

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

In re: : Chapter 11
: :
EMERGE ENERGY SERVICES LP, *et al.*,¹ : Case No. 19-11563 (KBO)
: :
: (Jointly Administered)
Debtors. :
----- Obj. Deadline: September 10, 2020 @ 4:00 p.m.

**RESPONSE OF A-1 EXCAVATING, INC. TO REORGANIZED
DEBTORS’ FIRST (SUBSTANTIVE) OMNIBUS OBJECTION TO, OR
MOTION TO RECLASSIFY, PURPORTED SECURED CLAIMS**

Pursuant to 11 U.S.C. §§ 502(b) and 506(a) and Fed. R. Bankr. P. 3007 and Local Bankruptcy Rule 3007-1, A-1 Excavating, Inc. (“A-1”), a creditor in this case, through its undersigned counsel, file this response (the “Response”) to the *Reorganized Debtors’ First (Substantive) Omnibus Objection to, or Motion to Reclassify, Purported Secured Claims* (the “Omnibus Objection”) [Doc. No. 876]. In support of its Response, A-1 asserts as follows:

PRELIMINARY STATEMENT

The Debtors engage in the mining of silica sand. They have facilities in Wisconsin, Texas, and Oklahoma. A-1 holds a properly perfected mining lien against the Debtors’ mining-related real estate and personal property located in Wisconsin. Throughout this case, A-1 has asserted that its liens are superior to those of the Debtors’ lenders on certain assets (namely, certain real estate located in Barron County, Wisconsin, and all of the Debtors’ mining related equipment and other personal property, wherever located within the State of Wisconsin). A-1 raised these assertions in its objection to the Debtors’ request for debtor-in-possession financing, in its objection to

¹ The 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 Debtors’ address is: 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.



confirmation of the Debtors' plan, and in an adversary proceeding in which it requested a determination under 11 U.S.C. § 506(a) as to the extent and priority of its liens. Those issues have routinely been reserved for later determination. In their Omnibus Objection, the Debtors now argue that A-1 does not hold a valid mining lien under Wisconsin law.

BACKGROUND

1. The above-captioned debtors (collectively, the "Debtors"), including Superior Silica Sands, LLC ("Superior"), each filed for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") on July 15, 2019 (the "Petition Date").

2. The Debtors, through the operations of Superior, engage in the mining, processing, and distribution of silica sand for use in hydraulic fracturing (or "fracking") of oil and gas wells. Superior has silica mining facilities in Wisconsin, Texas, and Oklahoma.

3. A-1 is an excavation company. It contracted with Superior to provide excavating and mining services to Superior's facilities in Wisconsin. Under the express terms of the mining services agreement, A-1 was to receive "compensation" for "services" performed. A-1 was required to develop a schedule for mining services and was to be available to provide services "Monday through Sunday (including holidays) and up to 24 hours per day." In order to receive its compensation, A-1 was required to submit weekly invoices for all "mining services" performed under outstanding purchase orders. The compensation payable to A-1 was expressly to constitute "the full and complete compensation" it was "entitled to receive in connection with the Mining Services."

4. A-1 has asserted statutory lien rights under Wis. Stat. § 779.35. A-1 holds statutory lien rights on real property in Barron County, Wisconsin, and on personal property related to the Debtors' mining activities wherever located in the State of Wisconsin.

5. A-1 filed a timely proof of claim in this case. A-1 also filed a notice of perfection of lien pursuant to 11 U.S.C. § 546(b)(2).

6. As reflected in its timely-filed proof of claim, A-1 is owed \$1,195,911.89 for mining services. It asserts that all of this amount is secured by the Debtors' mining-related personal property, and that \$712,157.37 of its claim is a valid and prior lien upon Superior's mining-related real estate in Barron County, Wisconsin as a result of the mining lien filed with the Barron County Clerk of Court pursuant to Wis. Stat. § 779.36.

PROCEDURAL HISTORY OF THE CASE

7. On the Petition Date, the Debtors filed a variety of so-called "First-Day Motions," including a *Motion (I) Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364 Authorizing the Debtors to (A) Obtain Senior Secured Priming Superpriority Postpetition Financing, (B) Grant Liens and Superpriority Administrative Expense Status, (C) Use Cash Collateral of Prepetition Secured Parties, and (D) Grant Adequate Protection to Prepetition Secured Parties; (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c); and (III) Granting Related Relief* [Doc. No. 20] (the "Financing Motion").

8. In the Financing Motion, Superior and the other Debtors asserted that they were parties to certain first and second lien obligations with HPS Investment Partners LLC as administrative and collateral agent on behalf of the "First Lien Prepetition Lenders" and the "Second Lien Prepetition Noteholders." Financing Motion, ¶ 5.

9. In the Financing Motion, Superior and the other Debtors (except for Emerge Energy Services GP LLC and Emerge Energy Services Finance Corporation) asserted they owed the First Lien Prepetition Lenders “not less than \$66,710,000, plus accrued and unpaid interest and fees with respect thereto.” *Id.*

10. In the Financing Motion, Superior and the other Debtors (except for Emerge Energy Services GP LLC and Emerge Energy Services Finance Corporation) asserted they owed the Second Lien Prepetition Noteholders “not less than \$215,755,307, plus accrued and unpaid interest and fees with respect thereto.” *Id.*

11. In the Financing Motion, Superior and the other Debtors asserted that the First Lien Prepetition Lenders and the Second Lien Prepetition Noteholders (collectively, the “Pre-petition Lenders”) were secured creditors holding liens on the “Pre-petition Collateral” identified in the respective loan documents. Financing Motion, ¶ 6.

12. In the Financing Motion, the Debtors asserted that the Pre-petition Collateral “comprises **substantially all** of the Debtors’ assets.” Financing Motion, ¶ 7 (emphasis added).

13. In the Financing Motion, the Debtors sought approval of debtor-in-possession financing from the Pre-petition Lenders who would, as to the post-petition loans, be identified as the “DIP Lenders.”

14. A-1 filed an objection to the Financing Motion. [Doc No. 134]. In the objection, A-1 asserted that its liens were superior to those of HPS on certain assets and reserved all rights associated with their assertion of “Senior Liens” or “Prior Permitted Liens” as those terms were defined in the DIP financing agreement and order. As noted above, throughout this case A-1 has consistently denied any characterization that the Pre-petition Collateral (as defined by the Debtors)

includes all or “substantially all” of the Debtors assets, at least insofar as it concerns collateral to which A-1’s liens attach.

15. The final order granting the Financing Motion and approving the DIP financing agreement (Doc. No. 209, the “Final DIP Order”) provided that HPS, on behalf of the DIP Lenders, would receive junior liens on any collateral that was subject to “valid, perfected and unavoidable liens senior to the Prepetition Liens in existence immediately prior to the Petition Date.” Final DIP Order, ¶ 13(a)(iii).

16. The “DIP Financing Agreement,” as approved, recognizes the possible existence of “Prior Permitted Liens” which would include certain valid, perfected, and unavoidable liens in favor of third parties. See § 7.2 of the DIP Financing Agreement attached to the Final DIP Order; and definitions of “Permitted Encumbrances” and “Prior Permitted Liens” contained therein at Section 1.2, pp. 23 and 26.

17. The resolutions of A-1’s objections to the Financing Motion specifically preserved and reserved all issues as to lien priority and the extent or validity of its lien rights, as well as any valuation issues.

18. Under the Final DIP Order, the Debtors’ stipulations as to the validity and priority of the liens of the Pre-petition Lenders were not binding upon other parties for a period of 75 days after entry of the order approving DIP financing (the “Challenge Period”) so as to permit certain so called “Challenges” to be lodged. These Challenges were to include objections to the stipulated valuation of assets as well as issues of lien priority. Final DIP Order, ¶ 26.

19. Under the Final DIP Order, the Debtors’ stipulations as to the validity and priority of Pre-petition Liens in the Pre-petition Collateral were subject to Challenge if brought within the Challenge Period; otherwise, the stipulations became binding on third parties.

20. The Final DIP Order was entered on August 14, 2019. The Challenge Period therefore expired on October 28, 2019.

21. On October 25, 2019, prior to the expiration of the Challenge Period, A-1 filed an adversary complaint (the “A-1 Complaint”) in the adversary proceeding styled *A-1 Excavating, Inc., v. Superior Silica Sands LLC and HPS Investment Partners LLC*, Adv. No. 19-50730. In the A-1 Complaint, A-1 sought a determination of the extent and priority of its liens, expressly asserting that (i) as there were no recorded mortgages against certain real estate in Barron County, Wisconsin as of the Petition Date, its mining lien was a superior lien against that property under Wisconsin law and (ii) as to any mining-related personal property located in the State of Wisconsin, A-1 held a superior lien on those items as well. The A-1 Complaint is docketed at Adv. Pro. No. 19-50730, [D.I. 1], and is incorporated into this Response.²

22. The solicitation version of the disclosure statement (the “Disclosure Statement”) for the Debtors’ *First Amended Joint Plan of Reorganization* was filed on September 11, 2019 [Doc. No. 363]. After a contested confirmation hearing, the Court initially denied confirmation of the Debtors’ plan in an order dated December 6, 2019. [Doc. No. 671, the “Confirmation Decision”]. The Court subsequently entered an order confirming a further amended plan on December 18, 2019 [Doc. No. 719].

23. The Debtors’ Second Amended Joint Plan of Reorganization [Doc. No. 682, the “Confirmed Plan”] defines a “Secured Claim” as a claim that is “secured by a Lien on property in which any of the Debtors’ Estates have an interest or that is subject to setoff under section 553 of the Bankruptcy Code, *to the extent of the value of the Claim holder’s interest in such Estate’s interest in such property* or to the extent of the amount subject to setoff, as applicable, *as*

² The parties had agreed to postpone the adversary proceedings pending their efforts at mediation. Mediation ultimately occurred on July 22, 2020 and was unsuccessful.

determined pursuant to section 506(a) of the Bankruptcy Code or, in the case of setoff, pursuant to section 553 of the Bankruptcy Code.” (Emphasis added). See Second Amended Joint Plan of Reorganization, Doc. No. 682, at 17.

24. The Confirmed Plan defines “Other Secured Claim” as “*any* Secured Claim other than an Administrative Claim, DIP Credit Agreement Claim, Secured Tax Claim, or Prepetition Debt Claim.” *Id.* at 13.

25. In the Confirmed Plan, Other Secured Claims were classified as “Class 2.” *Id.*, at Art. III.B.2.

26. The Confirmed Plan provides that each holder of an allowed Class 2 Claim shall receive, at the “election” of the Debtors or Reorganized Debtors:

(A) *Cash equal to the amount of such Allowed Class 2 Claim*; (B) such other less favorable treatment as to which the Debtors or Reorganized Debtors, as applicable, and the Holder of such Allowed Class 2 Claim shall have agreed in writing; (C) *the Collateral securing such Allowed Class 2 Claim*; or (D) such other treatment such that it will not be impaired pursuant to section 1124 of the Bankruptcy Code. . . . For the avoidance of doubt, any Lien that secures a Class 2 Claim shall be retained against the applicable Collateral until such Class 2 Claim is paid or reserved in full in Cash or *Disallowed* by order of the Bankruptcy Court.

Id. (emphasis added).

27. As concerns the treatment of construction or mechanics’ or materialmen’s liens, the Debtors’ Disclosure Statement provided as follows:

In some cases, vendors have asserted liens (“M&M Liens”) to secure allegedly accrued and unpaid amounts owing under prepetition contracts with the Debtors. The Debtors are aware of the assertion of M&M Liens filed against various of the Debtors’ properties at which the subject work and/or services were allegedly supplied. These properties include Debtor-owned property at Kingfisher, Oklahoma, Kosse, Texas, San Antonio, Texas, and Chippewa County, Wisconsin. The Debtors continue to examine the validity and perfection of such liens and their related claims, as well as the relative priority of any such valid and perfected liens relative to other valid and perfected liens on the affected properties. To the extent any valid

and perfected M&M Liens enjoy a priority in respect of the affected property sufficient to render the related claims secured, those claims will be treated as Other Secured Claims under the Plan, while any deficiencies will be treated as General Unsecured Claims. The Debtors continue to reserve all rights in respect of the asserted M&M Liens.

See Disclosure Statement, Article II.C.3.

28. After the Petition Date, A-1 conducted ordered letter reports regarding Superior's real property in Barron County, Wisconsin. These reports reflected that Superior owned the following properties on which no lien or encumbrance in favor of HPS or its principals appears of record as of the Petition Date:

- a. 1512 E. Division Avenue, Barron WI 54812, Tax ID No. 206-8045-75-000 (the "Division Property").
- b. Vacant land on County Highway SS, New Auburn, WI 54757, Tax ID No. 022-3500-29-000 (the "Vacant Land").
- c. 807 6th Street, Clayton, WI 54004, Tax ID No. 004-1900-18-010 (the "Clayton Property").

29. According to the Barron County property tax records, the current tax assessed fair market value of the Division Property as of the Petition Date was \$644,500.

30. According to the Barron County property tax records, the current tax assessed fair market value of the Vacant Land as of the Petition Date was \$207,000.

31. According to the Barron County property tax records, the current tax assessed value of the Clayton Property as of the Petition Date was \$6,400.

32. Based upon information and belief, the Division Property, the Vacant Land, and the Clayton Property (collectively, the "Unencumbered Mining Real Estate") are all connected with Superior's mining business.

33. Under Wisconsin law, a valid statutory mining lien on the Unencumbered Mining Real Estate would be superior to any subsequent mortgages, and a mining lien constitutes a paramount lien on all personal property ahead of all other liens and encumbrances except for taxes and fines. Consequently, A-1's mining lien is not subject to reclassification as an unsecured claim.

BASIS FOR RESPONSE

34. Under Wis. Stat. § 779.35, “any person” who performs any labor or services for any employer engaged in or organized for the purpose of mining, or the holder of any “draft, time check, or order for the payment of money due for that labor,” shall have a lien for the wages due “in the amount due on the draft, check or order.” The statute further provides that this lien is upon (i) all of the personal property connected with the mining, including products of the mine, and (ii) all of the employer's interest in any real estate connected with the mining. The statute specifically provides that the lien takes precedence “of all other debts, judgments, decrees, liens or mortgages” except liens accruing for taxes, fines or penalties.

35. Wis. Stat. § 779.36(2) provides that no claim shall be a lien upon any real property unless it is filed with the office of the clerk of the circuit court in which the real estate is situated. The claim must be filed within sixty days after the “draft, time check or order” upon which the claim is founded is due and payable, “in the manner that claims for mechanics' liens are required to be filed.”

36. Under Wis. Stat. § 779.38, no mortgage or other instrument by which a lien is created shall operate to “impair or postpone the lien and preference given and secured to the wages and moneys” identified in Wis. Stat. § 779.35, although no mortgage lien or judgment lien entered before the labor is performed shall be affected or impaired by the mining lien.

37. Under Wis. Stat. § 779.39, mining liens may be foreclosed in the same manner as mechanic’s liens, and all provisions of those statutes “relating to the foreclosure thereof shall apply to the foreclosure of liens so given.”

38. The Debtors assert, however, that A-1 has “ignored” the limits of the statute, and that because A-1 provided services pursuant to a mining services agreement it is not entitled to “wages” from an “employer” such that it is ineligible to hold a lien.³ They assert that Wis. Stat. § 779.35 should be interpreted in similar fashion to Wisconsin statutory provisions governing wage liens (i.e., the liens provided under Chapter 109 of Wisconsin Statutes, which are defined in accordance with specific definitions which are expressly applicable to that statutory chapter).

39. It is true that there is a relative lack of case law interpreting Wisconsin’s mining lien provisions. However, it should be noted that the Debtors’ argument about Chapter 109 cuts both ways: if the provisions of Wis. Stat. § 779.35 should be interpretively limited in similar fashion to wage liens found in Chapter 109, then there is little reason for Wis. Stat. § 779.35 to exist at all. As the Debtors note, wage liens under Chapter 109 are already superior to “other liens” and provide protections to *all* employees.

40. It must be noted that the terms “person,” “employer,” and “wages” in Wis. Stat. § 779.35 are not defined. However, there are several reasons why Wis. Stat. § 779.35 should, in fact, be interpreted to encompass A-1’s claim. Under Wisconsin law, unless it will otherwise produce a result which is “inconsistent with the manifest intent of the legislature,” the term “person” is defined to include “all partnerships, associations, and bodies politic or corporate.” *See* Wis. Stat. § 990.01(26). Wisconsin courts have long provided that the statutes giving a lien in favor of a laborer “are to be liberally construed *in the interests of the laborer.*” *Johnson v. Iron Belt Min. Co.*,

³ Indeed, it is the Debtors who have ignored the fact that the statute applies to “wages *and* moneys”. *See* Wis. Stat. § Wis. Stat. § 779.38 (emphasis supplied).

78 Wis. 159, 47 N.W. 363 (Wis. 1890) (emphasis supplied). There is no manifest inconsistency with the legislative intent if the reference in Wis. Stat. § 779.35 to a “person” who performs labor is interpreted in accordance with Wis. Stat. § 990.01(26) so as to include “bodies corporate” such as A-1.

41. A-1 was entitled to receive compensation under the mining services agreement for services rendered. While “employer” has a specific meaning in Chapter 109, there is no specific definition expressly applicable to Wis. Stat. § 779.35. From a dictionary perspective, “employ” can mean a variety of things, including “to make use” of someone or to “use or engage the services” of someone. When viewed broadly, wages are simply compensation for services rendered and A-1 submitted written invoices reflecting the services in question. Given that the purpose of the statute is to secure payment for mining “labor or services” in much the same way as liens for construction-related labor and services, it is appropriate to conclude that A-1’s claim is covered by the statute.

RESERVATION OF RIGHTS

42. A-1 reserve all rights, claims, defenses, and remedies, including the ability to supplement or amend this Response to the extent permitted by rule, to request any needed discovery, and to raise additional objections should the evidence as presented warrant such objections. A-1 also joins in any other responses to the Omnibus Objection to the extent such objections are not inconsistent with this Response.

CONCLUSION

For the foregoing reasons, A-1 requests that the Court enter an Order: (i) sustaining the Response; (ii) denying the Omnibus Objection; (iii) scheduling a hearing under § 506(a) to

determine the extent and priority of A-1's Allowed Secured Claims; and (iv) granting such other and further relief as the Court deems just and proper.

Date: September 10, 2020
Wilmington, DE

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/s/ E.E. Allinson III

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CERTIFICATE OF SERVICE

I, Elihu E. Allinson, III, do hereby certify I am not less than 18 years of age and that on this 10th day of September, 2020, I caused copies of the within *Response of A-1 Excavating, Inc. to Reorganized Debtors' First (Substantive) Omnibus Objection to, or Motion to Reclassify, Purported Secured Claims* to be served upon the parties listed below via Electronic Mail. All other parties who have signed up for electronic filing in this case will receive electronic notice via CM/ECF.

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September 10, 2020
Date

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