

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

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

Chapter 11

Case No. 19-11563 (KBO)  
(Jointly Administered)

Related to Docket Nos. 830

Hearing Date: June 4, 2020 at 10:00 a.m. (ET)  
Obj. Deadline: April 22, 2020 (extended for Trinity  
Industries Leasing Company to April 27, 2020)

TRINITY INDUSTRIES LEASING COMPANY'S  
OBJECTION TO MOTION OF THE REORGANIZED DEBTORS  
FOR AN ORDER EXTENDING THE DEADLINE FOR THE REORGANIZED DEBTORS  
TO OBJECT TO ADMINISTRATIVE CLAIMS AND GRANTING RELATED RELIEF

Trinity Industries Leasing Company ("Trinity"), a railcar manufacture, leasing and management company headquartered in Dallas, Texas, and a creditor in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), respectively submits this objection (this "Objection"),<sup>2</sup> by and through its undersigned counsel, to the above-captioned reorganized debtors' (collectively, the "Reorganized Debtors")<sup>3</sup> *Motion of the Reorganized Debtors for an Order Extending the Deadline for the Reorganized Debtors to Object to Administrative Claims and Granting Related Relief* [Docket No. 830] (the "Extension Motion"), and respectfully represents as follows:

**PRELIMINARY STATEMENT**<sup>4</sup>

1. In considering what may otherwise appear to be an innocuous motion, the Court should be aware of the Debtors' unfair and inequitable conduct towards Trinity. Since filing

<sup>1</sup> The Reorganized 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 Debtor's address is 6500 West Freeway, Suite 800, Fort Worth, Texas 76116.

<sup>2</sup> The Reorganized Debtors agreed to extend Trinity's deadline to object to the Extension Motion to April 27, 2020.

<sup>3</sup> Prior to the occurrence of the Effective Date (defined below), the Reorganized Debtors were debtors and debtors-in-possession (collectively, the "Debtors") in the Chapter 11 Cases.

<sup>4</sup> Capitalized terms not defined herein shall have the same meaning(s) as in the Order or Extension Motion, as applicable.



bankruptcy, the Debtors have not paid Trinity a single cent for their ongoing use of Trinity's railcars. At the outset of this bankruptcy, the Debtors represented that they would enter into new leases with Trinity, in accordance with a term sheet resulting from months of negotiations. *See generally* Rejection Motion, n.3, ¶¶ 13–16, 20–21, 27, 29. But after successfully obtaining the rejection order, the Debtors refused to sign those new leases. Meanwhile, the Debtors continued to benefit themselves and their estates by using Trinity's railcars but refusing to pay. Even to this day, the Debtors continue to use Trinity's railcars while ignoring Trinity's invoices. Moreover, the Debtors notified Trinity that they object to the administrative claim by letter in February. Now, the Debtors seek a substantial delay – **211 days** from the date Trinity filed its administrative claims – before they even provide their formal objections. This request is simply unfair but falls in line with the Debtors' repeated conduct towards Trinity during and after the Chapter 11 Cases.

2. The Debtors should not be permitted to inject months more of delay into the resolution of Trinity's administrative expense claims. The Debtors have already induced Trinity into agreeing to a rejection of its prepetition leases while the Debtors kept using the railcars; circumvented the Bankruptcy Code's requirement that the Debtors timely perform obligations under equipment lease agreements after 60 days;<sup>5</sup> backtracked on the term sheet that induced Trinity to agree to the rejection; not paid a single cent for their use of Trinity's railcars pre- and post-confirmation; and wiped out unsecured creditors in their chapter 11 plan, giving all of the equity to the secured lenders, only after being able to operate in chapter 11 using Trinity's railcars. Their request to now wait a total of 244 days since emergence before even filing an objection to Trinity's administrative expense claims should be rejected.

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<sup>5</sup> *See* 11 U.S.C. § 365(d)(5).

3. For the foregoing reasons, and those below, Trinity respectfully requests that the Court deny the Extension Motion.

**RELEVANT BACKGROUND**

4. On September 23, 2013, Trinity and reorganized debtor Superior Silica Sands LLC (“Superior Silica”) entered into the Railroad Car Lease Agreement (the “Master Lease”) and, in connection therewith, entered into a total of 29 Riders to the Master Lease, each serving as an individual and severable railcar lease (collectively, the “Riders,” and together with the Master Lease, the “Trinity Leases”). Subsequently, Trinity and reorganized debtor Emerge Energy Services LP (“Emerge”) also entered into a Guaranty Agreement in which Emerge guaranteed Superior Silica’s obligations under the Trinity Leases (the “Guaranty”).

5. After 2013, the Debtors approached Trinity over the years regarding their need to restructure their leases, and Trinity acquiesced in each instance. In early 2019, the Debtors once again advised Trinity of their need to future restructure their leases with Trinity.

6. As the Debtors approached the filing of these Chapter 11 Cases, the Debtors targeted their railcar negotiations with Trinity and two other railcar lessors. After weeks of negotiations, and on the eve of the Debtors’ bankruptcy, the Debtors executed letter agreements that contemplated the Debtors’ agreement to use only those three lessors for railcar services, in exchange for substantially reduced rent. The Debtors needed concessions from these lessors to operate in chapter 11 with renegotiated pricing. The agreement also contemplated that Trinity would consent to the rejection of the Trinity Leases if new leases were executed by year-end 2019.

7. On July 15, 2019 (the “Petition Date”), the Debtors filed voluntary petitions in this Court commencing the Chapter 11 Cases. The next day, the Debtors filed a motion to reject the Trinity Leases along with the railcar leases of the other two railcar lessors with which the Debtors had agreed to execute new leases [Docket No. 9] (the “Rejection Motion”). As represented by the

Debtors in the Rejection Motion, Trinity agreed to the rejection of the Trinity Leases on the condition that new leases would be executed:

the Debtors and their advisors have been in constant, parallel, arm's-length negotiations with the Counterparties, to re-negotiate the terms of the various railcar leases, since at least 2016. More specifically, in the months leading up to the Chapter 11 Cases, these negotiations picked up in earnest in order to reach terms more favorable to the Debtors. ***As a result of such negotiations, the Debtors and the Counterparties have agreed to the relief request herein.***

Rejection Motion, ¶ 13 (emphasis added). The Debtors told the Court that rejection *nunc pro tunc* to the Petition Date was fair, equitable, and supported by Trinity, explaining that Trinity would not be harmed by such a rejection because the parties intended to “enter into the New Railcar Leases effective as of the Petition Date.” *Id.* ¶ 29. Yet the Debtors never entered into those new leases with Trinity.

8. The Court granted the Debtors’ Rejection Motion [Docket No. 208] on August 14, 2019. Trinity subsequently filed two proofs of claims in the amount of \$320,535,802.36 on account of damages arising from the rejection. *See* proofs of claim numbers 373 and 374. But Trinity did not receive any distribution for its rejection damages claims. After a contested confirmation hearing, the Court entered an order [Docket No. 721] confirming the Debtors’ chapter 11 plan of reorganization (the “Plan”) on December 18, 2019. Pursuant to the Plan, holders of general unsecured claims received no recovery because they would not agree to the Plan’s so-called “deathtrap” provision and rejected the Plan. *See In re Emerge Energy Services LP*, Case No. 19-11563 (KBO), 2019 WL 7634308, at \*3 (Bankr. D. Del. Dec. 5, 2019).

9. Throughout the bankruptcy, despite rejecting the Trinity Leases, the Debtors continued to reap the benefit of the Trinity Leases by using Trinity’s railcars. Accordingly, on January 20, 2020, Trinity asserted against Superior Silica an administrative expense claim in the

amount of \$2,558,786 for the Debtors' post-petition use of the railcars (proof of administrative claim number 513) and a claim against Emerge in the same amount, on account of the Guaranty (proof of claim number 515).

10. Since emerging from Chapter 11, the Reorganized Debtors have continued to use but not pay for Trinity's railcars and to steadfastly refuse to sign the new leases. After months of silence or inaction from the Debtors, despite Trinity's efforts to have the new leases signed, Trinity delivered a letter to the Reorganized Debtors (attached as **Exhibit A**) advising them, among other things, that Trinity intended to fully prosecute its administrative claims. The Reorganized Debtors responded with a letter, dated February 11, 2020, (attached as **Exhibit B**), which disputed among other things, the rates asserted by Trinity in its administrative claims.

11. The Reorganized Debtors do not have a large number of pending administrative claims. Trinity estimates, based on the claim register, that there are approximately 37 administrative claims pending, filed by approximately 31 creditors. The administrative claims pending in the Chapter 11 Cases are attached hereto as **Exhibit C**.<sup>6</sup>

### **OBJECTION**

12. Trinity objects to the Extension Motion for the following reasons:

- a. The Reorganized Debtors do not need more time to respond to Trinity's claim. The Reorganized Debtors told Trinity over two months ago, in a February 11 letter, that they anticipate objecting to Trinity's administrative claims based on a rate dispute. The Reorganized Debtors do not require 120 more days (or 211 total) to prepare an objection.
- b. The Reorganized Debtors have not been diligent. The Reorganized Debtors have not demonstrated that they have made any progress reconciling the 37 pending administrative claims and, as of the date of this objection, the

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<sup>6</sup> Trinity has based its estimates on the claims register that was filed by the Reorganized Debtors' claims agent on April 10, 2020 [Docket No. 831]. Trinity only included proofs of claims that were noted to have administrative priority by the Reorganized Debtors' claims agent.

Reorganized Debtors have not filed a single objection, even though a number of the administrative claims clearly lack merit.<sup>7</sup>

- c. The Reorganized Debtors do not need the additional time, given the amount of claims at stake. Holders of general unsecured claims are not entitled to a distribution, and so, the Reorganized Debtors do not have to reconcile general unsecured claims. As a result, the universe of claims that the Reorganized Debtors have to review is small, and they should be able to focus entirely on administrative claims. Therefore, it is likely that the Reorganized Debtors not actively reconciling claims (or seeking to extract further leverage against Trinity) is a chief reason why they require an extension.
- d. Claimants with valid claims should not have to wait another year to be paid. If the Reorganized Debtors were not required to object until August 18, then contested claims could likely not be resolved until 2021. As the Plan contemplates that holders of administrative claims are to be paid in full, holders of administrative claims should not have to wait for more than a year after confirmation before receiving a distribution.
- e. The Reorganized Debtors have already received a substantial extension, by setting their hearing so far out—45 days after the Administrative Claims Objection Deadline—despite the availability of earlier hearing dates. Using the scheduling of a hearing to obtain an automatic extension of the Administrative Claims Objection Deadline that is equal to more than a third of the requested extension is improper.
- f. The global pandemic does not justify the requested relief. While Trinity is mindful of the impact of the global pandemic on all businesses, it is not plausible that the “stay at home orders” alone have prevented the Reorganized Debtors from reconciling or objecting to any claims. The stay-at-home order in Tarrant County, where the Reorganized Debtors are headquartered, was not issued until March 24, 2020. The Extension Motion does not explain what, if any progress, the Reorganized Debtors made on these claims before March 24, nor why, in light of technology that facilitates remote legal work as well as the potential lifting of the stay-at-home orders, the Reorganized Debtors would need approximately four more months to object.
- g. Delay would unfairly harm creditors, including Trinity, which are also facing economic challenges caused by the global pandemic and the distressed commodities markets. The Reorganized Debtors should not be able to use the Extension Motion to hedge against economic conditions and delay making distributions to holders of administrative claims. Further, Trinity is concerned that the Reorganized Debtors may have insufficient assets to make distributions to holders of administrative claims if market conditions continue to worsen.

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<sup>7</sup> For example, a number of the pending administrative claims were filed by *pro se* claimants on account of their equity interests in the Debtors. *See, e.g.*, proof of claim numbers 65, 79, 128, 452, 476, 477, 485, 490, 520 and 521. These claims are highlighted in blue on Exhibit C.

13. For the foregoing reasons, the Extension Motion should be denied in its entirety and the Reorganized Debtors should promptly file their objection to Trinity's administrative claims.

**RESERVATION OF RIGHTS**

14. Trinity reserves all rights to supplement or add to the legal and factual arguments raised in this Objection and to object to the Extension Motion, on any bases whatsoever at a future date.

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**CONCLUSION**

**WHEREFORE**, for the reasons set forth herein, Trinity respectfully requests that the Court deny the Extension Motion in its entirety.

Dated: April 27, 2020  
Wilmington, Delaware

DUANE MORRIS LLP

/s/ Jarret P. Hitchings

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*Counsel to Trinity Industries Leasing Co.*



**Exhibit A**

FILED UNDER SEAL

**January 31, 2020 Letter**

# **Exhibit B**

**February 11, 2020 Letter**



February 11, 2020

Trinity Industries, Inc.  
2525 N. Stemmons Freeway  
Dallas, TX 75207

Attention: Scott Ewing, Associate General Counsel

Re: *In re Emerge Services LP, et al.* (Case No. 19-11563, Bankr. D. Del.)

Dear Scott,

We are in receipt of your letter dated January 31, 2020. We disagree with the assertions made therein. There is no need to rehash all of them, and our disagreements, but I wanted to make a couple points on behalf the company.

First, as you well know, the pre-petition leases were rejected in the bankruptcy.

Second, while it is true that Rejection Order authorized Emerge to enter into leases in accordance with the terms of the non-binding term sheet and letter agreement, it did not compel the company to do so.

Third, notwithstanding the foregoing, it is not true that Emerge has refused to enter into new leases with Trinity. We have at all times been committed, and remain committed, to negotiating in good faith to arrive at a final deal that works for both you and us. We have provided the terms under which we are prepared to enter into new leases, and we share your desire to avoid resorting to judicial assistance to resolve any disputes.

Fourth, just to avoid doubt on the subject, if we do require judicial assistance, we would not agree that the rate, if any, to be charged for use of the leased cars in the absence of a new lease would be the rate that prevailed under the prior, rejected Trinity leases. My understanding is that reverting to such rates would not only be inconsistent with the law, but utilizing rates prevailing under rejected leases would not be an appropriate measure of rates for the current use of cars.



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Again, I don't think we need to go through the letter point by point, apart from the observations above, and making clear we reserve all rights. We hope to continue good faith negotiations and discussions with you towards a mutually agreeable resolution.

Best Regards,

A handwritten signature in blue ink that reads "Richard J. Shearer". The signature is fluid and cursive, with the first and last names being more prominent.

Richard J. Shearer  
CEO & President

# **Exhibit C**

## **Administrative Claims**

| Date Filed | Claim No. | Name   | Claim Amount   |
|------------|-----------|--|----------------|
| 1/20/2020  | 513       | Trinity Industries Leasing Company   | \$2,558,786.00 |
| 1/20/2020  | 515       | Trinity Industries Leasing Company   | \$2,558,786.00 |
| 1/22/2020  | 521       | Charles T. Atkinson  | \$520,000.00   |
| 9/4/2019   | 182       | Marabou Energy Management  | \$192,732.85   |
| 9/4/2019   | 236       | Marabou Superior Pipeline, LLC   | \$192,732.85   |
| 10/18/2019 | 452       | Lawrence Dell Aquila   | \$155,000.00   |
| 8/23/2019  | 65        | Eleanor Zuberek & Mark Zuberek JTWROS  | \$75,000.00    |
| 11/17/2019 | 479       | Badgerland Drilling LLC  | \$72,635.75    |
| 9/4/2019   | 219       | Purvis Industries, LLC   | \$69,610.14    |
| 1/22/2020  | 520       | Mary E Atkinson  | \$52,000.00    |
| 9/9/2019   | 368       | CRG Financial LLC  | \$43,273.01    |
| 9/6/2019   | 234       | Bear Oil Company, Inc  | \$30,887.03    |
| 11/18/2019 | 478       | Euler Hermes N. A. Insurance Co. Agent of Isco Industries, Inc. Claim Id 000435350 | \$29,398.44    |
| 8/29/2019  | 375       | Hopkins Oil Company, Inc.  | \$29,264.20    |
| 1/20/2020  | 523       | Clearfork Office 1, LP   | \$25,726.45    |
| 1/20/2020  | 524       | Clearfork Office 1, LP   | \$25,726.45    |
| 8/13/2019  | 25        | Lonestar Armature  | \$23,926.52    |
| 8/23/2019  | 79        | Jay Robert Whitson & Nancy J Whitson   | \$22,682.21    |
| 8/30/2019  | 128       | Joseph Fodera & Linda Catalano   | \$22,179.28    |
| 8/21/2019  | 49        | Bray Sales, Inc. dba Process Solutions   | \$14,219.71    |
| 9/9/2019   | 279       | Chippewa Valley Energy   | \$10,605.70    |
| 11/12/2019 | 477       | Donald A. Montbriand   | \$10,376.84    |
| 8/28/2019  | 110       | Lincoln Contractors Supply, Inc  | \$10,086.07    |
| 9/9/2019   | 363       | CRG Financial LLC (as Assignee of Synergy Cooperative)                             | \$9,075.07     |
| 8/28/2019  | 104       | Fastenal Company   | \$6,732.00     |
| 8/19/2019  | 41        | KFW Engineers  | \$5,535.18     |
| 8/27/2019  | 99        | KFW Engineers  | \$5,535.18     |
| 12/30/2019 | 485       | James A. Rollo   | \$5,140.14     |
| 8/22/2019  | 70        | G.W. Van Keppel Co   | \$4,554.24     |
| 9/9/2019   | 364       | CRG Financial LLC  | \$3,377.14     |
| 9/30/2019  | 436       | David A. McQuillian - D.A. Davidson & Co as Cust FBO                               | \$3,059.80     |
| 8/22/2019  | 53        | ROMCO Equipment Co.  | \$2,769.45     |
| 9/18/2019  | 408       | McMaster-Carr Supply Co  | \$2,497.20     |

| <b>Date Filed</b> | <b>Claim No.</b> | <b>Name</b>                  | <b>Claim Amount</b> |
|-------------------|------------------|------------------------------|---------------------|
| 11/5/2019         | 476              | Donald A. Montbriand         | \$2,296.79          |
| 12/30/2019        | 486              | Buffalo Wire Works Co., Inc. | \$1,800.74          |
| 1/3/2020          | 490              | W.H. Hodge                   | \$1,792.79          |
| 8/21/2019         | 46               | Citizens Connected           | \$1,165.78          |

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

In re:

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

Chapter 11

Case No. 19-11563 (KBO)  
(Jointly Administered)

**CERTIFICATE OF SERVICE**

I, Jarret P. Hitchings, hereby certify that April 27, 2020, a true and correct copy of *Trinity Industries Leasing Company's Objection to Motion of the Reorganized Debtors for an Order Extending the Deadline for the Reorganized Debtors to Object to Administrative Claims and Granting Related Relief* was served on the persons listed below via CM/ECF and First Class Mail:

Richards, Layton & Finger, P.A.  
John H. Knight  
Paul N. Heath  
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Office of the United States Trustee  
Attn: Juliet Sarkessian  
United States Department of Justice  
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844 King Street, Suite 2207,  
Lockbox 35  
Wilmington, Delaware 19801

Dated: April 27, 2020  
Wilmington, Delaware

DUANE MORRIS LLP

/s/ Jarret P. Hitchings  
Jarret P. Hitchings (DE 5564)

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<sup>1</sup> The Reorganized 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 Debtor's address is 6500 West Freeway, Suite 800, Fort Worth, Texas 76116.