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) (Jointly Administered)
Debtors[1]	RE: Docket Nos. 362, 414, 467

CHIPPEWA COUNTY'S OBJECTION TO THE FIRST AMENDED JOINT PLAN OF REORGANIZATION AND JOINDER TO ATLANTIC SPECIALTY INSURANCE COMPANY'S LIMITED OBJECTION

Chippewa County Department of Land Conservation & Forest Management ("Chippewa" or the "County"), by and through its attorneys, hereby files its (i) objection (the "Objection")[2] to the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and Its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code (the "Plan") [Docket No. 362] and (ii) joinder (the "Joinder") to the Limited Objection and Reservation of Rights of Atlantic Specialty Insurance Company to Notice of Cure Amount in Connection with Contracts and Leases [Docket No. 467], and respectfully submits the following:

BACKGROUND

1. On May 2, 2011, Chippewa County issued to one of the Debtors, Superior Silica Sands LLC ("SSS"), a Non-Metallic Mine Reclamation Permit, #2011-02, for the operation of an industrial sand mining site in the Town of Auburn, Chippewa County (the "Chippewa

[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.

[2] Defined terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

Mine"). From the Chippewa Mine, Superior Silica Sands has produced what is colloquially known as "frac sand" or "Wisconsin white sand", which it then markets and sells for use in the oil and gas fracking industry outside of Wisconsin. The total area currently permitted for mining is up to 475 acres, or approximately three quarters of a square mile. The actual area being mined at any given time is less than the permitted area. The original mining permit for the Chippewa Mine has been subject to a number of amendments, with the last amendment effective October 5, 2017. The current permit as amended is referred to herein as "Mine Permit." A copy of the current Mine Permit, dated October 5, 2017, is attached as Exhibit A hereto and incorporated herein.

2. Pursuant to authority granted by Wisconsin Statutes ch. 295.14 subchapter 1, Wisconsin Administrative Code NR ch. 135 and Chippewa Code of Ordinance chapter 30, Chippewa administers the Mine Permit and establishes related requirements for groundwater discharges and reclamation.

3. SSS is subject to the requirements of laws, regulations and the Mine Permit to comply with the terms of its approved Non Metallic Mining Reclamation Plan, initially submitted on May 2, 2011, and subsequently amended multiple times, and incorporated into the Mine Permit (together the Plan as amended is referred to herein as "Reclamation Plan)."

4. Pursuant to state statutes, administrative regulations and local ordinances referenced in paragraph 1 above, and the Mine Permit, SSS is mandated to maintain a Financial Assurance Bond ("Bond") to fund the requirements of the Reclamation Plan in financial amounts determined by Chippewa.

5. From the commencement of mining to date, Atlantic Specialty Insurance Company ("ASIC") has provided Bond No. 800008775 ("Bond") in the amount of Two Million

Nine Hundred Sixty Seven Thousand Eight Hundred Twenty Three Dollars and 89/100 ($2,967,823.89). A copy of the Bond dated January 20, 2014 is attached as Exhibit B and incorporated herein.

6. Due to operations expansion and environmental requirements, on March 12, 2019, Chippewa notified SSS that the amount of the Bond would increase to a total of Four Million Six Hundred Fifty Thousand Dollars ($4,650,000). This Bond amount increase was discussed with SSS and calculated to fund the Reclamation Plan and is set forth in correspondence from Chippewa, attached as Exhibit C and incorporated herein.

7. SSS failed to comply with legal requirements mandated by the statute and Mine Permit by failing to provide a Bond adequate to pay for the Reclamation Plan and failed to augment the mine groundwater monitoring.

8. On July 5, 2019, in a Memorandum to SSS, Dan Masterpole, Department Director of Chippewa, notified SSS that the Mine Permit was suspended due to failure to:

a. Maintain Financial Assurance in an amount that reflected the cost to Chippewa of hiring a contractor to perform the Reclamation Plan according to the Mine Permit; and

b. Comply with requirements of law and the Mine Permit requiring the augmentation of the existing monitoring well network.

A copy of the Memorandum is attached hereto as Exhibit D and incorporated herein. The suspension was continued to October 6, 2019 as reflected in the memorandum attached as Exhibit E.

9. In summary, the mining operations of SSS are not in legal compliance with the following:

a. Mine Permit requirements at Section 7 requiring adequate groundwater monitoring wells and at Section 2, 14 and 15 requiring the maintenance of financial assurance and the performance and certification of reclamation;

b. Wisconsin Administrative Code NR Ch. 135 and Wisconsin Statutes Ch. 295, Subch. 1, requiring, among other things, that Nonmetallic Mining is performed is compliance with environmental regulations and that there is successful reclamation of mining sites; and

c. Chippewa Code of Ordinances §§ 30-76, 30-103 and 30-137 relating to environmental regulations and required reclamation by SSS.

10. On July 15, 2019 (the "Petition Date") the Debtors commenced these cases. Since that time the Chippewa Mine has remained inactive. Since the filing of the petition, Superior Silica Sands has been working with Chippewa County to address some immediate environmental and regulatory concerns at the site. However, despite best efforts by Chippewa to obtain from the Debtors their intentions regarding future operations of the mine and addressing the above described violations of state and local law, little to no information has been forthcoming. Disappointingly, in response to the County's continuing efforts to engage the Debtors to attempt to resolve open issues, the most recent communication from the Debtors was essentially a suggestion that the County file a proof of claim.

OBJECTION

11. Confirmation must be denied. The Plan violates provisions of the Bankruptcy Code (the "Code") and applicable non-bankruptcy law. In addition, the Plan is not proposed in good faith and has not been shown to be feasible, and an adequate means for implementation of compliance measures with respect to the Debtors' environmental obligations has not been provided.

A. The Plan does not comply with applicable provisions of Title 11.

12. The Debtors have the burden of establishing each of the Code's confirmation requirements by a preponderance of the evidence. In re Maremont Corporation, 601 B.R. 1, 13 (Bankr. D. Del. 2019). Among the requirements, 11 U.S.C. §1129(a)(1) mandates that the "plan complies with the applicable provisions of this title." The Plan does not.

13. Article X of the Plan includes releases, waivers, discharges, exculpation, injunctions and related provisions which are violative of the Code to the extent they purport to apply to environmental liabilities claims, rights, controversies, obligations, cases, actions, disputes and the like[3].

14. The United States Supreme Court has made it crystal clear that the Code does not empower a debtor to contravene state or local laws designed to protect public health or safety. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 502 (1986) (citing Ohio v. Kovacs, 469 U.S. 274, 285 (1985)). Without an express carveout of the County from Article

[3] As a precaution, the County submitted a Class 6 ballot solely for the purpose of taking the opportunity to opt out of the third party releases. Because the County does not know the Debtors' position on the validity of such opt-out, this Objection includes the County's opposition to such Article X provisions. Shortly before filing this Objection, the County was advised by the Debtors' counsel that the Debtors and the U.S. Environmental Protection Agency had negotiated certain revised plan language, including with respect to third party releases. The County is reviewing that language to determine whether that addresses at least some of its concerns.

X of the Plan, the Debtors will be asking this Court to disregard the U.S. Supreme Court precedent.

15. Congress made expressly clear that the Code was not intended to preempt state environmental law. 28 U.S.C. § 959(b) specifically provides:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any case pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

16. Various courts have held environmental laws and regulations requiring a debtor to take certain compliance actions do not give rise to a dischargeable claim. For example, the Third Circuit in Torwico agreed with the New Jersey Department of Environmental Protection that a statutory obligation to clean up an environmental hazard was non-dischargeable and not a claim, even if the debtor must spend money to comply. In re Torwico Electronics, Inc., 8 F.3d 146, 150 (3d Cir. 1993). The Circuit disregarded the debtor's attempted distinction that it no longer possessed the site in question. Id. Under applicable state law the debtor had an obligation which it could not discharge under a chapter 11 plan. The Third Circuit cited decisions by the Second and Seventh Circuits in its holding. In re Chateauguay, 944 F.2d 997 (2d Cir. 1991); In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992).

17. In fact, courts recognize that a debtor's obligation to maintain its property and operate its business in compliance with environmental law continues post-chapter 11 emergence. See generally, Midlantic, 474 U.S. 494; Chateauguay, 944 F.2d 977. As such, at the time of confirmation courts view ongoing obligations involving post-confirmation, equitable remedies by governmental entities, without a right of payment, as not falling under the definition of a

"claim" under Section 101(5) of the Code. Accordingly, the obligations are not dischargeable "claims" under Section 1141(d). See, e.g., Torwico, 8 F.3d at 150-151.

18. Here, the County has advised the Debtors of their default under the Mine Permit and directed them to take corrective and investigative actions. There is a potential future scenario where the County must exercise equitable remedies, specifically it must make conditions at the Chippewa Mine safe, provide groundwater wells and it possibly may be required to perform Debtors' obligation to reclaim the Chippewa Mine. These rights and remedies by the County do not constitute dischargeable claims, per the above-cited precedent. Id. Therefore, the Plan's discharge provisions as they pertain to the County must be stricken or confirmation must be denied.

19. The Debtors cannot escape these bedrock public health and safety principles regarding environmental liabilities through other provisions in Article X of their Plan, specifically by releases and injunctions. Since they do have environmental obligations owing to the County, releasing or enjoining their enforcement would circumvent the U.S. Supreme Court's mandate in Midlantic (following its decision in Kovacs) that debtors cannot use the Bankruptcy Code to avoid compliance with state or local environmental law. Midlantic, 474 U.S. at 502. Releasing the Debtors and other parties and subjecting the County to a broad injunction are an attempt to do exactly that.

20. Specifically as to third party releases,[4] among other things, what such releases would do is preempt applicable state and local law, including the liabilities of responsible parties in addition to the Debtors. For example, guarantors like the bond issuer and those guaranteeing

[4] Again, Chippewa submitted a ballot (without voting) for the sole purpose of opting out of third party releases.

the bond are required to respond with remediation and funding. Like the discharge, injunctive and other release provisions, these must be stricken from the Plan as they pertain to the County. See In re Continental Airlines, 203 F.3d 203, 213 n.9 (3d Cir. 2000) (third party releases are a "rare thing" that should not be considered absent a showing of "exceptional circumstances").

21. Even if any of the Debtors' obligations owing to the County constitute a right of payment, the case law is clear that the County would be entitled to an allowed administrative expense claim.[5] The Third Circuit in Conroy affirmed the lower court's allowance of Pennsylvania's administrative expense claim for response costs incurred. Commonwealth of Pa., Dep't of Envtl. vs. Conroy, 24 F.3d 568, 570 (1994). The Circuit found such costs were "actual, necessary costs and expenses of preserving the estate" under 11 U.S.C. Section 503(b)(1)(A) of the Code, citing Second and Sixth Circuit precedent. Id. (citing Chateauguay, 944 F.2d at 1009–10; In re Well Tube & Metal Product, Co., 831 F.2d 118, 123–24 (6th Cir. (1987)).

22. As set forth below, the County joins in ASIC's objection to the Debtors' proposed cure amount of zero in connection with their bonding requirements. Such bonding, required by statute, is intended to underwrite the Debtors' reclamation obligations. The Debtors are in default under the Bonds for failure to increase the bonded amount of the projected reclamation costs and its failure to pay renewal premiums and additional premium shortfalls. Their position that the cure amount is zero is disingenuous. Nevertheless, were there to be a shortfall for whatever reason, any reclamation and related cost incurred by the County not "back stopped" by bond would constitute an administrative expense claim. Indeed, courts have recognized environmental liabilities as administrative claims even if unliquidated at the time of

[5] The County reserve the right to file a protective request for allowance of an administrative expense claim at any time, including prior to confirmation.

confirmation. See In re United Trucking Serv., Inc., 851 F.2d 159 (6th Cir. 1988) (approving the lower court's *estimation* of damages). Such decisions are consistent with the U.S. Supreme Court's seminal holding in Reading that administrative costs "preserving the estate" include costs incidental to the operation of the bankrupt's business (including in that case tort claims). Reading Co. vs. Brown, 391 U.S. 471, 476–77 (1968) (decided under the Bankruptcy Act).

23. There are two additional features of the Plan which contravene the Code, meaning the Debtors cannot meet the Section 1129(a)(1) confirmation requirement: the enjoinment of set off rights and the overly broad retention of jurisdiction. First, Subsection C of Article XI enjoins "asserting a set off or right of subrogation of any kind". That provision impermissibly abrogates Section 553 of the Code's preservation of set off rights. See Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995). The injunction must be narrowed to exclude the County. Second, the aforementioned injunctive provisions as well as Article XI's extremely broad retention of jurisdiction may be read as restricting the County from taking enforcement action outside of this Court or divesting other tribunals of jurisdiction. These provisions are violative of the Code and should be stricken accordingly.

B. The Plan is not feasible and lacks adequate means for implementation as to environmental obligations and liabilities.

24. The Plan contains a vacuum regarding how Debtors will fund their additional bonding requirement, address on-going environmental concerns, including the installation of a groundwater monitoring network, and how it will accomplish reclamation. Moreover, the Plan is silent about the Debtors' intention regarding the Chippewa Mine. For these reasons, the Plan is not feasible and fails to provide an adequate means for implementation.

25. The confirmation requirement of "feasibility" is found in Section 1129(a)(11) of the Code, which requires:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need to further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

W.R. Grace & Co., 475 B.R. 34, 114 (D. Del. 2012) (the debtor bears the burden of proof on feasibility); See In re Paragon Offshore PLC, No. 16-10386 (CSS), 2016 WL 6699318, at *16 (Bankr. D. Del. Nov. 15, 2016) (denying confirmation due to lack of feasibility).

26. How is Chippewa supposed to evaluate the Plan's feasibility, specifically the reorganized company's ability to honor its reclamation and monitoring obligations? The Disclosure Statement describes Debtors' expectation of $100 million in exit financing, half of which is projected to be applied to the Plan distributions. The County is also aware that the Debtors and the Unsecured Creditors Committee ("Committee") are engaged in a valuation fight. So the Committee on behalf of Class 6 seeks to extract significantly more value from the estate by enhancing Plan distributions to unsecured creditors. The County has no idea what other internal funding requirements the reorganized company will have and its available resources. But it is not the County's job to speculate on the Debtors' financial viability and its Plan's feasibility – it is the Debtor's burden to make the requisite showing.

27. Similarly, the Plan falls short of meeting another confirmation requirement: Section 1123(a)(5). That Code provision requires that a plan "provide adequate means for the plan's implementation". Again, the Debtors have not been forthcoming in their intentions regarding the Chippewa Mine. And there is nothing in the Plan or Disclosure Statement offering any clues. Therefore, the Debtors do not meet their burden under Section 1123(a)(5) with

respect to one of their mining properties, a property to which they are in default under their statutory obligations.

28. Notwithstanding that the United States Supreme Court in Midlantic spoke very clearly on the subject, the County has concerns that the Debtors either intend, or are preserving the option, to pursue a de facto abandonment of the Chippewa Mine after emergence from Chapter 11. If that is not the intention, the Debtors can alleviate the concern by complying with the confirmation requirements set forth in Sections 1129(a)(11) and 1123(a)(5).

C. The Plan has not been proposed in good faith.

29. Finally, the Debtors cannot confirm their Plan because it has not been proposed in good faith. Section 1129(a)(3) requires "the plan has been proposed in good faith and not by means forbidden by law." See In re Lernout & Hauspie Speech Prod. N.V., 301 B.R. 651, 657 (Bankr. D. Del. 2003), *aff'd* 308 B.R. 672 (D. Del 2004) (good faith has been defined alternatively as requiring: (1) the plan will foster a result consistent with Code's objections; (2) the plan has been proposed with honesty and good intentions; or (3) there was fundamental fairness in dealing with the creditors.) (internal citations omitted)).

30. The County submits the Plan does not meet the "good faith" standards under the Code. The Plan is silent on a business plan for the Chippewa Mine and any intention to correct violations under applicable state and local law. These omissions - coupled with the Debtors' position there is no cure amount owing in connection with the Bonds they want to assume - fundamentally reflects a lack of good faith. This chapter 11 plan would not advance the Code's objectives, does not reflect honesty and good intentions, and is not fair. See id.

31. In addition, the Plan as designed will be implemented with respect to the Chippewa Mine by means forbidden by law. As explained above, the Debtors are violating applicable non-bankruptcy law, i.e., the County's Mine Permit. The Debtor has not addressed how it will address on-going environmental concerns including but not limited to the installation of a groundwater monitoring network, how it will accomplish Reclamation post-bankruptcy and how it will cure the default in Bonding required by sate and local law. Congress' passage of 28 U.S.C. § 959(b) removes any doubt of the Debtors' ongoing obligations. Indeed, the United States Supreme Court cited this statute to underscore this point in Midlantic. See Midlantic, 494 at 505–07 (finding no preemption of state and local laws).

32. In summary, the Plan fails to meet several confirmation requirements and therefore cannot be confirmed.

JOINDER

33. The County joins ASIC's Limited Objection and Reservation of Rights. ASIC provides a good description of the Bonds to be assumed and the background and relationship between itself, the Debtors and the County as obligee. Clearly, the County is a third party beneficiary with respect to the Bonds. See generally In re Orexigen Therapeutics, Inc., 596 B.R. 9, 22 (Bankr. D. Del. 2018) ("[A] third-party beneficiary to a contract is a party who directly or incidently benefits from a contract between two other parties."). The Debtors' position that the cure amount is zero for the Bonds it seeks to assume is baseless.

34. ASIC's correctly points to the Debtors' admissions in their "first day motion" seeking approval of the continuation of the bonding program: "the Debtors must be able to provide financial assurances to federal and state governments, regulatory agencies, and other parties"; cancellation could "render the Debtors in violation of …federal laws and regulations

applicable to the Debtors' businesses…." The Debtors should be bound by these admissions when taking the position that the cure is zero, or more generally to the extent they disagree with the County's positions in this Objection.

35. As ASIC's explains, the Debtors are in default in two respects under the Bonds. First, they are in default of a renewal premium. Second, the County as obligee has demanded additional financial assurances and penal sum increases under the Bonds. However, the Debtors have failed to post the Collateral Shortfall. Disregarding these contractual obligations, which are necessary for the Debtors to comply with their statutory environmental obligations, the Debtors inexplicably state that their cure amount is zero.

36. For these reasons and as set forth in their pleading, ASIC's objections should be sustained.

RESERVATION OF RIGHTS

37. Nothing herein shall be considered a waiver of any rights that the County may have against the Debtors or any other parties. The County reserves all rights including, without limitation, the right to amend or supplement this Objection or Joinder.

WHEREFORE, for the foregoing reasons, the County respectfully requests that confirmation of the Plan be denied and that ASIC's objection be sustained.

Dated: October 18, 2019

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