

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

In re:

EMERGE ENERGY SERVICES, LP, *et al.*<sup>1</sup>

Debtor.

Chapter 11

Case No. 19-11563 (KBO)

(Jointly Administered)

MIDWEST FRAC AND SANDS LLC,

Plaintiff,

v.

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

Defendants.

Adversary Proceeding No. 19-50732 (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 Midwest Frac and Sands LLC (“**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, HPS is not required to respond as no relief is sought from HPS. HPS reserves its rights

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<sup>1</sup> 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.



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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.

**RESPONSE TO JURISDICTION AND VENUE**

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.

**RESPONSE TO PARTIES AND GENERAL BACKGROUND**

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 the allegations in Paragraph 7.

8. The allegations in Paragraph 8 are not directed at HPS and therefore no response is required. To the extent a response is required, HPS admits the allegations in Paragraph 8.

9. HPS admits the allegations in Paragraph 9.

10. The allegations in Paragraph 10 are not directed at HPS and therefore no response is required. To the extent a response is required, 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, and on that basis denies 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 the allegations in Paragraph 12. HPS further refers the Court to Exhibit 1 for a full statement of its terms.

13. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 13; HPS further refers the Court to Exhibit 1 for a full statement of its terms.

14. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 14; HPS further refers the Court to Exhibit 1 for a full statement of its terms.

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 the allegations in Paragraph 15. HPS further refers the Court to Exhibit 2 for a full statement of its terms.

16. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16, and on that basis denies 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, and on that basis denies the allegations in Paragraph 17. HPS further refers the Court to Exhibit 3 for a full statement of its terms.

18. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18, and on that basis denies 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, and on that basis denies 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 the allegations in Paragraph 20.

21. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21, and on that basis denies the allegations in Paragraph 21.

22. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 22, and on that basis denies the allegations in Paragraph 22.

**RESPONSE BANKRUPTCY FILING AND POSTURE OF THE CASE**

23. HPS admits the allegations in Paragraph 23, and further refers the court to the *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 admits the allegations in Paragraph 29, and further refers the Court to the Financing Motion 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 the quoted language of Paragraph 31 appears in the DIP Financing Agreement, which is included as an attachment to the Final DIP Order, but denies any inferences suggested by Plaintiff, and further refers the Court to the Final DIP Order for a full statement of its terms.

32. The allegations in Paragraph 30 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 32, 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.

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, and 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. To the extent a response is required, HPS denies the allegations in Paragraph 34, and refers the Court to the Final DIP Order for a full statement of its terms.

35. HPS admits the allegations in Paragraph 35, 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**”).

36. HPS admits the allegations in Paragraph 36, and further refers to the Court to the Plan for a full statement of its terms.

37. HPS admits the allegations in Paragraph 37, and further refers the Court to 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 that the quoted language in Paragraph 39 appears in the Plan, and further refers to the Court to the Plan for a full statement of its terms.

### **RESPONSE TO COUNT I**

40. HPS incorporates by reference its Answer to Paragraphs 1–39 as if fully set forth herein.

41. The allegations in Paragraph 41 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 whether the Midwest holds an interest in the Land and Equipment as described in the Purchase Contract and on that basis denies the allegations.

42. HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 42.

43. The allegations in Paragraph 43 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 43.

44. The allegations in Paragraph 44 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 44.

45. The allegations in Paragraph 45 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 45.

46. The allegations in Paragraph 46 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 46.

47. The allegations in Paragraph 47 state legal conclusions to which no response is required. To the extent a response is required, HPS denies 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, no response is required.

50. The allegations in Paragraph 50 are not directed at HPS and therefore no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 50.

51. The allegations in Paragraph 51 are not directed at HPS and therefore no response is required. To the extent a response is required, HPS denies knowledge or information sufficient to form a belief about the truth of 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 knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 52.

53. The allegations in Paragraph 53 state legal conclusions to which no response is required.

54. The allegations in Paragraph 54 state legal conclusions to which no response is required.

### **RESPONSE TO COUNT II**

55. HPS incorporates by reference its Answer to Paragraphs 1-54 as if fully set forth herein.

56. The allegations in Paragraph 56 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 about the truth of the allegations in Paragraph 56, and on that basis 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 denies knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 57, and on that basis denies the allegations in Paragraph 57.

58. The allegations in Paragraph 58 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 whether the Midwest has an interest in the Mine.

59. The allegations in Paragraph 59 state legal conclusions to which no response is required.

**RESPONSE TO COUNT III**

60. HPS incorporates by reference its Answer to Paragraphs 1–59 as if fully set forth herein.

61. The allegations in Paragraph 61 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the allegations in Paragraph 61.

62. The allegations in Paragraph 62 state legal conclusions to which no response is required. To the extent a response is required, HPS denies the 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.

64. The allegations in Paragraph 64 state legal conclusions to which no response is required.

65. The allegations in Paragraph 65 state legal conclusions to which no response is required.

**RESPONSE TO PRAYER FOR RELIEF**

66. HPS admits that Plaintiff seeks relief from the Court, but denies Plaintiff is entitled to any relief.

**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**

**(Rejected Contract)**

The contract giving rise to Plaintiff's claims has been rejected by the terms of the Plan.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Reservation of Defenses)**

As a separate affirmative defense to each alleged cause of action, the Complaint and each and every cause of action alleged therein is pleaded in a vague and conclusory fashion, and Debtor's discovery and investigation is ongoing. Debtor 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 23<sup>rd</sup> 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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