Docket #0111 Date Filed: 3/19/2024

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)

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION OF SCOTT WAUGHTAL REGARDING UPDATED DAMAGES

BAKER & HOSTETLER LLP
Jeffrey J. Lyons (#6437)
1201 North Market Street, 14th Floor
Wilmington, DE 19801-1147
(302) 468-7088
jjlyons@bakerlaw.com

David J. Richardson [*pro hac vice*]
1900 Avenue of the Stars, Suite 2700
Los Angeles, CA 90067
(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: March 19, 2024
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.

1911563240322000000000002

Superior hereby files this Reply in support of its Motion for Leave to File a Supplemental Declaration of Scott Waughtal Regarding Updated Damages (the "Motion") [Adv. D.I. 109].

The premise of Defendants' opposition [Adv. D.I. 110] is that Superior's motion for summary judgment filed one year ago should be denied because the costs of Superior's ongoing work to fulfill Defendants' breached reclamation obligations are more certain today than they were when the motion was filed.

That is a flawed premise. Superior contends that when damages figures have become more certain before a hearing on summary judgment, such as where a plaintiff has mitigated damages, the Court should be provided with that information prior to ruling on the motion. The alternative procedure is not denial of the motion for summary judgment, as Defendants suggest, but a judgment on issues of liability followed by the submission of further post-hearing evidence on updated damages. *See, e.g.*, *Pro. Merch. Advance Cap., LLC v. C Care Servs., LLC*, 2015 WL 4392081, at *4 (S.D.N.Y. July 15, 2015) (granting summary judgment on liability and reserving ruling on damages pending supplemental submission by plaintiff); *Wilson v. Fioritto Constr., LLC*, 2018 WL 2149737, at *7 (S.D. Ohio May 10, 2018) (granting summary judgment on liability and requiring supplemental briefing on damages); *Ford Motor Credit Co. v. Maxwell*, 2013 WL 4782597, at *20 (M.D. Pa. Sept. 6, 2013) (granting summary judgment on issues of liability, deferring a ruling on damages pending the filing of supplemental briefs and evidence).

Superior seeks to update the Court with additional information in advance of the hearing because its mitigation efforts have been successful and have dramatically reduced the costs of the Phase II "mud pond" reclamation that will be carried out in 2024. Defendants appear to prefer arguing the hearing without such evidence in the record.

The case law cited by Defendants—holding that "proposed supplementary information" should not be admitted if it "does not provide any new evidence or create any new questions of material fact …" [Adv. D.I. 110 at 4]—has no relevance to supplemental information concerning mitigation efforts that will reduce Superior's Phase II damages by millions of dollars. The court in *Jackson v. Ivens*, 2010 WL 2802279, at *1 (D. Del. July 13, 2010), addressed supplemental medical records, not damages information. In *Hinkle v. City of Wilmington*, 205 F. Supp. 3d 558, 579 (D. Del. 2016), the court found that supplemental information pertaining to a dispute over employment disability would not be admitted because it would "not alter the decision rendered herein." *Id*. Superior's revisions to its damages numbers are not the result of an error, as suggested in Defendants' opposition, but are the result of Superior's diligent efforts to negotiate a reclamation process for Phase II that will mitigate its damages, and Superior has kept Defendants abreast of those efforts with supplemental document productions every few months. Superior's successful efforts to mitigate damages on Phase II (for Defendants' benefit) will reduce the amount that Superior seeks to recover from Defendants by several million dollars, and is the epitome of "new evidence" that impacts the judgment sought by Superior.

Defendants continue to object to Superior's motion for summary judgment because it is based on damages projections arising from ongoing reclamation, but this objection is misplaced. Summary judgment requires a "reasonable" degree of certainty, not absolute certainty. *See AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24 P19, 308 Wis. 2d 258, 268-69, 746 N.W.2d 447 (2008) (requiring a "reasonable degree of certainty" for damages estimate at summary judgment); *Doe v. Bank of Am., N.A*., 2018 WL 295565, at *7 (D.N.J. Jan. 3, 2018) ("Even at summary judgment, 'an estimate of damages, calculated within a reasonable degree of certainty,' suffices.") (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792-93 (N.J. 2005)). The

updated information that Superior proposes with respect to Phase I will further demonstrate the reliability of its original estimates by showing how actual costs have continued to confirm the reasonable nature of Superior's estimates. The updated information on Phase II will address mitigation efforts that Superior had a duty to pursue, and estimate the costs for a non-confirmed process with the same degree of reasonable certainty.

Superior believes that it is in the best interests of all parties to ensure that the Court has the most recent damages information prior to the upcoming Hearing. Wherefore, Superior respectfully requests entry of the proposed order filed with its Motion granting Superior leave to file a supplemental declaration of Scott Waughtal in advance of the MSJ Hearing to provide the Court and Defendants with updated damages information.

Dated: March 19, 2024

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*]
1900 Avenue of the Stars, Suite 2700
Los Angeles, CA 90067
(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