for Sunoco, LLC

Related Docket No. 362

LIMITED OBJECTION TO CONFIRMATION OF FIRST AMENDED JOINT
PREPACKAGED PLAN OF REORGANIZATION FOR EMERGE ENERGY
SERVICES LP AND ITS AFFILIATE DEBTORS UNDER
CHAPTER 11 OF THE BANKRUPTCY CODE

Sunoco, LLC (“**Sunoco**”), by and through its undersigned counsel, hereby files this Limited Objection to *First Amended Joint Prepackaged Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 362] (the “**Amended Plan**”). In support hereof, Sunoco respectfully states as follows:²

BACKGROUND

A. PROCEDURAL BACKGROUND

4. On July 15, 2019 (the “**Petition Date**”), the above captioned Debtors (the “**Debtors**”) filed voluntary petitions for relief under the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (“**Chapter 11 Cases**”). The Debtors are operating

¹ The Debtors in these 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.

² Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Amended Plan and Disclosure Statement.



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their businesses and managing their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On July 31, 2019 the Office of the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) appointed the Official Committee of Unsecured Creditors (the “**Committee**”).

6. On July 25, 2019, the Debtors filed with this Court their *Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (as it may be amended, modified or supplemented from time to time, the “**Plan**”) and the *Disclosure Statement with Respect to Joint Plan of Reorganization for Emerge Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (as it may be amended, modified or supplemented from time to time, the “**Disclosure Statement**”).

7. On August 29, 2019, the Debtors filed with this Court their *First Amended Joint Prepackaged Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (the “**Amended Plan**”).

8. The hearing to consider confirmation of the Amended Plan (the “**Confirmation Hearing**”) is scheduled to commence at 1:00 p.m. (*prevailing* Eastern Time) on October 24, 2019.

B. FACTUAL BACKGROUND

9. Prior to the Petition Date, on August 31, 2016, Sunoco as assignee buyer and Sunoco LP, as Buyer Parent Guarantor, and Debtor Emerge Energy Services Operating LLC as seller (the “**Seller**”), and Debtor Emerge Energy Services LP, as Seller Parent Guarantor entered into that certain Amended and Restated Purchase and Sale Agreement (as amended, the “**Purchase**”).

Agreement)³. A copy of the Purchase Agreement is attached to the Declaration of William E. Chipman, Jr., Esq. (the “**Chipman Declaration**”) filed contemporaneously herewith as **Exhibit A** and is incorporated herein by reference.

10. Pursuant to the Purchase Agreement, Sunoco purchased from Seller 100% of the issued and outstanding limited liability company interests in Direct Fuels LLC, a Delaware limited liability company, Allied Energy Company LLC, an Alabama limited liability company, and Emerge Energy Distributors Inc., a Delaware corporation.

11. Section 2.2(b)(ii) of the Purchase Agreement provides that, at closing, a cash amount equal to \$7,000,000 (the “**General Escrow Amount**”) shall be deposited into escrow by Sunoco to be held in accordance with the terms of an escrow agreement for the purpose of establishing a source of funds to secure the indemnification obligations of the Seller to Sunoco and other indemnified parties (each an “**Indemnification Notice Claim**”).

12. Section 2.2(b)(iii) of the Purchase Agreement provides that, at closing, a cash amount equal to \$4,000,000 (the “**Hydrotreater Escrow Amount**”) shall be deposited into escrow by Sunoco to be held in accordance with the terms of an escrow agreement for the purpose of establishing a source of funds to satisfy any losses of Sunoco as a consequence of a “Hydrotreater Completion Defect” under Section 10.25 of the Purchase Agreement.

13. Section 2.2(b)(iv) of the Purchase Agreement provides that, at closing, a cash amount equal to \$2,250,000 (the “**RFS Escrow Amount**”) shall be deposited into escrow by Sunoco to be held in accordance with the terms of an escrow agreement for the purpose of

³ The Purchase Agreement amends and restates that certain Purchase and Sale Agreement, dated as of June 23, 2015 (the “**Original Agreement**”), pursuant to which Buyer agreed to purchase from Seller all of the Interests (as defined below) upon the terms and subject to the conditions set forth therein.

establishing a source of funds to satisfy any losses of Sunoco as a consequence of a “**RFS Violation**” under Section 10.26 of the Purchase Agreement.

14. Section 2.2(b)(v) of the Purchase Agreement provides that, at closing, a cash amount equal to \$1,000,000 (the “**Pipeline Release Escrow Amount**”) shall be deposited into escrow by Sunoco to be held in accordance with the terms of an escrow agreement for the purpose of establishing a source of funds to satisfy any losses of Sunoco as a consequence of a “**Pipeline Release**” under Section 10.27 of the Purchase Agreement.

15. On August 31, 2016, Sunoco, Seller and CitiBank, N.A., as escrow agent (“**Escrow Agent**”) entered into that certain Escrow Agreement, as amended by that certain First Amendment to and Direction Under Escrow Agreement, between Seller, Buyer and Escrow Agent, dated April 17, 2017 (collectively, the “**Escrow Agreement**”). A copy of the Escrow Agreement is attached to the Chipman Declaration as **Exhibit B** and is incorporated herein by reference.

16. At closing, pursuant to the terms of the Escrow Agreement and the Purchase Agreement, Sunoco fully funded:

(i) the General Escrow Amount (together with any Earnings (as defined in the Escrow Agreement), collectively, the “**General Escrow Property**”), in an account established with the Escrow Agent (the “**Indemnification Escrow Account**”);

(ii) the Hydrotreater Escrow Amount (together with any Earnings, collectively, the “**Hydrotreater Escrow Property**”), in an account established with the Escrow Agent (the “**Hydrotreater Escrow Account**”);

(iii) the RFS Escrow Amount (together with any Earnings, collectively, the “**RFS Escrow Property**”), in an account established with the Escrow Agent (the “**RFS Escrow Account**”); and

(iv) the Pipeline Release Escrow Amount (together with any Earnings, collectively, the “**Pipeline Release Escrow Property**” and, together with the General Escrow Property, the Hydrotreater Escrow Property and the RFS Escrow Property, the “**Escrow Funds**”), in an account established with the Escrow Agent (the “**Pipeline Release Escrow Account**” and, together with the Indemnification

Escrow Account, the Hydrotreater Escrow Account and the RFS Escrow Account, the “**Escrow Accounts**”).⁴

17. Sunoco has asserted claims against certain of the Escrow Accounts. Out of an abundance of caution and under compulsion of the bar date in these cases, on September 6, 2019, Sunoco filed a protective proof of claim which was assigned claim number 303 (the “**Proof of Claim**”). A copy of the Proof of Claim is attached to the Chipman Declaration as **Exhibit C** and is incorporated herein by reference.

18. As set forth in the Proof of Claim, Sunoco contends that the Escrow Funds held in the Escrow Accounts are not property of the bankruptcy estates and, accordingly, Sunoco’s claims to the Escrow Accounts are not claims against property of the bankruptcy estates.

19. To preserve its rights, solely to the extent this Court was to determine that the Escrow Funds held in the Escrow Accounts are property of the estates, Sunoco submitted the Proof of Claim in the amount of at least Ten Million One Hundred Twenty Seven Thousand and 00/100 Dollars (\$10,127,000.00), plus legal fees, costs and expenses in an amount to be determined, for amounts due to Sunoco from the Seller under the Purchase Agreement and Escrow Agreement.

20. More specifically, Sunoco asserted a Section 10.25(a) Hydrotreater Completion Defect claim against the Hydrotreater Escrow Property held in the Hydrotreater Escrow Account and a Section 2(b)(i) Hydrotreater Indemnification Claim under the Escrow Agreement in the amount of not less than Three Million One Hundred Twenty-Seven Thousand Dollars (\$3,127,000.00) (the “**Hydrotreater Claimed Amount**”). The Hydrotreater Claimed Amount is secured by funds being held by the Escrow Agent in trust for the benefit of Sunoco. The Hydrotreater Claimed Amount relates to Sunoco’s lost profits resulting from the Birmingham

⁴ Pursuant to the amendment to the Escrow Agreement, (a) the RFS Escrow Property was released from escrow to Seller, and the RFS Escrow Account was closed, and (b) Eight Hundred Seventy-Three Thousand and 00/100 Dollars (\$873,000.00) of the Hydrotreater Escrow Property was released to Seller.

Hydrotreater having not been constructed or installed on time in accordance with then Birmingham Hydrotreater Construction Plans and Schedules as a direct consequence of actions, events and omissions that occurred prior to closing on the Purchase Agreement.

21. Sunoco also asserted an Indemnification Notice Claim against the General Escrow Property held in the Indemnification Escrow Account under Section 8.1(a)(i) of the Purchase Agreement, and Section 2(a)(i) Claim under the Escrow Agreement in the amount of Seven Million Dollars (\$7,000,000.00) (the “**Indemnification Claimed Amount**”). The Indemnification Claimed Amount is secured by funds being held by the Escrow Agent in trust for the benefit of Sunoco. The Indemnification Claimed Amount relates to breaches of representations and warranties, set forth in Section 3.28 of the Purchase Agreement, regarding the Specification Condition of the Hydrotreaters and the construction and installation of the Birmingham Hydrotreater.

22. Finally, to the extent the Seller asserts claims against Sunoco of any kind, Sunoco reserved the right to assert that such claims are subject to rights of setoff and/or recoupment, which rights are treated as secured claims under sections 506 and 553 of the Bankruptcy Code, and similar state and federal laws as well as in equity.

23. Further details of the Hydrotreater Claimed Amount and the Indemnification Claimed Amount are further detailed in certain Claim Notices dated as of November 29, 2017 and September 6, 2019 (the “**Claims Notices**”) that were served on the Escrow Agent by Sunoco pursuant to the terms of the Escrow Agreement. Copies of the Claims Notices are attached to the Chipman Declaration as **Exhibit D** and are incorporated herein by reference.

24. The Seller has disputed the Claims Notices by submitting a Response Notice to the Escrow Agent dated October 4, 2019 (the “**Response Notice**”) pursuant to the procedures set forth

in the Escrow Agreement. A copy of the Response Notice is attached to the Chipman Declaration as **Exhibit E** and is incorporated herein by reference.

25. Pursuant to Section 7 of the Escrow Agreement, the laws of the State of New York govern any dispute thereunder and both the Buyer and Seller irrevocably and unconditionally submitted to the exclusive jurisdiction of the federal and state courts located in the Borough of Manhattan, City, County and State of New York, for any proceedings commenced regarding the Escrow Agreement.

26. Pursuant to Sections 10.10 and 10.11 of the Purchase Agreement, the laws of the State of Texas govern any dispute thereunder and both the Buyer and Seller irrevocably and unconditionally submitted to the exclusive jurisdiction of the federal and state courts located in Tarrant County Texas for any proceedings commenced regarding the Purchase Agreement.

27. Other than a brief mention in the Debtors' liquidation analysis (the "**Liquidation Analysis**") of their anticipated recoveries of Escrow Funds from the Escrow Accounts, the Amended Plan does not deal with the Escrow Claims or the Escrow Funds. In addition, the Releases, Discharge, Exculpation and Injunction set forth in Article X of the Amended Plan, if applicable to the Escrow Claims, could potentially preclude Sunoco from pursuing its claims against the Escrow Accounts.

27 Simultaneously with the filing of this Limited Objection, Sunoco also filed a motion for seeking entry of an order (a) finding that the Escrow Funds are not property of the bankruptcy estate of Seller and, therefore, that Sunoco can pursue its Hydrotreater Claimed Amount and Indemnification Claimed Amount (collectively, the "**Escrow Claims**") pursuant to the terms of the Purchase Agreement and Escrow Agreement and draw all amounts determined to be due and payable currently and all future amounts payable thereunder from the Escrow Accounts without

requiring relief from the automatic stay, or (b) in the alternative, granting Sunoco limited relief from the automatic stay to allow Sunoco to pursue its Escrow Claims against the Escrow Funds pursuant to the terms of the Purchase Agreement and Escrow Agreement.

LIMITED OBJECTION

28. The Debtors are currently seeking confirmation of their Amended Plan. The Amended Plan does not provide for the liquidation of the Escrow Claims and the Debtors do not rely upon the Escrow Funds to confirm their Amended Plan. However, Article X of the Amended Plan Contains Release, Discharge, Injunction and Related Provisions that could potentially preclude Sunoco from pursuing its claims against the Escrow Accounts.

29. More specifically, the Injunction contained in Article X.G would permanently enjoin Sunoco from commencing or continuing any suit, action or other proceeding to recover on its Escrow Claims against the Escrow Accounts and would also preclude any rights to setoff against the Seller.

30. Article X.B.2. of the Amended Plan provides that unless Sunoco opts out of the third-party releases (the “**Releases**”), then Sunoco shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever provided a full discharge, waiver and release to the Seller under the Purchase Agreement from any and all claims and to the Escrow Accounts.

31. As set forth in its Proof of Claim, Sunoco does not believe it is an unsecured creditor in these cases, however, the Debtors provided Sunoco with a Class 6 – General Unsecured Claim ballot (the “**Ballot**”). The Ballot provides Sunoco with the option to opt out of the third-party releases contained in the Amended Plan. Out of an abundance of caution, Sunoco intends to submit the Ballot to opt out of the Releases. By submitting the Ballot, Sunoco is not agreeing to be bound by the Debtors unilateral classification of Sunoco as an unsecured creditor.

32. If the Escrow Funds are deemed to be property of the Debtors' estates, which they are not, Sunoco believes that it is a secured creditor secured by the Escrow Accounts. As a secured creditor, Sunoco should be classified as a holder of a Class 2 Other Secured Claim, entitled to cash equal to the amount of its Allowed Class 2 Claim, or the Collateral securing its Allowed Class 2 Claim. Because holders of claims in Class 2 are conclusively deemed to have accepted the Amended Plan, they are not entitled to vote to accept or reject the Amended Plan and therefore are not able to opt out of the Releases. As set forth above, Sunoco intends to opt out of the Releases.

33. The discharge contained in Article X.D. of the Amended Plan purports to discharge all claims against the Debtors, including the Seller, in exchange for consideration distributed under the Amended Plan. However, the Escrow Funds are not being distributed under the Amended Plan, they are subject to distribution under the Escrow Agreement and are not property of the Debtors' estates. Therefore, the discharge and release provisions contained in Article X.D. of the Amended Plan should not discharge or release the Escrow Claims against the Escrow Accounts. Finally, the Exculpation provisions contained in Article X.E. of the Amended Plan, to the extent applicable, should likewise not apply to Sunoco's Escrow Claims.

34. To resolve Sunoco's Limited Objection, Sunoco respectfully requests that the following language be added to the Confirmation Order, which is designed to preserve all parties' rights with regard to the Escrow Funds, the Escrow Accounts and the Escrow Claims:

Notwithstanding anything in the Plan or this Confirmation Order to the Contrary, the Releases, Discharge, Exculpation and Injunction set forth in Article X of the Plan shall not apply to Sunoco, LLC's ("Sunoco") claims against certain transactional escrows and the funds held in such escrows, for amounts due to Sunoco from Emerge Energy Services Operating LLC ("Seller") in connection with that certain Amended and Restated Purchase and Sale Agreement between Sunoco as assignee buyer and Sunoco LP, as Buyer Parent Guarantor, and Seller, and Emerge Energy Services LP, as Seller Parent Guarantor, dated August 31, 2016 (the "Purchase Agreement"), and that certain Escrow Agreement entered into by Sunoco, Seller and CitiBank, N.A., as escrow agent ("Escrow Agent"), as amended

by that certain First Amendment to and Direction Under Escrow Agreement, between Seller, Sunoco and Escrow Agent, dated April 17, 2017 (collectively, the “Escrow Agreement”) as more fully set forth in Sunoco’s proof of claim [Claim No. 303]. Sunoco’s setoff and recoupment rights, to the extent applicable, are fully preserved. All parties’ rights under the Purchase Agreement and Escrow Agreement are fully preserved including the choice of venue to resolve any disputes thereunder.

CONCLUSION

For the reasons set forth herein, Sunoco respectfully requests that the Court (a) deny confirmation of the Amended Plan absent modifications to the Confirmation Order that obviate the objections set forth herein, and (b) grant such other and further relief as it deems just and proper.

Dated: October 15, 2019
Wilmington, Delaware

CHIPMAN BROWN CICERO & COLE, LLP

/s/ William E. Chipman, Jr.

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