Docket #0061 Date Filed: 4/13/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EMERGE ENERGY SERVICES LP, *et al.*, Debtors.[1]	Chapter 11 Case No. 19-11563 (KBO) Jointly Administered
SUPERIOR SILICA SANDS LLC, a Texas limited liability company, Plaintiff, vs. IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation. Defendants.	Adv. Proc. No. 20-51052 (TMH)

REORGANIZED DEBTOR SUPERIOR SILICA SANDS LLC'S SUPPLEMENTAL MOTION FOR PARTIAL SUMMARY JUDGMENT ON THIRD CLAIM FOR RELIEF FOR BREACH OF CONTRACT

BAKER & HOSTETLER LLP
Jeffrey J. Lyons (#6437)
1201 North Market Street, Suite 1407
Wilmington, DE 19801-1147
(302) 468-7088
jjlyons@bakerlaw.com

David J. Richardson [*pro hac vice*]
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025
(310) 442-8858
drichardson@bakerlaw.com

Jorian L. Rose [*pro hac vice*]
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4681
jrose@bakerlaw.com

Attorneys for Superior Silica Sands LLC

Dated: April 13, 2023
Wilmington, Delaware

[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.

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Plaintiff and reorganized debtor Superior Silica Sands LLC ("Superior"), by and through its undersigned counsel, files this Supplemental Motion for Partial Summary Judgment (the "Breach of Contract MSJ") requesting entry of a judgment substantially in the form of the proposed judgment attached hereto as Exhibit 1, finding that Defendants Iron Mountain Trap Rock Company ("IMTR") and Fred Weber, Inc. ("Weber") (collectively herein "Defendants") have breached their contractual obligations under the parties' Services Agreement (defined below) to carry out all environmental reclamation at the quarry that was operated by Defendants, and awarding damages to Superior based upon evidence filed herewith.

I. INTRODUCTION

This litigation concerns the survivability of a contractual obligation to reclaim a former frac sand quarry in Chippewa County, Wisconsin (the "Quarry") following the cessation of mining activities. Reorganized debtor Superior was the owner of the Quarry, leased the land from landowners, and contracted with Defendants to carry out all physical mining at the Quarry. The parties' contract required Defendants to carry out "all reclamation" at the Quarry arising from their mining activities. Disputes over Defendants' failure to fulfill this obligation arose in late 2016 and continued through to the petition date in Superior's chapter 11 case. Superior then rejected its contract with Defendants. Defendants' reject any liability to reclaim the Quarry, but Defendants' environmental obligations survive and remain enforceable despite contract rejection as federal bankruptcy law preserves a debtor's existing claims for breach of contract, and as the parties' contract specifically provides for the survival of obligations such as environmental reclamation.

Superior previously filed a motion for partial summary judgment on the Second Claim for Declaratory Relief on August 9, 2022 [ECF No. 42] (the "Decl. Relief MSJ") which addresses Defendants' statutory liability under Wisconsin law to reclaim the Quarry. By this Breach of

Contract MSJ, Superior seeks entry of a judgment finding Defendants liable under the Third Claim for Relief for Breach of Contract, and awarding damages arising from that breach including contractual attorney's fees and expenses. If this Breach of Contract MSJ is granted, Superior will recover its entire damages by summary judgment, rendering moot the earlier Decl. Relief MSJ.

When Superior filed its Decl. Relief MSJ, it had not yet commenced reclamation of the Quarry, and therefore was unable to satisfy the necessary standard under Wisconsin law requiring that breach of contract damages be proven with a reasonably certain estimation. But Superior began the reclamation process at the Quarry on Defendants' behalf in late 2022 following demands made by Chippewa County and landowners. As a result, Superior is now able to introduce evidence that outlines its breach of contract damages with reasonable certainty, and its claim for breach of contract is now ripe for consideration by summary judgment.

Superior anticipates that Defendants will insist that Superior's breach of contract allegations require extensive evidentiary development and a lengthy trial to address disputed facts pertaining to operations dating back to 2011. But it would be an unnecessary and wasteful trial process, as there are only two issues of fact pertaining to Defendants' breaches of contract that are material to this Breach of Contract MSJ: (i) Defendants have failed to commence "all reclamation" arising from their mining activities at the Quarry, for which they are responsible under the plain language of the parties' contracts; and (ii) Superior provided notice to Defendants of their breached reclamation obligations prior to Superior's Petition Date, confirming that such claim had accrued by the time Superior rejected the parties' contract.

At its core, this Breach of Contract MSJ – indeed, this litigation – is about whether this Reorganized Debtor has the responsibility to clean up Defendants' environmental mess. Superior has been sued by property owners for issues caused by Defendants' actions, such as burying topsoil

rather than preserving it for reclamation. And Superior has been forced to commence the clean-up of Defendants' operations because of pressure from Chippewa County and litigation filed by certain landowners. But the parties' contract plainly provides that Superior is responsible for "pre-existing" environmental conditions, while Defendants are responsible for all "ongoing conditions" related to the environment arising from their operations, including "all reclamation" related to their physical mining operations. Defendants' failure to fulfill those obligations is a breach of contract that survives contract rejection in bankruptcy.

II. NATURE AND STAGE OF THE PROCEEDINGS

This action arises from the chapter 11 cases of Superior and its affiliated and jointly administered debtors in possession identified in footnote 1 (collectively, with Superior, the "Debtors"), styled *In re Emerge Energy Services LP*, and jointly administered as Case No. 19-11563 (KBO) (the "Chapter 11 Cases").

Superior filed the instant action (the "Action") against Defendants on December 23, 2020. On August 26, 2021, the Court granted in part and denied in part Defendants' motion to dismiss Superior's complaint, dismissing a claim for equitable indemnity, and otherwise denying Defendants' motion. Superior filed its Decl. Relief MSJ on August 9, 2022, seeking declaratory relief on certain issues of law pertaining to Defendants' statutory liability for environmental reclamation under Wisconsin law. Discovery is now closed, and the last day to file dispositive motions pursuant to the parties' filed discovery plan is April 10, 2023.

III. SUMMARY OF ARGUMENT

Both the Decl. Relief MSJ and this Breach of Contract MSJ concern ongoing and surviving rights and liabilities that arise under that certain Wet Sand Services Agreement and related amendments thereto executed by Superior and Weber in 2011 (the "Services Agreement"), and

later assigned to IMTR. Whereas Superior's Decl. Relief MSJ asks the Court to rule on certain issues of law that will determine the nature of Defendants' legal obligations under Wisconsin statutory law to carry out environmental reclamation as an "operator" of the Quarry, this Breach of Contract MSJ pertains to the Defendants' express reclamation obligations under the Services Agreement, and their breach of contract for refusing to carry out reclamation at the Quarry.

Superior rejected the Services Agreement in July 2019, pursuant to 11 U.S.C. § 365, to address a multi-million-dollar take-or-pay term contested by Superior. Superior did not reject a separate Guaranty executed by Weber on the grounds that a guaranty is not an executory contract.

The Services Agreement plainly separates two clear lines of responsibility. Superior is the owner of the project and the lessee of the land, and it has obligations to facilitate Defendants' ability to mine the Quarry, such as obtaining required permits, ensuring access to electricity and water, and being responsible for pre-existing environmental conditions. Defendants, in turn, are obligated to carry out all physical operations at the Quarry, including "all reclamation" related to their physical mining of sand, and are responsible for all "ongoing" environmental issues and compliance with permits. Superior delivered a notice of default to Weber in late 2016 declaring that Weber had breached its reclamation obligations. This dispute remained pending when Superior rejected the Services Agreement in bankruptcy in July 2019. Superior's breach of contract claim against Defendants is an accrued claim that survives contract rejection. And as Superior has now commenced reclamation and is in a position to document its damages with reasonable certainty, the breach of contract claim is now ripe for summary judgment.

Wherefore, Superior seeks entry of a judgment finding that Defendants' failure to carry out reclamation at the subject quarry is a breach of contract, entitling Superior to a recovery of its damages, including reasonable attorney's fees and costs as provided under the parties' contract.

IV. STATEMENT OF FACTS

A. The Wet Sand Services Agreement

On April 7, 2011, Weber and Superior entered into the Services Agreement. *See* Supplemental Statement of Uncontroverted Facts filed herewith ("SUF") at ¶ 1; *see also* Supplemental Declaration of Scott Waughtal (the "Waughtal Decl."), and Exhibit A thereto.

The Services Agreement specifically delineates the Parties' respective duties in relation to the Quarry. Superior, as lessee of the land, is obligated to perform tasks such as obtain required permits and provide certain equipment to facilitate the mining process, while Weber is obligated to carry out all mining and processing operations. Consistently, the Services Agreement provides that Superior is responsible for pre-existing environmental conditions, while Weber is responsible for all environmental conditions and clean-up arising from its operation of the Quarry. This delineation of responsibility and liability is addressed throughout the Services Agreement.

Article 1: Mobilization; Construction

Article 1, entitled "Mobilization; Construction," sets out the parties' respective responsibilities concerning the commencement of activities at the Quarry, and their rights in certain personal property. Generally, Superior's obligations are to deliver a "notice to proceed" at an appropriate time, and to transfer title to certain specifically identified equipment to Weber. SUF ¶¶ 5-6. Weber, in turn, is obligated to construct the Wash Plant to "produce Product Sand as required under this Agreement," mobilize necessary equipment, furnish required personnel "as necessary to produce Product Sand as required under this Agreement," fulfill a lengthy list of operational requirements, and "commence mining" by a set date. SUF ¶¶ 7-8.

Article 2: Real Property Rights Related to Quarry Site

Article 2 of the Services Agreement defines the parties' "Real Property Rights Related to Quarry Site." Section 2.1 provides that Superior holders the leasehold interests and will obtain

agreements from the landowners that equipment placed at the Quarry by Weber will not become fixtures. SUF ¶ 9. Section 2.2, entitled "Contractor's License to Operate at the Quarry Site," is a grant from Superior to Weber of an exclusive, unrestricted license to access the Quarry "for the sole purpose of performing its obligations under this Agreement," and an obligation to grant Weber all related rights "reasonably necessary **to enable Contractor to mine the Mined Sand and otherwise perform Contractor's obligations under this Agreement**." SUF ¶ 10 (emphasis added). Section 2.3 consistently places the burden on Defendants to report any noncompliance with the environmental requirements of the "SSS Permits," including that they "shall promptly (but in no event more than ten (10) days after such an occurrence) notify SSS of any environmental accidents or non-compliance with any applicable law or SSS Permits." SUF ¶ 11.

Article 3: Plant Site and Stock Pile Areas

Article 3 of the Services Agreement lays out the "Contractor's Responsibilities" in Section 3.1, and "SSS Responsibilities" in Section 3.2 pertaining to the "Plant Site and Stock Pile Areas." SUF ¶ 12. The Defendants' responsibilities as "Contractor" concern the physical operation of the Quarry, such as "surveying and staking" out the site, preparing the site for installation of the Wash Plant, grading and compacting soil, and providing proper storage and staging areas. SUF ¶ 13. Superior's responsibilities concern the sharing of surveys, reports and plans, and the provision of electrical and water services to the site. SUF ¶ 14.

Article 4: Permits

Article 4, "Permits," includes critical terms that further delineate the parties' agreed duties and liabilities. Consistent with Superior's role as the owner of the Quarry and as the facilitator of underlying conditions required to permit Defendants' mining activities, Section 4.1, "SSS Permits," provides that Superior will obtain and maintain:

> **all federal, state and local permits and approvals necessary for Contractor to extract the Mined Sand, construct, install and operate the Wash Plant and otherwise perform its obligations under this Agreement,** including without limitation, air quality, spill prevention control and countermeasures and storm water pollution prevention permits (collectively, the "SSS Permits"). **The SSS Permits shall include all plans and requirements for reclamation of the Quarry Site** ("Reclamation Plan"). [SUF ¶ 15 (emphasis added)].

While it was Superior's responsibility to obtain Permits, it was Defendants' responsibility to comply with the Permits. Section 4.3 provides that: (i) Superior's only responsibility for environmental conditions at the site is to remedy "pre-existing conditions," (ii) Weber is responsible for "ongoing conditions," (iii) Weber must "comply" with all permits; and (iv) the parties' respective indemnity obligations – including Superior's right to recover attorney's fees – is based on this division of pre-existing and ongoing environmental conditions, as follows:

> 4.3 Erosion Control and Environmental Matters.
>
> (a) **SSS Responsible for Pre-Existing Conditions**. **SSS will be responsible for any pre-existing (as of the Mobilization Date) non-compliance** of the Quarry Site (including the Plant Site) with applicable laws, rules and regulations pertaining to the control and regulation of hazardous materials and substances **or protection of the environment**. Subject to Section 4.3(b), SSS will promptly remediate or correct any such pre-existing condition or activity which is in violation of any such laws, rules and regulations …
>
> (b) **Contractor Responsible for Ongoing Conditions**. Subject to Section 4.3(a), **Contractor shall** in performing its obligations under this Agreement **comply with the SSS Permits and all applicable laws, rules and regulations pertaining to** the control and regulation of hazardous materials and substances or **protection of the environment**. Notwithstanding the foregoing, Contractor shall provide customary erosion control dust control and road maintenance at the Plant Site.
>
> (c) Indemnities. To the fullest extent permitted by law, SSS shall indemnify, defend and hold harmless Contractor and the Contractor Parties from and against any and all third party claims, losses, damages, liabilities and expenses, including reasonable attorney's fees and expenses, to the extent arising out of or resulting from the presence or remediation of hazardous substances or conditions (i) existing prior to the Mobilization Date for which Contractor is responsible pursuant to Section 4.3(a) or (ii) introduced to the Quarry Site or Plant Site by SSS or by the SSS Parties after the Mobilization Date. Notwithstanding the foregoing, SSS is not responsible for hazardous substances or conditions introduced to the Quarry Site or Plant Site by

> Contractor or the Contractor Parties, and **Contractor shall indemnify, defend and hold harmless SSS and the SSS Parties from and against all claims, losses, damages, liabilities and expenses, including reasonable attorney's fees and expenses, to the extent arising out of or resulting from hazardous substances or conditions for which Contractor is responsible pursuant to Section 4.3(b)**. [SUF ¶¶ 16-18 (emphasis added)].

Article 5: Mining of Quarry Site; Operation and Maintenance; Production; Tendering

Article 5, entitled "Mining of Quarry Site; Operation and Maintenance; Production; Tendering," sets out the parties' respective responsibilities in relation to mining operations, including the Defendants' responsibility to carry out "all reclamation required pursuant" to their mining activity. Section 5.1 of the Services Agreement provides in relevant part that:

> (a) Requirements: Standards. By the date set forth in Exhibit L, SSS shall deliver to Contractor a copy of the mining plan describing the requirements for mining of the Quarry Site ("Mine Plan"). During the Operational Period, **Contractor shall mine the Mined Sand and operate and maintain the Plant and Equipment** in accordance with the terms of the Mine Plan, this Agreement, applicable law, **the SSS Permits**, and Prudent Mining & Wash Plan Operation Practice …
>
> (e) Reclamation. **Contractor shall be responsible for all reclamation required pursuant to Contractor's mining activity hereunder.** Contractor specifically acknowledges that the SSS Permits may require construction of property berms and reclamation of fully mined areas during the Term. SSS agrees that if reclamation costs are greater than $2/ton in any Operational Year, SSS will reimburse Contractor for the costs above $2/ton; provided, however, that: (i) Contractor shall inform SSS of any such costs expected to be greater than such amount prior to incurring the costs and shall cooperate with SSS to undertake changes to the Mine Plan and the Reclamation Plan so as to avoid such excess costs if possible; and (ii) all such costs shall be reasonable and appropriate for Contractor to effectuate such reclamation. [SUF ¶¶ 19-20 (emphasis added)].

Article 8: Other Responsibilities/Obligations of Contractor

Section 8.4 provides a broad indemnity obligation of Defendants to indemnify Superior for any injury to persons or damage to property, including those that arise from "Contractor's performance of, or failure to perform, its obligations under this Agreement …" SUF ¶ 21.

Article 14: Governing law

The Services Agreement is governed by Wisconsin law. SUF ¶ 22.

Article 14: Survivability of Obligations

Section 14.10 of the Services Agreement preserves the parties' respective obligations despite the expiration or termination of the Services Agreement, stating that "[e]xpiration or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such expiration or termination." SUF ¶ 23.

B. The Four Amendments to the Services Agreement

Between 2011 and 2017, Superior and Weber executed four amendments to the Services Agreement. SUF ¶¶ 24, 26, 32, 36, and Exhibits B – E to Waughtal Decl. The amendments addressed issues such as extensions of the operating period, changes to take-or-pay payment terms, a suspension of mining operations in 2016 due to market conditions, and other non-material amendments. SUF ¶¶ 25, 27-31, 33-35, 37-38.

C. The Assignment and Assumption Agreement

On June 6, 2018, both Defendants entered into an Assignment and Assumption Agreement (the "Assignment and Guaranty"), which includes a guaranty undertaken by Weber and accepted by Superior (the "Guaranty"). SUF ¶ 39, and Exhibit F to Waughtal Decl. Under the terms of the Assignment and Guaranty, Weber assigned "all of Assignor's right, title and interest in and to" the Services Agreement (SUF ¶ 40), while IMTR accepted "the assignment of the Agreement and assum[ed] Assignor's liabilities and obligations under the Agreement and agree[d] to perform each and every obligation of Assignor thereunder" (SUF ¶ 41).

The Guaranty that forms a material part of the Assignment and Guaranty is a guaranty of both payment and performance of IMTR's obligations, and provides that Weber agreed:

> to be legally bound, hereby absolutely, irrevocably and unconditionally guarantees (as primary obligor and not merely as surety) to SSS all of IMTR's obligations under the Agreement and the foregoing Assignment (the "Guaranty"), including, without limitation, any and all damages incurred by the SSS as a result of the failure of IMTR or Guarantor to perform any of their obligations under the Agreement or the

> Assignment (collectively, the "Guaranteed Obligations"). The Guarantor's liability hereunder is absolute, unconditional, irrevocable and continuing irrespective of (i) any modification, amendment or waiver of or any consent to departure from the Agreement or (ii) any discharge of the Guarantor as a matter of applicable law (other than a discharge of the Guarantor with respect to Guaranteed Obligations as a result of payment and performance of the Guaranteed Obligations, in full, in accordance with the terms thereof) … This Guaranty is a guaranty of payment **and performance** and not of collection … [SUF ¶¶ 42-43 (emphasis added)].

When the Debtor filed its Rejection Motion to reject the Services Agreement, it **did not** list the Guaranty as a contract to be rejected. *See* Section VI.A.3, below. This was intentional, as a guaranty is not an executory contract.

D. The Permit and Reclamation Plan

In compliance with its duties under Section 4.1 of the Services Agreement to obtain "all federal, state and local permits …," Superior obtained a "Nonmetallic Mining Reclamation Permit" dated May 2, 2011 (the "2011 Reclamation Permit"). SUF ¶ 44. The Reclamation Permit requires in Paragraph 1, among other terms, that "[a]ll mining and reclamation shall be conducted in compliance with the reclamation plan titled 'Non-Metallic Mining Reclamation Plan Narrative, Superior Silica Sands, dated 3-17-2011 …" *See* Exhibit G to Waughtal Decl.

The Non-Metallic Mining Reclamation Plan Narrative referenced in the 2011 Reclamation Permit preceded execution of the Services Agreement, and therefore does not mention Weber. SUF ¶ 47. But there are no terms within the 2011 Reclamation Permit or the 2011 Reclamation Plan that vary the parties' respective contractual obligations undertaken one month later in the Services Agreement. Rather, the 2011 Reclamation Permit incorporates the 2011 Reclamation Plan and various amendments and requires that reclamation be conducted in accordance with the terms of the plan. SUF ¶¶ 45, 49 ("All mining and reclamation shall be conducted in compliance with the reclamation plan titled 'Non-Metallic Mining Reclamation Plan Narrative, Superior Silica Sands, dated 3-17-2011 and four (4) copies of the maps …"). See Exhibit H - J to Waughtal Decl.

And the Services Agreement, in turn, provides throughout that Weber will comply with the 2011 Reclamation Permit and its incorporated 2011 Reclamation Plan. SUF ¶¶ 11, 17, 19, 20.[2]

E. Defendants Breached Their Reclamation Obligations Prior to the Petition Date

On October 12, 2016, Superior wrote to Weber to outline a variety of reclamation failures on the part of Weber raised by both Chippewa County and landowners. SUF ¶ 50. Superior referenced Weber's liability for "all reclamation" and its obligation to abide by the "SSS Permits," among other terms of the Services Agreement defining Weber's obligations. SUF ¶ 51.

On December 21, 2016, Superior wrote to Weber further to its letter of October 12, 2016, to expand upon Weber's reclamation failures and to provide Weber with an express "Notice of Default under the April 7, 2011 Wet Sand Services Agreement." SUF ¶ 52 (the "2016 NOD"). Superior noted in the 2016 NOD that Weber had disputed Superior's contention that Weber was responsible for reclamation at the Quarry. SUF ¶ 53. See Exhibit K to Waughtal Decl.

On December 29, 2016, Superior wrote further to its 2016 NOD: (i) to confirm that Superior had "not received a satisfactory response" from Weber to its earlier letters and 2016 NOD; (ii) to reassert that Weber remained in default under the Services Agreement; (iii) to note that Weber was scheduled "to recommence operations at the Quarry Site on January 1, 2017; (iv) to demand that Weber "take all necessary and appropriate actions to timely cure its defaults" under the Services Agreement's reclamation provisions; and (v) to confirm that no rights were waived against Weber. SUF ¶ 54. See Exhibit L to Waughtal Decl.

By late 2018, the parties had not resolved their disputes, Weber had not carried out all required reclamation at the site, and there had been no waiver of either side's positions. SUF ¶ 55. The parties continued to discuss a potential resolution, however, including a proposal discussed in

[2] The 2011 Reclamation Permit, amended as of October 5, 2017 (SUF ¶ 48, and Exhibit I to Waughtal Decl.), continues to require that all mining and reclamation "be conducted in compliance with the Reclamation Plan …" (SUF ¶ 49).

late 2018 and early 2019 that would address similar issues at two Superior frac mines, including addressing reclamation required at the Quarry for its closure, but the parties did not reach a resolution of their disputes prior to July 15, 2019 (the "Petition Date"). SUF ¶ 56.

F. The Debtors' Chapter 11 Cases, and IMTR's Proof of Claim and Motion Practice

Superior and its affiliated entities filed chapter 11 petitions on the Petition Date, July 15, 2019, initiating the above-captioned Chapter 11 Cases. SUF ¶ 57.

On July 16, 2019, the Debtors filed a motion for authority to reject certain executory contracts and leases (the "Rejection Motion"). SUF ¶ 58, and Exhibit N to Waughtal Decl. In Exhibit 1, the Debtors listed the executory contracts to be rejected, including the Services Agreement and its four amendments. SUF ¶ 59. The Rejection Motion **did not** list the Assignment and Guaranty as a contract to be rejected, as it was not an executory contract capable of rejection. SUF ¶ 60. On August 14, 2019, the Court entered an order granting the Rejection Motion. SUF ¶ 61, and Exhibit O to Waughtal Decl.

On August 16, 2019, Weber filed Proof of Claim No. 31 in the chapter 11 cases, asserting a claim for $32,334,905.00 (the "IMTR POC"). SUF ¶ 62, and Exhibit P to Waughtal Decl.

On September 10, 2019, IMTR filed its *Motion of Iron Mountain Trap Rock Company to Confirm Automatic Stay Does Not Apply to Nondebtor Property, or, in the Alternative, for Relief from, or Annulment of, the Automatic Stay* (the "Stay Motion"). SUF ¶ 64. *See* Exhibit Q to Waughtal Decl. By its Stay Motion, IMTR sought relief to recover certain equipment from the Quarry, and laid out the same division of responsibilities described above under the terms of the Services Agreement, confirming that while Superior had a limited role as lessee of the land, Weber was the physical operator of the facility:

a. "Under the Agreement, **IMTR agreed to provide its mining services to SSS** at a quarry site located in Chippewa Falls, Wisconsin (the "Quarry Site"). SSS does

not own the Quarry Site but rather leases it from various owners under certain lease and royalty agreements." (page 2, ¶ 5) (emphasis added). [SUF ¶ 66].

b. "Under the specific terms of the Agreement, IMTR was required to build, at its own expense, a fixed wash plant (the "Wash Plant") and deliver to the Quarry Site all parts and equipment necessary to produce the sand contemplated by the Agreement (the "Contractor Equipment"), as well as other rolling stock and non-permanent equipment (the "Non-Permanent Contractor Equipment")." (page 3, ¶ 6). [SUF ¶ 67].

c. "Also under the Agreement, SSS was required to deliver the equipment listed on Exhibit D of the Agreement (the "SSS Equipment") to the Quarry Site, 'and transfer title to the SSS Equipment to [IMTR], free and clear of all liens.'" (page 3, ¶). [SUF ¶ 68].

d. "Consistent with the terms of the Agreement and with its ownership of the Plant, Equipment and other property at the Quarry Site, IMTR pays all taxes, costs and maintenance related to this property, submits annual personal property tax declarations to the local assessor's office, and pays all insurance related to the Plant. SSS has never paid any such amounts related to the Plant, Equipment or other property of IMTR. In addition, IMTR obtained and maintained all spare parts for use in connection with the Plant while it was operating. In short, SSS has never demonstrated any claim or incident of ownership with respect to the Plant or any other equipment at the Quarry Site." (page 5, ¶ 11). [SUF ¶ 69].

e. "**IMTR maintained the Quarry Site,** the Plant, Equipment and all other property at the site since the inception of the project in 2011. As noted, IMTR pays all costs, insurance, maintenance and taxes related to the Plant, Equipment and other property at the site. **IMTR ran all operations at the site**, and even the silica sand (in which SSS actually did have an interest) would be hauled by third-party movers, not by SSS itself. **SSS itself never exhibited any presence or control over the site**, other than occasional efforts to control stormwater runoff, which SSS was required to do under its applicable mining permit. But as to the Plant and Equipment itself, **SSS had no possession or control at any time**, prior to or after the Petition Date." (page 7, ¶ 17) (emphasis added). [SUF ¶ 70].

G. The Instant Action and the Status of Proceedings

Superior filed the instant Action against Defendants on December 23, 2020. SUF ¶ 71. Superior filed its First Amended Complaint, the operative pleading (the "Complaint"), on February 25, 2021. SUF ¶ 72. Defendants then filed a motion to dismiss the Complaint on March 18, 2021 (Doc. 23) (the "MTD"), which was opposed by Superior. SUF ¶¶ 73-74.

On August 26, 2021, the Court granted in part and denied in part Defendants' MTD, dismissing a claim for equitable indemnity, and otherwise denying Defendants' MTD. SUF ¶ 75; see also *Superior Silica Sands LLC v. Iron Mountain Trap Rock Co. (In re Emerge Energy Servs. LP)*, No. 19-11563(KBO), 2021 Bankr. LEXIS 2361 (Bankr. D. Del. Aug. 26, 2021) (the "MTD Ruling"), attached to the Waughtal Decl. as Exhibit R.

On August 9, 2022, Superior filed its Decl. Relief MSJ. SUF ¶ 76.

Superior has been made a defendant to litigation brought by landowners, in which the landowners allege that Superior is responsible for damages arising from Weber's mining activities and failure to carry out reclamation. On January 19, 2022, lessor and landowner Anthony G. Glaser filed an action in Wisconsin Circuit Court against Superior, initiating Case No. 2022CV000013 (the "Anthony Glaser Action"), while lessor and landowner Gerald Glaser filed an action against Superior in the same court, initiating Case No. 2022CV000014 (the "Gerald Glaser Action") (the "Glaser Actions"). SUF ¶¶ 77, 80. *See* Exhibits OO - PP to Waughtal Decl.

The allegations stated in the Anthony Glaser Action pertain to physical operation of the Quarry, which means actions taken by Defendants that caused damages to a landowner's home. SUF ¶ 78. Gerald Glaser's allegation include: (i) "[w]hen mining the property, the Defendant stripped off the topsoil of the land … [and] on information and belief the defendant may have simply buried it somewhere under the surface;" and (ii) "Defendant has now completed the mining process but refuses to reclaim the land to the original condition …" SUF ¶ 82.

Superior removed both the Glaser Actions to federal court, filed third-party complaints against Weber/IMTR, and sought a transfer of venue for consolidation with the instant litigation. SUF ¶¶ 79, 83. Anthony Glaser then dismissed his action without prejudice. SUF ¶ 79. The United States District Court for the Western District of Wisconsin then denied Superior's motion

for a transfer of venue and remanded the Gerald Glaser Action to Wisconsin state court where it remains pending. SUF ¶ 83. Superior incurred and continues to incur substantial fees and costs responding to the Glaser Actions as a direct result of Defendants' breaches of contract.

H. Superior Has Commenced Reclamation of the Quarry

Physical mining operations ceased at the Quarry prior to the filing of Superior's chapter 11 case on the Petition Date. SUF ¶ 84. For three years thereafter, Superior was able to delay commencement of reclamation of the Quarry because there was a stockpile of mined sand at the site. SUF ¶ 86. As long as there was sand that was not yet sold, the Quarry was deemed to be in operation and there was no requirement to begin reclamation. But by April 2022, Superior had removed all stockpiled sand, and the Glaser's had commenced their litigation demanding that Superior begin the reclamation process. SUF ¶ 87. Therefore, while Superior continues to contend that reclamation is an obligation of Defendants, Superior was obligated to commence reclamation on the Defendants' behalf. *Id.*

Superior has engaged D&E Excavating LLC ("D&E Excavating") for the physical reclamation, has engaged Short Elliott Hendrickson, Inc. ("SEH") for the environmental testing, and is actively working with Chippewa County to ensure that all required reclamation is carried out according to permits and applicable law. *Id*., at ¶¶ 27, 40, 91.

The Waughtal Decl. contains an extensive description of the reclamation already completed, the two phases of reclamation that remain to be accomplished, the amounts paid thus far by Superior, and the written estimates that Superior has obtained for completion of the reclamation work. See Waughtal Decl., ¶¶ 23-41, SUF ¶¶ 84-137. The discussion and the attached exhibits are far too extensive to be cut-and-paste into this Motion, but are incorporated herein, and can be summarized as follows:

RECLAMATION ITEM	COMPLETED WORK/COSTS	ESTIMATE FOR COMPLETION	TOTAL COSTS
Phase I:			
Demolition tasks	$236,290	$148,240	$384,530
Blasting and shaping high wall area		$1,596,800	$1,596,800
Earth moving and shaping	$549,696	$926,490	$1,476,186
Erosion control		$78,000	$78,000
Seeding, mulching, trees		$343,350	$343,350
Repairs		$170,967	$170,967
Total Phase I Reclamation:	$785,986	$3,263,847	**$4,049,833**
Phase II:			
Soil removal and disposal		$6,654,000	$6,654,000
Earth moving and shaping		$118,150	$118,150
Seeding, mulching		$62,615	$62,615
Repairs		$9,038	$9,038
Total Phase II Reclamation:		$6,843,803	**$6,843,803**
Fees, Costs and Expenses:			
SEH Consultants	$44,819	$178,000	$222,819
Bond premiums and collateral (at 65%)	$1,413,455		$1,413,455
Attorney's fees and expenses - BakerHostetler	$775,242	$48,000	$823,242
Attorney's fees and expenses – Foley & Lardner	$3,280		$3,280
Total Fees, Costs/Expenses	$2,281,908	$226,000	**$2,462,796**
TOTAL DAMAGES:			**$13,356,432**

See Waughtal Decl., ¶¶ 23-41, SUF ¶¶ 84-137, and Exhibits U - NN thereto.

Superior now files this Breach of Contract MSJ seeking summary judgment finding: (i) that Defendants have an ongoing obligation to fulfill their duties under the Services Agreement to carry out all reclamation at the Quarry; (ii) that Defendants breached their obligations under the Services Agreement to carry out all reclamation at the Quarry, and (iii) that Superior has been damaged thereby, and may recover its damages from Defendants.

V. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that a court may partially grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. A material fact is one that "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute concerning a material fact is present "when reasonable minds could disagree on the result." *In re Delta Mills, Inc.*, 404 B.R. 95, 105 (Bankr. D. Del. 2009). A moving party bears the initial burden of demonstrating the absence of a dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden by demonstrating the absence of a dispute of material fact, "the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Those specific facts need to be "definite, competent[,]" and "adduce more than a mere scintilla of evidence in [the nonmovant's] favor." *Delta Mills*, 404 B.R. at 105. The nonmovant may only rely on "sufficient evidence (not mere allegations)." *Id.* In other words, "the mere existence of some alleged factual dispute between the parties" cannot defeat a properly supported summary judgment motion. *Anderson*, 477 U.S. at 247-48. Rather, the dispute must relate to a genuine issue of material fact. *Delta Mills*, 404 B.R. at 105. Thus, a non-moving party cannot defeat a summary judgment motion based on conclusory allegations and denials, but must provide arguments or facts that show the necessity of a trial. *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990).

VI. DEFENDANTS HAVE BREACHED THEIR OBLIGATIONS TO CARRY OUT "ALL RECLAMATION" RELATED TO THEIR MINING OPERATIONS

Under Wisconsin law, a breach of contract claim requires proof of three elements: "(1) a

contract between the plaintiff and the defendant that creates obligations flowing from the defendant to the plaintiff; (2) failure of the defendant to do what it undertook to do; and (3) damages." *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 289 Wis. 2d 795, 807, 714 N.W.2d 582 (2006), aff'd 297 Wis. 2d 606, 724 N.W.2d 879 (2006). Each of these elements may be established by uncontroverted facts.

A. Defendants Have an Ongoing Contractual Obligation to Carry Out All Reclamation at the Quarry Related to Their Mining Operations

1. The Plain Language of the Services Agreement Establishes Defendants' Duties

The terms of the Services Agreement outlined in the Factual Background section above plainly delineate Defendants' obligations to carry out all physical-mining-related tasks at the Quarry, including "all reclamation" arising from such mining, on the one hand, and Superior's obligations to facilitate Defendants' ability to fulfill those obligations, on the other hand.

Under Section 5.1(a) of the Services Agreement, Defendants agreed that they "shall mine the Mined Sand and operate and maintain the Plant and Equipment in accordance with the terms of the Mine Plan, this Agreement, applicable law, the SSS Permits, and Prudent Mining & Wash Plan Operation Practice …" SUF ¶ 19. The term "SSS Permits" is a broad definition that includes the 2011 Reclamation Permit, and each amendment thereto. SUF ¶ 15.

Section 5.1(e), entitled "Reclamation," further provides in material part that "Contractor shall be responsible for all reclamation required pursuant to Contractor's mining activity hereunder." SUF ¶ 20. And Section 4.3(b), entitled "Contractor Responsible for Ongoing Conditions," provides in material part that Weber/IMTR "shall in performing its obligations under this Agreement comply with the SSS Permits and all applicable laws, rules and regulations pertaining to the control and regulation of hazardous materials and substances or protection of the environment." SUF ¶ 17.

The plain language of these contract terms are consistent with all other relevant terms of the Services Agreement and obligate Defendants to carry out all reclamation at the Quarry unless it arises from a "pre-existing condition." If Superior had operated the Quarry for another decade with a replacement "Contractor" carrying out all physical mining activities, Defendants would certainly have an argument that all remaining reclamation required at the Quarry would no longer be reclamation arising "pursuant to Contractor's mining activity hereunder," as their mining activities would have been superseded by a subsequent long-term operator. But Defendants are the only "Contractor" that ever carried out physical "mining activity hereunder" (SUF ¶ 85) and all reclamation that is required at the Quarry arises from their activities. Instead of fulfilling that responsibility, they have disclaimed any liability for reclamation.

Section 5.1 of the Services Agreement is plainly worded, and by its plain meaning it obligates Defendants to carry out all reclamation at the Quarry – both interim reclamation that Weber never finished, and final reclamation that Weber never commenced – as all such reclamation arises "pursuant to Contractor's mining activity hereunder." *Id*.

Interpretation of the Services Agreement is governed by Wisconsin law. SUF ¶ 22. Under Wisconsin law, "interpretation of a contract is a question of law." *Edwards v. Petrone*, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990). The primary goal in contract interpretation under Wisconsin law is to "give effect to the parties' intent, as expressed in the contractual language." *Maryland Arms Ltd. P'ship v. Connell*, 326 Wis. 2d 300, 311, 786 N.W.2d 15 (2010). When contract terms are clear and unambiguous, they are construed according to the literal terms. *Id*., 326 Wis. 2d at 311.

Defendants may attempt to argue that Section 5.1 is ambiguous. But for a contract term to be ambiguous under Wisconsin law, it must be susceptible to two reasonable interpretations. *Wilke*

v. First Fed. Sav. & Loan Ass'n, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982). The plain wording of Section 5.1 cannot be interpreted in a manner that places responsibility for "all reclamation" arising from physical mining activities on any party other than the Defendants. The meaning of Section 5.1 is particularly clear when read alongside Section 4.3, which separates the environmental liabilities of Superior and Defendants by their "pre-existing" (for Superior) or "ongoing" (for Defendants) nature.

"As a general matter, it has long been a rule of contract construction in Wisconsin that 'the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole.'" *Folkman v. Quamme*, 264 Wis. 2d 617, 635, 665 N.W.2d 857 (2003) (citation omitted). Thus, should the Court find the language of Section 5.1(e) to be other than plain, the contract as a whole establishes the nature of Defendants' reclamation obligation.

As fully addressed above, the Services Agreement provides throughout that the roles of Superior and Defendants are such that Superior has duties as the owner of the project to facilitate and support Defendants' corresponding duties to carry out the physical operations and mining at the Quarry, including all reclamation.

2. The Services Agreement Remains an Enforceable Contract with Respect to Defendants' Failure to Fulfill Their Reclamation Obligations

Superior's Decl. Relief MSJ has raised the continuing enforceability of the Services Agreement as an issue to be resolved in connection with the Second Claim for Relief. The same issue applies to Superior's Third Claim for Relief for Breach of Contract, and the following legal argument pertaining to the ongoing enforceability of the Services Agreements is substantially identical to the legal argument on this issue in the Decl. Relief MSJ, amended solely: (i) to address the differing nature of the Third Claim for Relief; (ii) to incorporate discussion from Superior's

reply brief filed in support of its Decl. Relief MSJ, and (iii) to address limited case law that has been decided subsequent to the filing of the Decl. Relief MSJ.

Superior's rejection of the Services Agreement in the initial weeks of its chapter 11 case did not release its prepetition claims against the Defendants related to environmental matters such as reclamation of the Quarry (among other claims preserved by law), nor erase Defendants' ongoing and independent duty to carry out "all reclamation" under the terms of the Services Agreement. As the Court explained in its MTD Ruling:

> When an executory contract is rejected in bankruptcy, the contract is not rescinded — it is considered a breach as of the filing of the bankruptcy by the debtor who "repudiate[es] any further performance of its duties" under the contract. "The decision is forward looking, and does not affect the rights and obligations that have already accrued; 'the issues of affirmance or rejection relates only to those aspects of the contract which remained unfulfilled as of the date the petition was filed.'" "[E]xecuted portions of the contracts remain intact, and property rights acquired under the contracts prior to filing bec[o]me property of the estate despite the [debtor's] rejection of unperformed obligations of the contracts."

Exhibit R, MTD Ruling, pp. 9-10, and 2021 Bankr. LEXIS 2361 at * 17 (quoting *Empire State Bldg. Co. v. New York Skyline, Inc. (In re New York Skyline, Inc.)*, 432 B.R. 66, 80 (Bankr. S.D.N.Y. 2010), and *Delightful Music Ltd. v. Taylor (In re Taylor)*, 913 F.2d 102, 106 (3d Cir. 1990)). *See also Music Royalty Consulting, Inc. v. Reservoir Media Mgmt.*, 598 F. Supp. 3d 158, 175-76 (S.D.N.Y. 2022) (following *Empire State* for holding that "rejection is 'forward looking" and "does not affect the rights and obligations that have already accrued.'"); *Nickels Midway Pier, LLC v. Wild Waves, LLC (In re Nickels Midway Pier)*, 372 B.R. 218, 224 (D. N.J. 2007) (following debtor's rejection of contract, the question of "whether [the non-debtor party] breached the agreement pre-petition, and the consequences of any breach, will be determined").

The Third Circuit addressed this issue in *In re Taylor*, *supra*, in which a musician rejected a publishing contract, and confirmed that contract rejection does not erase prepetition claims for damages. *In re Taylor*, 913 F.2d at 106 ("To the extent that money is due the debtor for pre-

petition services under a personal services contract, the debtor's claim for those sums is undoubtedly an asset of the estate which passes to the trustee/debtor-in-possession. And this is so regardless of whether the trustee later affirms or rejects the contract.").

The Third Circuit's statement in *Taylor* has been followed repeatedly by courts that have confirmed that any prepetition claims or causes of action a debtor may hold against a contracting party are not impacted by the debtor's subsequent rejection of that contract. *See Arrowsmith v. Warnick (In re Health Diagnostic Lab., Inc.)*, No. 15-32919, 2018 Bankr. LEXIS 2953, at *25 (Bankr. E.D. Va. September 27, 2018) (following *Taylor* and holding that, upon rejection of a contract, "if the debtor has a claim under the contract arising out of a pre-petition event, 'the debtor's claim for those sums is undoubtedly an asset of the estate which passes to the trustee …'"); *Lauter v. Citgo Pet. Corp.*, No. H-17-2028, 2018 U.S. Dist. LEXIS 21065, 2018 WL 801601, at *15 (S.D. Tex. Feb. 8, 2018) (following *Taylor*, and holding that "[r]ejection did not cut off the right of Gas—Mart's estate … to pursue claims based on pre-petition breaches of the Agreement."); *In re New York Skyline, Inc.)*, 432 B.R. at 80 (rejection of contract "does not affect the rights and obligations that have already accrued"); *Creator's Way Associated Labels, Inc. v. Mitchell (In re Mitchell)*, 249 B.R. 55, 58 (Bankr. S.D.N.Y. 2000) (following *Taylor*, and finding that "any pre-petition breach giving rise to a money damage claim in favor of [the debtor] would vest in the estate under § 541(a)."); *In re Tomer*, 128 B.R. 746, 756 (Bankr. S.D. Ill. 1991) (following *Taylor*, and finding that "executed portions of the contracts remain intact, and property rights acquired under the contracts prior to filing became property of the estate despite the trustee's rejection of unperformed obligations of the contracts"), *aff'd*, 147 B.R. 461 (S.D. Ill. 1992). *See also Callahan v. Mountain Empire Oil Co. (In re Lambert Oil Co.)*, No. 03-01183-WSA; 2006 Bankr. LEXIS 4641, at *41 (Bankr. W.D. Va. Nov. 24, 2006) (contract

rejection does "not deprive such agreements of all continuing legal effect or consequence in the bankruptcy case"), *aff'd*, 372 B.R. 265 (W.D. Va. 2007). *See also*, MTD Ruling, 2021 Bankr. LEXIS 2361, at *17-18.

This case law is consistent with the parties' intent, as they provided by Section 14.10 of the Services Agreement that "[e]xpiration or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such expiration or termination." SUF ¶ 23. Section 14.10 confirms what is already the law: that rejection did not wipe out pre-existing claims, such as Superior's claim against Defendants for breach of contract.

Under both applicable law and the terms of Section 14.10 of the Services Agreement, contract rejection cannot release Defendants – *non-debtors* – from their liability for environmental reclamation. It would be a particularly odd outcome to this litigation if the *debtor* that reorganized in chapter 11 assumed the breached obligations of a non-debtor for environmental reclamation simply by rejecting an otherwise onerous contract.

Section 14.10's provision for the survival of "obligations that by their nature should survive such expiration or termination" must include Defendants' reclamation obligations. An obligation to clean up a mining site, and an obligation to be liable for the failure to clean up a mining site, are both obligations that will naturally follow the cessation of mining activities. They are obligations that must remain enforceable at the final stages of a contract's existence, including after expiration and termination, as they are obligations that by their "nature should survive such expiration or termination." *See Uniloc 2017 LLC v. Google LLC*, 52 F.4th 1352, 1358 (Fed. Cir. 2022) ("[C]ourts have found that rights or contract provisions that by their nature survive termination include those related to what remedies are available in case of breach occurring during the term of the contract or dispute resolution mechanisms concerning such breach.").

Superior's remedies for breach of Defendants' reclamation obligations remain enforceable.

3. The Guaranty Remains an Enforceable Contract with Respect to Defendants' Failure to Fulfill Their Reclamation Obligations

Weber's Guaranty of all obligations of IMTR under the Services Agreement, both payment and performance, was not rejected in Superior's chapter 11 case because a guaranty is not an executory contract. *In re Furniture Brands Int'l, Inc*., No. 13-12329(CSS), 2013 Bankr. LEXIS 5162, *9-13, 2013 WL 9065131 (Bankr. D. Del. Nov. 7, 2013) (citing cases); *In re Chicago, R.I. & P.R. Co.*, 604 F.2d 1002, 1004 (7th Cir. 1979) (Bankruptcy Act, guaranty not executory contract).

Weber's obligations under the Guaranty accrued the moment Weber and IMTR executed their assignment in 2018. The Guaranty was signed at a time when Weber's reclamation obligations were already unfulfilled, were the subject of the 2016 NOD, and instantly became the guaranteed obligations of IMTR. Weber's obligations under its Guaranty were not impacted by Superior's Rejection of the Services Agreement.

Thus, to the extent that Superior's breach of contract claim seeks damages under the Guaranty, the first element – existence of an enforceable contractual obligation – is satisfied both by ongoing obligations under the rejected Services Agreement, and by the Guaranty.

B. Defendants Have Breached Their Reclamation Obligations

1. Defendants Have Breached the Services Agreement

Superior delivered its 2016 NOD on December 21, 2016, informing Weber that various violations of its reclamation obligations had created events of default under the Services Agreement. SUF ¶ 52. Defendants' failure to fulfill their reclamation obligations, including the obligation to complete "all reclamation" related to their physical operation of the Quarry, has continued through to the Petition Date. SUF ¶ 56. Defendants' breaches were not a single, material

breach, but an ongoing breach of their obligations to carry out reclamation in relation to their operations, including the reclamation required for closure of the Quarry.

Defendants have not carried out their obligation to perform "all reclamation" arising from their physical mining activities, forcing Superior to act in their plaice. SUF ¶ 87. Defendants may attempt to create disputed material facts pertaining to the limited reclamation that was carried out by Weber or IMTR in earlier years, but no such efforts can overcome the fact that Defendants have breached their reclamation obligations, that such breaches were noticed prior to the Petition Date, and that such breaches remained unresolved prior to the Petition Date.

Superior is presently engaged in the reclamation that is Defendants' contractual obligation to carry out. SUF ¶ 87. Superior has satisfied the second element of its breach of contract claim.

2. Superior's Breach of Contract Claim Had Accrued Prepetition

When a contract provides for continuing obligations, such as performance under a construction or mining contract, each new breach, and each ongoing breach, creates a new claim that accrues at such time. *Jensen v. Janesville Sand & Gravel Co.*, 141 Wis. 2d 521, 527, 415 N.W.2d 559 (Ct. App. 1987) ("[I]f the promisor has a continuing duty to perform, generally a new claim accrues for each separate breach. The injured party may assert a claim for damages from the date of the first breach within the period of limitation.") (quoting *Segall v. Hurwitz*, 114 Wis. 2d 471, 491, 339 N.W.2d 333 (Wis. App. 1983).[3] See also *United States ex rel. Roach Concrete, Inc. v. Veteran Pac., JV*, 787 F. Supp. 2d 851, 857 (E.D. Wisc. 2011) (under construction contract, continuing obligation related to all ongoing contractual duties); *Hi-Lite Prods. Co. v. American Home Prods. Corp.*, 11 F.3d 1402, 1408-09 (7th Cir. 1993) (Illinois law) (following *Segall*,

[3] The continuing nature of a contract need not be pleaded in a complaint. *Hi-Lite Prods. Co. v. Am. Home Prods. Corp.*, 11 F.3d 1402, 1409 (7th Cir. 1993).

ongoing breaches of distributorship agreement would create new claims for breach of contract, remanding for factual determination).

Superior delivered its 2016 NOD on December 21, 2016, identifying breaches of Weber's reclamation obligations that arose in 2016. The statute of limitations under Wisconsin law for a breach of contract claim is six years. Wis. Stat. § 893.43(1). Superior filed this action on December 23, 2020, but while 11 U.S.C. §108 continued to toll any statute of limitations beyond the Petition Date. Thus, any reclamation breaches dating back six years before the Petition Date, to July 15, 2013, would be a breach that is covered by Superior's breach of contract claim. And to whatever extent Weber failed to carry out reclamation obligations prior to that date, they are simply delayed obligations that now form part of "all reclamation" being carried out by Superior on the Defendants' behalf.

Thus, the first two elements of Superior's breach of contract claim – the existence of an enforceable contractual obligation that has been breached – are satisfied.

C. Superior Has Been Damaged by Defendants' Breach of Contract

1. Superior's Damages Are Capable of Reasonable Estimation

Superior's commencement of reclamation at the Quarry permits Superior to provide a reasonably certain estimate of the damages it will incur to complete all required reclamation.

Wisconsin law requires a party seeking summary judgment for breach of contract to come forward with evidence sufficient to estimate its damages with "reasonable certainty." *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24 P19, 308 Wis. 2d 258, 268-69, 746 N.W.2d 447 (2008) ("The phrase "reasonable certainty" refers to a component of the ordinary burden of proof that a plaintiff must carry at trial when proving facts to the jury"). Damages may not be determined "by speculation or guesswork," but may be determined where the court can "make a reasonable

estimate of the damage based on relevant date and evidence." *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977) (citation omitted). The standard of reasonable certainty does not include any requirement for "mathematical precision." *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 125, 479 N.W.2d 557 (Ct. App. 1991). "It is generally held that the uncertainty which prevents recovery is uncertainty as to the fact of the damage and not to its amount." *Id.*

Superior's damages are a combination of costs incurred in the reclamation process, costs estimated by contractors who will carry out the reclamation, and attorney's fees incurred thus far in pursuit its rights against Defendants. As more fully addressed in the Waughtal Decl., and Exhibits U - HH, Superior has engaged D&E Excavating to carry out the primary reclamation work and has already incurred $785,986 in reclamation costs, while the estimated cost to complete for Phases I and II total $10,107,650, for total reclamation costs of $10,893,636, plus fees, expenses, and costs. *Id.* at ¶¶ 91-133.

These costs have been and will continue to be incurred for tasks that include demolition of mining infrastructure, blasting a rock wall that does not comply with standards, spreading rock and soil, acquiring missing top soil, seeding and mulching, and related tasks. *Id*., at ¶ 89. All of these tasks constitute reclamation that arises pursuant to the Defendants' mining activities. Superior has also incurred and will continue to incur expenses for its necessary engagement of SEH to carry out required environmental testing, in the total amount of $222,819. *Id*., ¶ 40; SUF ¶¶ 134-137. Superior has also incurred contractual attorney's fees and expenses in a total amount of $823,242 for BakerHostetler, and $3,280 for Foley & Lardner, including estimated fees through to resolution of this Motion, addressed more fully below. SUF ¶¶ 144-147, 160.

Finally, Superior has already incurred $1,413,455 in premiums and collateral costs for the performance bond it was required to post for the benefit of Chippewa County. While the posting

of a performance bond was a requirement of the 2011 Reclamation Permit, an increase in its amount to $4.65 million, and the requirement that it stay in place at such amount is a direct result of Defendants' breach of contract. The performance bond amount relates to the reclamation work to be performed. Superior estimates that, if Defendants had carried out their contractual obligations in a timely manner, the bond that Superior would have been required to post through to closure of the Quarry would have been 35% of the amount required as a result of Defendants' breach, as 65% of the reclamation work would have been performed by 2020. SUF ¶¶ 106, 138-143. Therefore, Superior has estimated its bond-related damages as 65% of its premiums and collateral costs for the years 2020-23, in the amount of $1,413,455. SUF ¶ 143.

Thus, the total damages sought by Superior for Defendants' breach of contract, for all categories described above, is $13,356,432. SUF ¶ 161.

2. Superior Is Entitled to Recover all Reasonable Attorney's Fees and Expenses Arising from Defendants' Failure to Fulfill Their Reclamation Obligations

Section 4.3(c) of the Services Agreement provides that Defendants will indemnify Superior for "reasonable attorney's fees and expenses … arising out of … conditions for which" Defendants are responsible under Section 4.3(b). SUF ¶ 18. Section 4.3(b), in turn, provides that Defendants are required to "comply with the SSS Permits and all applicable laws, rules and regulations pertaining to the control and regulation of hazardous materials and substances or protection of the environment." SUF ¶ 17. The SSS Permits establish parameters for reclamation pursuant to the Reclamation Plan, for which Defendants are responsible under Section 5.1(e).

These contract terms permit Superior to recover its reasonable attorney's fees and expenses in response to Defendants' refusal to fulfill their reclamation obligations. The specific reference to "attorney's fees" overcomes Wisconsin's general adherence to the American rule on attorney's fees. *See*, *e.g., Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC*, 549 F. Supp. 2d 249, 273

(E.D.N.Y. 2008) (applying Wisconsin law, finding subject contract "explicitly states that the costs for which Broan is entitled to seek reimbursement include 'actual attorney's fees.'").

Weber's Guaranty does not contain a choice of law clause, but Wisconsin law and Missouri law are the most likely choices of law to apply, and the law of both states is identical with respect to Weber's guarantor liability.[4] Because the Services Agreement provides a contractual right to attorney's fees, the Guaranty need not reference "attorney's fees" in order for Superior to be entitled to collect its attorney's fees and expenses from Weber under the Guaranty. Rather, because Weber has guaranteed "all" payment and performance obligations of IMTR under the Services Agreement, and has agreed to be liable for "all" of Superior's damages, Weber has guaranteed and is liable for IMTR's obligation to pay Superior's attorney's fees and expenses under the Services Agreement. *See Sportsman Channel, Inc. v. Andy Ross Tour, LLC*, No. 15-CV-416, 2016 U.S. Dist. LEXIS 38593, at *10, 2016 WL 1175126 (E.D. Wisc. March 23, 2016) (applying Wisconsin law, where personal guaranty guaranteed "the sums owed" under related contract, and the contract included express recovery of attorney's fees, judgment against guarantor included attorney's fees); *Henty Construction Co. v. Hall*, 783 S.W.2d 412, 417-18 (Mo.App. 1989) (applying Missouri law, guarantor liable for attorney's fees despite no clause in guaranty, where underlying note included attorney's fees clause); *Townsend v. Alewel*, 202 S.W. 447, 448 (Mo.App. 1918) (applying Missouri law, stating that "Defendant guaranteed payment of the note. That meant the note as written, and the note included the payment of an attorney's fee.").

Superior's right to recover attorney's fees also arises under Wisconsin common law as it pertains to fees incurred in defense of the Glaser Actions. Under Wisconsin law, a defendant that

[4] The Services Agreement is governed by Wisconsin law (¶ 14.1), while the Assignment between Weber and IMTR is governed by Missouri law. *See* Exhibit F to Waughtal Decl. As the Guaranty is a guaranty of obligations under the Services Agreement, Wisconsin law should apply. But as Wisconsin and Missouri law are the same on this issue, it makes no difference which law determines Weber's guarantor liability for attorney's fees and costs.

breaches a contract is also liable to the plaintiff for all damages, including costs and attorney's fees, that the plaintiff incurs as a result of contract claims brought by third persons if it was foreseeable that such damages would be "the probable result of his breach at the time he made the contract." *City of Cedarburg Light & Water Comm'n v. Glens Falls Ins. Co.*, 42 Wis. 2d 120, 126, 166 N.W.2d 165 (1969) (quoting restatement); *see also Talmer Bank & Trust v. Jacobsen*, 380 Wis. 2d 171, 177-83, 908 N.W.2d 495 (Ct. App. 2018) (discussing cases).

The Declaration of David J. Richardson (the "Richardson Decl.") filed herewith attaches all of Baker & Hostetler LLP's invoices for fees and costs arising in this litigation and the Glaser Actions, and breaks down the nature and amount of such fees. Superior has incurred and expects to incur through to the resolution of this motion $823,242 in attorney's fees and expenses arising from BakerHostetler's work in this litigation and the related Glaser Actions. SUF ¶¶ 144-147, 158. And Superior has incurred $3,280 thus far in attorney's fees and expenses for its recent engagement of Foley & Lardner as counsel in the remanded Gerald Glaser Action. SUF ¶¶ 156-157. In total, Superior has incurred or expects to incur through to the hearing on this motion $826,522 in attorney's fees and expenses, arising from Defendants' breach of their obligations under the Services Agreement. SUF ¶ 160.

Defendants respectfully request that they be awarded their attorney's fees and expenses pursuant to the terms of the Services Agreement, the Guaranty, and Wisconsin and Missouri law.

III. CONCLUSION

For all of the reasons argued herein, Superior respectfully requests that this Court grant its Motion and enter a judgment in its favor and against Defendants for breach of contract as requested herein, and award Superior its damages, including attorney's fees and costs, as outlined herein.

Dated: April 13, 2023

BAKER & HOSTETLER LLP

/s/ *Jeffrey J. Lyons*

Jeffrey J. Lyons (#6437)
1201 North Market Street, Suite 1407
Wilmington, DE 19801-1147
(302) 468-7088
jjlyons@bakerlaw.com

David J. Richardson [*pro hac vice*]
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025
(310) 442-8858
drichardson@bakerlaw.com

Jorian L. Rose [*pro hac vice*]
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4681
jrose@bakerlaw.com

Attorneys for Superior Silica Sands LLC

EXHIBIT 1

PROPOSED ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EMERGE ENERGY SERVICES LP, *et al.*, Debtors.[5]	Chapter 11 Case No. 19-11563 (KBO) Jointly Administered
SUPERIOR SILICA SANDS LLC, a Texas limited liability company, Plaintiff, vs. IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation. Defendants.	Adv. Proc. No. 20-51052 (KBO)

ORDER AND JUDGMENT GRANTING REORGANIZED DEBTOR SUPERIOR SILICA SANDS LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THIRD CLAIM FOR RELIEF FOR BREACH OF CONTRACT

On _____, 2023 (the "Hearing"), the United States Bankruptcy Court for the District of Delaware (the "Court") heard and considered the Motion for Partial Summary Judgment on Third Claim for Relief for Breach of Contract (the "Motion") [Dkt. No. __], filed by plaintiff and reorganized debtor Superior Silica Sands LLC ("Superior"). By the Motion, Superior requested summary judgment in its favor on its claim for breach of contract (the "Third Claim for

[5] 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.

Relief") stated in its First Amended Complaint (the "Complaint") against defendants Fred Weber, Inc. ("Weber") and Iron Mountain Trap Rock Company ("IMTR," collectively with Weber, "Defendants"), arising from Defendants' failure to fulfill contractual obligations to perform all reclamation required at the subject sand quarry, as more fully described in the Motion. Capitalized terms not defined herein carry the meaning ascribed to them in the Motion.

This Court, having considered the Motion, the Proposed Statement of Uncontroverted Facts and Conclusions of Law, as well as the pleadings, declarations and evidence filed in connection therewith or in opposition to the Motion, the arguments of counsel at the Hearing, after finding that this Court has jurisdiction to consider the Motion and enter final judgment on the claims addressed in the Motion, after finding that there are uncontroverted material facts supporting entry of this judgment, and for good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion is granted.

2. The Court hereby awards judgment in favor of Superior on its Third Claim for Relief, finding as follows:

(i) Defendants agreed under the terms of the Services Agreement to carry out all reclamation required at the Quarry arising from their mining operations;

(ii) Defendants are the sole entities that carried out physical mining operations at the Quarry, and are liable for all reclamation required under the 2011 Reclamation Permit;

(iii) Superior provided notice of Defendants' breach of contract prior to the Petition Date, and the claim remained pending when Superior rejected the parties' Services Agreement pursuant to 11 U.S.C. § 365;

(iv) Defendants' obligation to carry out all reclamation at the Quarry is a contract term that, by its nature, is meant to survive contract expiration or termination;

(v) Superior's claim for breach of Defendants' obligation to carry out all reclamation at the Quarry is a prepetition claim that survived rejection of the Services Agreement, and remains enforceable;

(vi) Weber's Guaranty was not rejected in Superior's chapter 11 case as it is not an executory contract, and remains enforceable against Weber;

(vii) By its Guaranty, Weber has guaranteed IMTR's obligations under the Services Agreement;

(viii) Superior has commenced reclamation of the Quarry and is entitled to damages according to proof;

(ix) Superior has presented evidence to establish with reasonable certainty that its breach of contract damages arising from Defendants' failure to carry out all reclamation at the Quarry total $10,893,636 in reclamation costs, plus $2,462,796 in attorney's fees, expenses, and bond premiums and costs, for total damages of $13,356,432;

(x) Superior has a contractual right to recover its attorney's fees and costs arising from Defendants' breach of contract and related third-party litigation, pursuant to Section 4.3 of the Services of Agreement, Wisconsin common law, and Weber's corresponding Guaranty of all obligations of IMTR;

(xi) Judgment is awarded in favor of Superior, and against Defendants Weber and IMTR, for $10,893,636 in reclamation costs, plus $2,462,796 in attorney's fees, expenses, and bond premiums and costs, for total damages of $13,356,432.

Dated: _____, 2023

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UNITED STATES BANKRUPTCY JUDGE