

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

In re:

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

Chapter 11

Case No. 19-11563 (KBO)

(Jointly Administered)

**Re: Docket No. 414**

**LIMITED OBJECTION AND RESERVATION  
OF RIGHTS OF ATLANTIC SPECIALTY INSURANCE COMPANY TO  
NOTICE OF CURE AMOUNT IN CONNECTION WITH CONTRACTS AND LEASES**

Atlantic Specialty Insurance Company (“ASIC”), by and through its undersigned counsel, files this Limited Objection and Reservation of Rights (the “Objection”) to the Notice of Cure Amount in Connection with Contracts and Leases [Docket No. 414] (the “Assumption Notice”)<sup>2</sup> filed by the above-captioned debtors and debtors in possession (each a “Debtor,” and collectively, the “Debtors”), and states as follows:

**I. BACKGROUND**

1. On July 15, 2019, (the “Petition Date”), each of the Debtors filed a voluntary petition for Chapter 11 relief in the United States Bankruptcy Court for the District of Delaware (the “Court”).

2. According to the *Declaration of Bryan Gatson, Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 14] (the “Gatson”

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Assumption Notice.

Declaration”), the Debtors’ business operations relate to mining, processing, and distributing silica sand. (Gatson Declaration, ¶ 11). The Debtors conduct their mining and processing operations at facilities located in Wisconsin and Texas. (*Id.* at ¶ 7).

3. As the Debtors’ acknowledged in the Gatson Declaration and their motion to approve the continuation of their bonding program [Docket No. 8] (the “Bonding Program Motion”), they are required under applicable statutes, rules, and regulations to provide surety bonds to certain third parties, or obligees, to secure the Debtors’ payment or performance of certain obligations relating to, among other things, reclamation obligations, permits and taxes, and conservation and environmental obligations. (*Id.* at ¶ 99; *see also* Bonding Program Motion, ¶ 15).

4. ASIC has issued the following two bonds to the debtor, Superior Silica Sands, LLC, to secure payment or performance of certain reclamation obligations at several mining operations located in Wisconsin:

<b>Bond Number</b>	<b>Bond Type</b>	<b>Principal</b>	<b>Primary Obligee Name</b>	<b>Bond Description</b>	<b>Issue Date</b>	<b>Penal Sum</b>
800008776	Continuous	Superior Silica Sands LLC	Barron County Soil and Water Conservation Department (the “ <u>Barron County Bond</u> ”)	Financial Assurance Bond/Nonmetallic Mining	07/10/2017	\$4,679,973
800008775	Continuous	Superior Silica Sands LLC	Chippewa County Department of Land Conservation and Forest Management (the “ <u>Chippewa County Bond</u> ”).	Financial Assurance Bond/Nonmetallic Mining	10/01/2013	\$2,967,823
<b>TOTAL PENAL SUM</b>						<b>\$7,647,796</b>

The Barron County Bond and the Chippewa County Bond are collectively referred to herein as the “Bonds.” A true and correct copy of the Bonds are attached hereto and incorporated herein as **Exhibit “A.”**

5. Among other things, the Bonds state that the obligees “may require additional financial assurance” from the Debtors (and ASIC). (*See Ex. A*).

6. Additionally, as partial consideration for the execution of the Bonds, on September 23, 2013, Debtors Superior Silica Sands, LLC and Emerge Energy Services Operating LLC, and other non-debtor affiliates (collectively, the “Indemnitors”), jointly and severally, executed a General Indemnity Agreement in favor of ASIC (the “Indemnity Agreement”) in which the Indemnitors agreed to indemnify and hold ASIC harmless from every claim that ASIC may pay as a result of the Bonds. A true and correct copy of the Indemnity Agreement is attached hereto and incorporated herein as **Exhibit “B”**.

7. In addition, the Indemnitors agreed to pay “all premiums, costs and charges for any Bonds requested from and/or issued by Surety.” (*See Ex. B, ¶ 1*). Indeed, the Debtors acknowledged that they are required to maintain the existing Bonds, including paying bond premiums as they come due, “and paying any indemnity obligations that may arise in connection with the [Bonds] ...” to avoid cancellation of the Bonds. (Bonding Program Motion, ¶ 20).

8. Further, the Indemnity Agreement requires the Debtors to deposit collateral with ASIC “at any time and for any reason, including but not limited to surety’s receipt of a claim.” (*See Ex. B, ¶ 3*).

9. As additional consideration for issuing the Bonds, the Debtors delivered \$2,839,451 to ASIC, which represents approximately 37% of the Penal Sum and leaving a shortfall of \$5,097,796 (the “Collateral Shortfall”).

10. The Debtors also acknowledged that “the Debtors must be able to provide financial assurances to federal and state governments, regulatory agencies, and other third parties” in order to continue their business operations. (Bonding Program Motion, ¶ 20). Indeed, the Debtors acknowledged that cancellation of the Bonds could “render the Debtors in violation of ... federal laws and regulations applicable to the Debtors’ businesses, the laws of the various states in which the Debtors operate, and the Debtors’ various contractual commitments.” (*Id.* at ¶ 33).

11. In sum, maintaining the Bonds is essential for the Debtors in order to continue to operate their businesses. Any disruption of the bonding program arrangement with ASIC could severely disrupt the Debtors’ operations to the detriment of not only the Debtors, but other creditors as well.

12. Pre-petition, the obligees under the Bonds issued notices (the “Obligee Notices”) to the Debtors requiring additional financial assurances in compliance with applicable reclamation ordinances, including an increase of the penal sum amount under the Bonds. True and correct copies of the Obligee Notices are attached hereto as **Exhibit “C.”**

13. On September 11, 2019, the Court entered an *Order (I) Approving the Disclosure Statement, (II) Establishing the Voting Record Date, Voting Deadline and Other Dates, (III) Approving Procedures for Soliciting, Receiving and Tabulating Votes on the Plan and for Filing Objections to the Plan, (IV) Approving the Manner and Forms of Notice and Other Related Documents, (V) Approving Procedures for Assumption of Contracts and Leases and Form and Manner of Assumption Notice, and (VI) Granting Related Relief* [Docket No. 361] (the “Order Approving Disclosure Statement”).

14. On September 11, 2019, the Debtors filed the *First Amended Joint Plan of Reorganization for Emerge Services LP and its Affiliate Debtors Under Chapter 11 of the*

*Bankruptcy Code* [Docket No. 362] (the “Chapter 11 Plan”).

15. The Court has scheduled the Confirmation Hearing for October 24, 2019.

16. On or about September 9, 2019, ASIC timely filed a Proof of Claim in Superior Silica Sands, LLC’s case number 19-11566 and in Emerge Energy Services Operating LLC’s case number 19-11565 [Claim Nos. 286, 296] in the approximate amount of \$7,647,796.00, which included the penal sum of the Bonds ( “ASIC’s Claims”).

17. At the time of filing ASIC’s Claims, ASIC reserved its right to supplement its Claim to include, *inter alia*, the amount of premiums past due, any paid claims, and loss adjustment expenses. *See id.*

18. On September 27, 2019, the Debtors filed the Assumption Notice in furtherance, and as part, of the plan confirmation process. (*See* Docket No. 414). Included in the Assumption Notice are the Debtors’ proposed cure amounts for unpaid monetary obligations under the Specified Contracts<sup>3</sup> (the “Cure Amount”).

19. The deadline to object to the Assumption Notice is October 11, 2019.

20. Pursuant to the Contract Schedule [Docket No. 414, Ex. 1], the Debtors list the Bonds as executory contracts to be assumed. The Debtors do not list the Indemnity Agreement.

21. Pursuant to the Assumption Notice, the Debtors list the Cure Amount for the Bonds as \$0.00 (the “Proposed Cure Amount”).

22. The Chippewa County Bond renewed on October 1, 2019. The premium for the renewal of the Chippewa County Bond is \$74,196.00, which is currently unpaid. A true and correct copy of the Chippewa County Bond Renewal Invoice is attached hereto as **Exhibit “D.”**

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<sup>3</sup> As defined in the Assumption Notice.

## II. LIMITED OBJECTION

### A. The Debtors Must Cure All Defaults to Assume a Contract.

23. It is well-established that in order to assume an executory contract, the debtor must cure all monetary defaults or provide adequate assurances that the monetary defaults will be promptly cured. *See* 11 U.S.C. § 365(b)(1); *see also In re G-I Holdings, Inc.*, 568 B.R. 731, 766 (Bankr. D.N.J. 2017) (“In order to assume such an agreement, the debtor-in-possession must cure defaults and provide assurance of future performance.”) (citing *in re Kiwi Int’l Air Lines, Inc.*, 344 F.3d 311, 317-18 (3d Cir. 2003)); *In re Harry C. Partridge, Jr. & Sons, Inc.*, 43 B.R. 669, 671 (Bankr. S.D.N.Y. 1984) (stating that a “debtor’s right to assume an executory contract ... is expressly conditioned ... upon debtor’s duty to cure the default”).

24. Here, there exist two monetary defaults under the Bonds. First, as reflected in the Chippewa County Bond Renewal Invoice, ASIC’s records reflect an outstanding renewal premium of \$74,196.00. (*See* Ex. D). This renewal premium remains unpaid and subjects the Chippewa County Bond to cancellation.

25. Second, the Debtors have not posted the Collateral Shortfall necessary to continue providing financial assurances to the obligees under the Bonds. (*See* Ex. C). The obligees have demanded additional financial assurances and an increase in the penal sums of the Bonds. Consequently, the Debtors will need to correspondingly increase the deposit of collateral with ASIC in the amount of the Collateral Shortfall.

26. The Debtors even acknowledged to the Court their various obligations under the Bonds (paying premiums and posting collateral) and sought authority to satisfy these obligations post-Petition –

**To continue their business operations, the Debtors must be able to provide financial assurances to federal and state governments**, regulatory agencies, and other third parties. This, in

turn, **requires the Debtors to maintain access to the existing Bonding Program, including by paying the Bonding Obligations as they come due, maintaining required letters of credit, and paying any indemnity obligations that may arise in connection with the Bonding Program in the ordinary course of business,** as well as renewing or **potentially acquiring additional bonding capacity as needed in the ordinary course of their business,** requesting releases from obsolete bonding obligations, **and executing other agreements in connection with the Bonding Program.**

...

The Debtors, therefore, request that they **be authorized** to participate in the Bonding Program **in the same manner as they did prepetition and to:** (i) pay any Prepetition Bonding Obligations;[] (ii) **continue to make all payments for Postpetition Bonding Obligations;** and (iii) revise, extend, **supplement, or change the Bonding Program as needed,** including through the issuance of new surety bonds.

(See Bonding Program Motion, ¶¶ 20-21 (emphasis added)).

27. Consequently, the Proposed Cure Amount (\$0.00) does not satisfy the requirement under section 365(b)(1) of the Bankruptcy Code that the Debtors fully cure all monetary defaults in order to assume the Bonds. To cure all monetary defaults, the Debtors will need to pay the outstanding bond premium for the Chippewa County Bond (\$74,196) and post the Collateral Shortfall (\$5,097,796.00).

28. Moreover, ASIC continues to provide services to the Debtors – namely providing the necessary bonding coverage to the Debtors so that they remain in compliance with federal and state regulations pertaining to their mining operations – which is necessary for the Debtors to continue their mining operations. As a result of the foregoing, ASIC objects to the Proposed Cure Amount and any assumption of the Bonds must be conditioned upon curing the outstanding monetary defaults.

**B. The Bonding Program Must Be Assumed *Cum Onere*.**

29. The Assumption Notice description suggests that the Debtors seek to assume only portions of the agreements comprising the broader contractual arrangement with ASIC – namely, just the Bonds. The Bonds, however, are part of a larger contractual arrangement between the Debtors and ASIC for the corresponding bonding program.

30. Specifically, the contractual arrangement includes the Bonds and the Indemnity Agreement. If the Debtors want the benefits of the Bonds (*i.e.*, the financial assurances necessary to comply with federal and state mining regulations so that the Debtors can continue to operate), the Debtors must also accept the burdens of the Bonds (*i.e.*, the indemnity requirements under the Indemnity Agreement). *See Am. S. Ins. Co. v. DLM, LLC*, No. GLR-16-3628, 2017 WL 2930464, \*6 (D. Md. July 10, 2017) (citing *In re Italian Cook Oil Corp.*, 190 F.2d 994, 997 (3d Cir. 1951) (the debtor “may not blow hot and cold. If [the debtor] accepts the contract [the debtor] accepts the contract cum onere. If [the debtor] receives the benefits [the debtor] must adopt the burdens. [The debtor] cannot accept one and reject the other.”)).

31. In other words, the Debtors want to receive the benefit of forcing ASIC to do business with them (*i.e.*, maintaining the Bonds), but also seek to reject the burden of recognizing ASIC’s rights under this contractual arrangement (*i.e.*, not assuming the Indemnity Agreement). This Court cannot countenance this. *See id.* (holding that the court “cannot countenance” a debtor assuming the benefit of one part of a surety-arrangement – forcing the obligees and surety to do business with the debtor – but rejecting the burden of recognizing the surety’s rights under the surety-arrangement)

32. Thus, if the Debtors seek to assume the Bonds, they must do so *in toto* and assume the corresponding Indemnity Agreement. *See, e.g.*, 11 U.S.C. § 365; *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1983) (if the debtor assumes an agreement, it assumes the

agreement *cum onere*, and must pay for the obligations that have arisen under the contract); *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (holding that the principle of *cum onere* applies to a debtor's assumption of an executory contract under 11 U.S.C. § 365); *In re C-I Holdings, Inc.*, 580 B.R. 388, 420 (Bankr. D.N.J.) (“A debtor may not ‘cherry-pick’ the provisions of an assumed contract which it will comply.”) (citations omitted) (citing *Kopel v. Campanile (In re Kopel)*, 232 B.R. 57, 63-64 (Bankr. E.D.N.Y. 1999) (“A debtor cannot simply retain the favorable and excise the burdensome provisions of an agreement.”). The Debtors cannot seek to bifurcate their obligations to ASIC under the Bonds and the Indemnity Agreement. As such, to the extent the Debtors are seeking to assume the Bonds and continue the bonding program with ASIC, the Debtors must also assume corresponding obligations under the Indemnity Agreement.

**C. There is a Lack of Adequate Assurance of Future Performance.**

33. Under section 365(b)(1)(C), in order to assume a contract, a debtor must also provide adequate assurance of future performance under such contract or lease. *See* 11 U.S.C. § 365(b)(1)(C); *see also In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996) (“Congress's intent in imposing these conditions on the ability of the debtor to assume the contract was ‘to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance.’”) (internal citations omitted); *see also Matter of Silent Partner, Inc.*, 119 B.R. 95, 98 (E.D.La. 1990) (“While an absolute guarantee of performance is not required under 11 U.S.C. § 365(b)(1)(C), more than the debtor's speculative plans are needed.”).

34. As noted above, pre-Petition, the obligees sent the Obligee Notices demanding additional financial assurances relating to the reclamation obligations of the Debtors. Further, the Debtors' Chapter 11 Plan does not provide sufficient information detailing how the Debtors intend to handle reclamation issues under the Bonds if, and when, they should arise. To the extent not cured, ASIC seeks as adequate assurance of the Debtors' future ability to perform under the Bonds

and the Indemnity Agreement in the amount of the Collateral Shortfall – \$5,097,796.00.

### **III. RESERVATION OF RIGHTS**

35. As stated above, the Debtors are in default under the Bonds for the renewal premium (\$74,196.00) and the Collateral Shortfall. (*See* Ex. D). Additionally, further premiums may continue to accrue under the Bonds and Indemnity Agreement and further collateral may be required under the Bonds until the obligees release the Debtors and ASIC from the Bond obligations. ASIC reserves the right to file a claim or motion seeking payment on an administrative expense basis of all unpaid amounts relating to the Bonds and Indemnity Agreements from and after the Petition date. *See* 11 U.S.C. § 503(b); 507(a)(2).

36. ASIC further files this Objection to put all parties on notice that any assumption and/or cure under the Bonds and the Indemnity Agreement does not affect the fact that the Debtors retain and remain primarily liable for the obligations potentially covered under the Bonds for any payment of any claims made pursuant to the Bonds. In addition, ASIC respectfully requests that, among other things, the aforementioned language in the paragraph be included in the Confirmation Order.

37. Nothing herein shall be considered a waiver of any rights or claims that ASIC may have against the Debtors, their subsidiaries and affiliates. ASIC reserves the right to amend and supplement this Objection and/or join in any other statements and/or objections related to the relief requested by the Debtors. The submission of this Objection by ASIC is not intended as, and shall not be construed as:

- a. ASIC's admission of any liability or waiver of any defenses or limitations of any rights of ASIC with respect to any claims against one or more of the Bonds or under the Indemnity Agreement;
- b. ASIC's waiver or release of any rights to exoneration it may have against any one with respect to its obligations pursuant to the Bonds;
- c. ASIC's waiver or release of its right to be subrogated to the rights of one or more parties paid pursuant to the Bonds;
- d. an election of remedies; or
- e. consent to the determination of the Debtors' liability to ASIC by a particular court, including without limitation, this Court.

#### **IV. CONCLUSION**

WHEREFORE, for the foregoing reasons, ASIC respectfully requests that, absent complete assumption of the Bonds and the Indemnity Agreement, payment of the amounts due and owing to ASIC under the Bonds and Indemnity Agreement, and providing adequate assurances of future performance in the form of posting the Collateral Shortfall with ASIC, (i) the Debtors' request (pursuant to the Assumption Notice, Chapter 11 Plan, or otherwise), to assume the Bonds be denied; (ii) the Court enter an order sustaining this Objection; and (iii) the Court provide such other and further relief as the Court deems just and proper.

October 11, 2019

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