

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

EMERGE ENERGY SERVICES, LP, *et al.*¹

Debtor.

Chapter 11

Case No. 19-11563 (KBO)

(Jointly Administered)

MARKET & JOHNSON, INC.,

Plaintiff,

v.

SUPERIOR SILICA SANDS LLC, and
HPS INVESTMENT PARTNERS, LLC,

Defendants.

Adversary Proceeding No. 19-50728 (KBO)

HPS INVESTMENT PARTNERS, LLC'S ANSWER AND AFFIRMATIVE DEFENSES

In accordance with Rule 7012 of the Federal Rules of Bankruptcy Procedure, Defendant HPS Investment Partners, LLC (“**HPS**”) respectfully submits this Answer and Affirmative Defenses in response to the Complaint filed by Plaintiff Market & Johnson, Inc. (“**Plaintiff**”) against HPS and Superior Silica Sands LLC (“**Superior**” or the “**Debtors**”). To the extent that claims and allegations in the Complaint are asserted against the Debtors and not HPS,

¹ The debtors in these chapter 11 cases (the “Debtors”), along with the last four digits of each of the Debtors’ 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.



HPS is not required to respond as no relief is sought from HPS. HPS reserves its rights to seek dismissal of the action against it on this basis. HPS denies all allegations in the Complaint not expressly admitted in this Answer.

RESPONSE TO GENERAL STATEMENT

1. The allegations in Paragraph 1 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 1.

SPECIFIC RESPONSES

2. The allegations in Paragraph 2 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that the Debtors filed for relief under chapter 11 of Title 11 of the United States Code and the Debtors have continued to operate their businesses as debtors-in possession.

3. The allegations in Paragraph 3 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that this proceeding has been filed pursuant to Fed. R. Bankr. P. 7001(2) and (9).

4. The allegations in Paragraph 4 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that this Court has jurisdiction over this matter, and this is a core proceeding.

5. The allegations in Paragraph 5 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that venue in this Court is proper.

6. The allegations in Paragraph 6 state legal conclusions to which no response is required.

7. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 7, and on that basis denies them.

8. HPS admits the allegations in Paragraph 8.

9. HPS admits the allegations in Paragraph 9.

10. HPS admits the allegations in Paragraph 10.

11. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 11.

12. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 12, and on that basis denies them.

13. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 13, and on that basis denies them. HPS further refers the Court to the documents attached as Exhibit A to Plaintiff's Complaint for a full statement of their terms.

14. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14, and on that basis denies them. HPS further refers the Court to the documents referenced in Paragraph 14 for a full statement of their contents.

15. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15, and on that basis denies them.

16. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16.

17. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 17. HPS further refers the Court to the documents attached as Exhibit B to Plaintiffs' Complaint for a full statement of their contents.

18. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18.

19. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19.

20. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 20, and on that basis denies them.

21. Paragraph 21 contains legal conclusions to which no response is required. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21, and on that basis denies them.

22. HPS admits the allegations in Paragraph 22.

23. HPS admits the allegations in Paragraph 23, and further refers the Court to *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 [D.I. 20]
(the “**Financing Motion**”) for a full statement of its terms.

24. HPS admits the allegations in Paragraph 24, and further refers the Court to the Financing Motion for a full statement of its terms.

25. HPS admits the allegations in Paragraph 25, and further refers the Court to the Financing Motion for a full statement of its terms.

26. HPS admits the allegations in Paragraph 26, and further refers the Court to the Financing Motion for a full statement of its terms.

27. HPS admits the allegations in Paragraph 27, and further refers the Court to the Financing Motion for a full statement of its terms.

28. HPS admits the allegations in Paragraph 28, and further refers the Court to the Financing Motion for a full statement of its terms.

29. HPS denies the allegations in Paragraph 29, except admits that M&J, along with other lien claimants, filed *Combined Objection of Market and Johnson, Inc., Stout Excavating Group LLC, and A-1 Excavating, Inc. to Debtors 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 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 [D.I. 134] (the “**Combined Objection**”). HPS further refers the Court to the Combined Objection for a full statement of its terms.

30. HPS admits the allegations in Paragraph 30, and further refers the Court to the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Certain Protections to Prepetition Secured Parties, (III) Scheduling a Final Hearing, and (IV) Granting Related Relief* [D.I. 209] (the “**Final DIP Order**”) for a full statement of its terms.

31. HPS admits that Paragraph 31 quotes a portion of the DIP Financing Agreement and refers the Court to the Final DIP Order for a full statement of its terms.

32. The allegations in Paragraph 32 state legal conclusions to which no response is required.

33. The allegations in Paragraph 33 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 33, except admits that the Final DIP Order provides for a 75 day “Challenge Period.” HPS further refers the Court to the Final DIP Order for a full statement of its terms.

34. The allegations in Paragraph 34 state legal conclusions to which no response is required. HPS further refers to the Final DIP Order for a full statement of its terms.

35. The allegations in Paragraph 35 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 35.

36. HPS admits the allegations in Paragraph 36.

37. HPS admits the allegations in Paragraph 37, and further refers the Court to the *First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [D.I. 362] (the “**Plan**”) for a full statement of its terms.

38. HPS admits the allegations in Paragraph 38, and further refers the Court to the Plan for a full statement of its terms.

39. HPS admits the allegations in Paragraph 39, and further refers the Court to the Plan for a full statement of its terms.

40. HPS admits that the quoted language appears in the Plan, and further refers the Court to the Plan for a full statement of its terms.

41. HPS admits the allegations in Paragraph 41, and further refers the Court to 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* [D.I. 363] (the “**Disclosure Statement**”) for a full statement of its content.

42. HPS admits that the quoted language appears in the Disclosure Statement and refers the Court to the Disclosure Statement for a full statement of its content.

RESPONSE TO COUNT I

43. HPS incorporates by reference its answers to Paragraphs 1-42 as if fully set forth herein.

44. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 44, and on that basis denies them. HPS further refers the Court to the Financing Motion and the declarations referenced in Paragraph 44 for a full statement of their content.

45. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 45, and on that basis denies them.

46. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 46, and on that basis denies them. HPS further refers the Court to Plaintiff's Exhibit C for a full statement of its terms.

47. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 47.

48. The allegations in Paragraph 48 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 48.

49. The allegations in Paragraph 49 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 49.

50. The allegations in Paragraph 50 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 50.

51. The allegations in Paragraph 51 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 51.

52. The allegations in Paragraph 52 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 52.

53. The allegations in Paragraph 53 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 53.

54. HPS admits that on August 30, 2019, the Debtors filed *Amended Schedules of Assets and Liabilities for Superior Silica Sands LLC* [D.I. 281] (the “**Schedules**”) and that the quoted language appears in the Schedules. HPS further refers the Court to the Schedules for a full statement of its terms.

55. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55. HPS further refers the Court to the Schedules for a full statement of their content.

56. The allegations in Paragraph 56 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 56.

57. The allegations in Paragraph 57 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that Plaintiff has accurately quoted a portion of Section 506(a).

58. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 58. HPS further refers the Court to the Disclosure Statement and the Plan for a full statement of their content.

59. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 59. HPS further refers the Court to the Plan and the Schedules.

60. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 60, and on that basis denies them.

61. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 61, and on that basis denies them.

62. The allegations in Paragraph 62 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that an actual controversy exists between the Plaintiff and Defendants, and denies the remaining allegations in Paragraph 62.

63. The allegations in Paragraph 63 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 63.

RESPONSE TO COUNT II

64. HPS incorporates by reference its answers to Paragraphs 1-63 as if fully set forth herein.

65. HPS admits the allegations in Paragraph 65.

66. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66.

67. The allegations in Paragraph 67 contain legal conclusions to which no response is required. HPS further denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 67.

68. The allegations in Paragraph 68 state legal conclusions to which no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 68.

69. The allegations in Paragraph 69 state legal conclusions to which no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 69.

70. The allegations in Paragraph 70 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 70.

71. The allegations in Paragraph 71 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 71.

72. The allegations in Paragraph 72 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 72.

73. The allegations in Paragraph 73 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 73.

74. The allegations in Paragraph 74 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 74.

75. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 75. HPS further refers the Court to the Plan for a full statement of its terms.

76. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 76. HPS further refers the Court to the Plan for a full statement of its terms.

77. The allegations in Paragraph 77 state legal conclusions to which no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 77.

78. The allegations in Paragraph 78 state legal conclusions to which no response is required. To the extent a response is required, HPS admits that Plaintiffs accurately quote parts of Section 506(a).

79. The allegations in Paragraph 79 state legal conclusions to which no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 79.

80. Admits the allegations in Paragraph 80.

81. The allegations in Paragraph 81 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 81.

RESPONSE TO COUNT III

82. HPS incorporates by reference its answers to Paragraphs 1-81 as if fully set forth herein.

83. The allegations in Paragraph 83 state legal conclusions to which no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 83.

84. The allegations in Paragraph 84 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 84.

85. The allegations in Paragraph 85 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 85.

86. The allegations in Paragraph 86 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 86.

87. The allegations in Paragraph 87 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 87.

88. The allegations in Paragraph 88 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 88.

89. The allegations in Paragraph 89 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 89.

90. The allegations in Paragraph 90 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 90.

91. The allegations in Paragraph 90 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 90.

The “Wherefore” clause, Paragraphs A-F, purports to characterize the relief Plaintiff seeks and therefore no response is required. To the extent a response is required, HPS denies the allegations in the “Wherefore” clause.

AFFIRMATIVE DEFENSES

92. The Complaint fails to plead a basis for naming HPS as a defendant in this action which is a dispute between the Plaintiff and the Debtor. HPS incorporates by reference each of the affirmative defenses asserted by the Debtor in its Answer to the Complaint and expressly reserves the right to amend and supplement its Answer and Affirmative Defenses.

93. The Complaint fails to state a claim upon which relief can be granted.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The Complaint fails to state a claim upon which relief may be granted against HPS.

SECOND AFFIRMATIVE DEFENSE

(Failure to Join a Necessary Party)

The Complaint is barred, in whole or in part, as Plaintiff failed to join necessary parties.

THIRD AFFIRMATIVE DEFENSE

(Standing)

Plaintiff lacks standing to pursue the claims asserted in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

(Equitable Doctrines)

The relief sought is barred, in whole or in part, under the doctrines of estoppel, waiver, ratification, laches, acquiescence, in pari delicto, unclean hands, and/or other equitable doctrines.

FIFTH AFFIRMATIVE DEFENSE

(Breach of Contract)

Plaintiff's claims are barred as Plaintiff breached an underlying contract with Superior.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

Plaintiff's claims are barred, in whole or in part, because Plaintiff has failed to take appropriate and necessary steps to mitigate damages.

SEVENTH AFFIRMATIVE DEFENSE

(Invalidity, Perfection, Lien Deficiency)

Plaintiff's claims are barred, in whole or in part, because Plaintiff has invalid, improperly filed, and/or unperfected lien(s), or if Plaintiff has any valid and perfected liens, they are not "Senior Liens" under the Final DIP Order and/or are junior to the liens of HPS.

EIGHTH AFFIRMATIVE DEFENSE

(Improper Procedural Mechanism)

Plaintiff's claims are barred, in whole or in part, as this lawsuit is the improper judicial procedural mechanism to raise this dispute regarding a purported claim in the Debtor's bankruptcy case.

NINTH AFFIRMATIVE DEFENSE

(Unripe Claim)

Plaintiff's claims fail, in whole or in part, to the extent any claim is moot or not ripe for adjudication.

TENTH AFFIRMATIVE DEFENSE

(Reservation of Defenses)

HPS reserves the right to assert additional affirmative defenses and to supplement or modify this Answer upon revelation of more definitive facts and upon the undertaking of discovery and investigation in this matter.

WHEREFORE, HPS prays as follows:

- A. That the Court enter judgment in favor of HPS and dismiss the Complaint with prejudice;
- B. That Plaintiff's prayer for relief be denied;
- C. That this Court award HPS such other relief as it may deem just and proper.

Dated: December 23, 2019

/s/ Laura Davis Jones

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CERTIFICATE OF SERVICE

I, Laura Davis Jones, hereby certify that on the 23rd day of December, 2019, I caused a copy of the following document to be served on the individuals on the attached service list in the manner indicated.

HPS Investment Partners, LLC's Answer and Affirmative Defenses

Dated: December 23, 2019

/s/ Laura Davis Jones

Laura Davis Jones (Bar No. 2436)

Emerge Energy-Adv. Service List
Adv. 19-50728, Market & Johnson v Superior, HPS
Adv. 19-50729, Stout Excavating v Superior, HPS
Adv. 19-50730, A-1 Excavating v Superior, HPS
Adv. 19-50732, Midwest Frac v Superior, HPS
Doc #226359
01-Hand Delivery
01-First Class Mail

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Emerge Energy Services 2002 Service List
FCM
Case No. 19-11563
Document No. 224544
20 – Hand Delivery
46 – First Class Mail

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