Docket #0541 Date Filed: 10/22/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
EMERGE ENERGY SERVICES LP, *et al.*,	:	
	:	Case No. 19-11563 (KBO)
	:	
	:	**Hearing Date: October 30, 2019, at 9:30 AM**
Debtors.	:	**Objections Due: October 11, 2019, at 4:00 PM extended to October 22, 2019.**
	:	

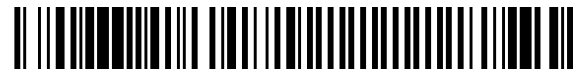
OBJECTION BY THE UNITED STATES TO THE DEBTORS' FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION

The United States, by and through the undersigned attorneys, in support of its objection to the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors under Chapter 11 of the Bankruptcy Code [Docket No. 362] ("Plan"), avers as follows:

1. On July 15, 2019, the Debtors filed voluntary bankruptcy petitions seeking relief under Chapter 11 of the Bankruptcy Code.

2. The United States Department of Labor, Mine Safety and Health Administration ("MSHA"), assessed civil penalties against certain Debtor entities arising from citations and orders for alleged violations of the Federal Mine Safety and Health Act of 1977, ("the Mine Act") as part of MSHA's ongoing mandatory health and safety inspections under that law. For violations before the Chapter 11 filing on July 15th, 2019, the Debtor entities received violations over several inspections, spanning Oct. 9th 2018 to May 22, 2019, at two different locations (Texas and Wisconsin). As of October 9th, 2019, MSHA issued at least nine violations to Debtor entities since their Chapter 11 petition filing on July 15th, 2019.

3. In Article I(A) of the Plan, the Debtors also identify a "MSHA Action" as "that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certain mud retaining pond wall breach, which occurred on June 21, 2019, at the San Antonio, Texas facility of the Debtors, the related 103(k) order issued by the Mine Safety and Health Administration affecting the entire mine area at the San Antonio Texas facility, and all related matters affecting the condition of the mine at the San Antonio Texas facility."

4. Debtor, Superior Silica Sands LLC, holds four wireless licenses (the "Licenses") issued and regulated by the Federal Communications Commission ("FCC"). The Licenses are private radio licenses which are used for day-to-day business operations. As a license holder, this Debtor is accordingly an entity regulated by the FCC.

5. Through the Plan, the Debtors propose to issue new equity interests to certain classes of creditors and to cancel existing equity interests, effecting a change of control. Thus, the Debtors seek to transfer all assets under the Plan, including the Licenses and control of an FCC licensee, to new equity holders, which requires prior approval by the FCC. Although in bankruptcy, the Debtors remain responsible for complying with FCC regulations applicable to them, including regulatory requirements for operation and transfer of a License. "Congress has granted the FCC the authority to regulate the use of the public airwaves in the United States, which includes the exclusive right to grant a license to use the airwaves and to approve any transfer of a license by a licensee." *In re TerreStar Networks, Inc.*, 457 B.R. 254, 262 (Bankr. S.D.N.Y. 2011).

The FCC's regulations at 47 C.F.R. §1.948 and section 310(d) of the Communications Act, require i) a regulated entity that holds a license to obtain prior FCC approval for a proposed transfer of that License or a proposed transfer of control of itself and ii) a regulated entity in control of an FCC licensee to obtain prior FCC approval of a proposed transfer of control of the FCC licensee, whether such transfer is voluntary or involuntary, whether such transfer is direct

or indirect and irrespective of whether the regulated entity possesses any other FCC license or authorization. The United States objects to the Plan to the extent it purports to transfer FCC licenses or control of FCC licenses without compliance with the Communications Act of 1934, as amended, and the rules, regulations, and orders promulgated thereunder by the FCC.

6. The United States objects to the third party non-debtor limitation of liability, exculpation, injunction and release provisions set forth in Article X of the Plan. The injunction provisions violate the Anti-Injunction Act, I.R.C. Section 7421(a). See American Bicycle Association v. United States, 895 F.2d 1277 (9th Cir. 1990); United States v. Prescription Home Health Care, Inc., 316 F.3d 542 (5th Cir. 2002); In re Plainwell, Inc., 2004-2 USTC Paragraph 50, 393 (D. Del. 2004). The Plan currently defines the multitude of parties to be released as the "Releasing Parties". Correspondingly, the release and injunction provisions of the Plan extend its protections to the Releasing Parties. While the Third Circuit stopped short of adopting a *per se* rule that a non-debtor release in a reorganization plan is not permissible (as other circuits have done), it held that, at most, such a provision could only be valid in "extraordinary" cases. Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir. 2000). At minimum, Continental held that such a nonconsensual release of non-debtor entities must contain all of the following "hallmarks": "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." Id. at 214; see also In re: Wash. Mut., Inc., 442 B.R. 314, 351-52 (Bankr. D. Del. 2011) (collecting cases). This Court has interpreted Continental's holding on non-debtor releases to mean that "limiting the liability of non-debtor parties is a *rare thing that should not be considered absent a showing of exceptional circumstances* in which several key factors are present." In re Genesis Health Ventures, Inc., 266 B.R. 591, 608 (Bankr. D. Del. 2001) (emphasis added). This Court has previously held that a

non-debtor release over a creditor's objection "would not pass muster." Wash. Mut., 442 B.R. at 352 ("This Court has previously held that it does not have the power to grant a third party release of a non-debtor."). Where this Court has even contemplated approval of a non-consensual release, it has required the following factors be present to justify the "rare" release: "(1) the non-consensual release was necessary to the success of the reorganization, (2) the releasees have provided a critical financial contribution to the debtor's plan, (3) the releases' financial contribution is necessary to make the plan feasible, and (4) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the releases." In re Tribune Co., 464 B.R. 126, 177-78 (Bankr. D. Del. 2011); see also Genesis Health Ventures, 266 B.R. at 607-09. 52. Here, setting aside the question of whether the Debtors have made such a showing against all creditors generally (and they have not), the Debtors make no adequate showing of a single factor, let alone all of the Tribune / Genesis factors, that justifies the extraordinary release of non-debtors with respect to their potential liability to the United States.

7. The United States objects to any attempt by the Debtors in Article X of the Plan to release any member of the Special Restructuring Committee.

8. Article VII(B) of the Plan provides that unless specifically provided for in the Plan, the Confirmation Order or Final Order of the Bankruptcy Court, or required by applicable bankruptcy law, post-petition interest shall not accrue or be paid on any claims and no holder of a claim shall be entitled to interest accruing on or after the Petition Date on any Claim. The United States objects to the Plan to the extent it fails to provide for the payment of interest on administrative expense claims of the United States. See 11 U.S.C. Section 503(b)(1)(C) and Section 511; United States v. Friendship College, Inc., 737 F.2d 430 (4th Cir. 1984); In re Mark

Anthony Construction, Inc., 886 F.2d 1101 (9th Cir. 1989).

9. The United States objects to Article XI of the Plan to the extent that it provides for the retention of exclusive jurisdiction. *See* 28 U.S.C. 1334. While "the bankruptcy court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. Rather, if for example, the United States, post-confirmation, asserts liabilities in a non-bankruptcy court of competent jurisdiction, that court may hear and determine all issues raised in the action, including whether the defendant can rely on the confirmation order as an affirmative defense. Adjudication of such a defense is a proceeding over which the bankruptcy court, as a unit of the district court, has "original but not exclusive jurisdiction." 28 U.S.C. § 1334(b) (emphasis added); *see also Stern v. Marshall*, 131 S.Ct. 2594 (2011); *In re Mystic Tank Lines Corp*., 544 F.3d 524 (3d Cir. 2008) ("No provision of the Bankruptcy Code requires the Bankruptcy Court to hear all 'related to' claims . . . the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'") (citing *In re Wood*, 825 F.2d 90, 92 (5th Cir.1987)); *In re Combustion Eng'g, Inc*., 391 F.3d 190, 224-225 (3d Cir. 2004), *as amended* (Feb. 23, 2005) ("Section 105(a) permits a bankruptcy court to 'issue any order, process or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code. But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction."); *In re Skyline Woods Country Club*, 636 F.3d 467 (8th Cir. 2011); *Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002). Interestingly, while the Plan provides for the Bankruptcy Court to retain exclusive jurisdiction in almost all circumstances, the Debtors carve out from the jurisdiction provisions those items that pertain

directly to certain favored transactions.

10. The United States objects to the estimation procedures governing the Plan distributions set forth in Article VIII(A)(3) of the Plan as overly broad and prejudicial to creditors.

11. The United States objects to the provisions in Article X and throughout the Plan which purport to treat the claims and causes of action of the United States as having been settled pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure. The United States is not consenting to the compromise or settlement of its claims and causes of action and this provision is unfairly prejudicial to the rights of the United States. Section 1123(b)(3)(A) of the Bankruptcy Code provides for the settlement or adjustment of any claim belonging to the Debtors or to the estate. The Debtors here are not settling their own claims but instead are attempting to settle the claims of creditors without providing adequate notice. By virtue of the Plan process, the United States does not waive sovereign immunity and has not consented to the compromise or settlement of its claims and this provision is unfairly prejudicial to the rights of the United States.

12. The United States objects to the deemed occurrence of substantial consummation on the Effective Date in Article XII(A) of the Plan because the Debtors are indirectly attempting to waive the automatic stay protections for creditors under 3020(e) and 6004(g) of the Federal Bankruptcy Rules. The United States does not consent to the truncation of its statutory protections. Potentially eliminating the stays provided for the in the Bankruptcy Rules negatively affects the United States' appeal rights. If the Debtors consummate the Plan immediately after confirmation, the Debtors are effectively requesting that the Court shorten the time for appeal afforded by the federal bankruptcy rules. Pursuant to Rules 6004(g) and 3020(e) of the Federal Rules of Bankruptcy Procedure, unless otherwise ordered by the Court, an

automatic fourteen-day stay is imposed from the date of entry of the order. Under the Debtors' proposed scheme, if the United States is unable immediately to obtain a hearing before the appropriate Court to seek a stay, its appeal may be contended to be moot. Particularly in light of the appellant being a government agency, with a chain of command to be consulted, this unilateral ability of the Debtors to waive the stay period would be unfair and prejudicial to the government.

WHEREFORE, the United States respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

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Dated: October 22, 2019

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AFFIDAVIT OF SERVICE

I, Shane Macas, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on October 22, 2019, a copy of the **OBJECTION BY THE UNITED STATES TO THE DEBTORS' FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION** was served electronically via the Court's CM/ECF system upon the parties registered to receive notice thereby, and upon the following via email.

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