

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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 In re: : Chapter 11  
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 EMERGE ENERGY SERVICES LP, *et al.*,<sup>1</sup> : Case No. 19-\_\_\_\_\_ (\_\_\_\_\_)  
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 Debtors. : (Joint Administration Requested)  
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 ----- X  
 Objection Deadline: To be determined  
 Hearing Date: To be determined

**DEBTORS’ OMNIBUS MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO (I) REJECT CERTAIN RAILCAR LEASE AGREEMENTS *NUNC PRO TUNC* TO THE PETITION DATE, AND (II) ENTER INTO PROPOSED NEW RAILCAR LEASE AGREEMENTS EFFECTIVE AS OF THE PETITION DATE**

**THIS MOTION SEEKS TO, AMONG OTHER THINGS, REJECT CERTAIN EXECUTORY CONTRACTS. PARTIES RECEIVING THIS MOTION SHOULD REVIEW THE MOTION TO SEE IF THEIR NAME(S) OR CONTRACT(S) ARE SET FORTH IN THE MOTION OR THE EXHIBITS ATTACHED HERETO TO DETERMINE WHETHER THE MOTION AFFECTS THEIR CONTRACT(S).**

The debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”) hereby file this motion (the “**Motion**”) for entry of an order, substantially in the form attached hereto as Exhibit A (the “**Order**”), under sections 105(a), 363, and 365(a) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing the Debtors to (i) reject certain railcar lease agreements, each as set forth on Schedule 1, Schedule 2 and Schedule 3 attached to the Order, including any amendments or modifications thereto (collectively, the “**Rejected Railcar Leases**”), with Trinity Industries Leasing Company (“**Trinity**”), MUL Railcars Leasing, LLC (“**MUL**”), and CIT Bank, N.A. and The CIT Group/Equipment

<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.



Financing, Inc., as an assignee of CIT Rail, LLC (collectively, “**CIT**” and, together with Trinity and MUL, the “**Counterparties**”), *nunc pro tunc* to the Petition Date (as defined below), and (ii) enter into new railcar lease agreements (collectively, the “**New Railcar Leases**”) with the Counterparties, effective as of the Petition Date. In further support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

### **JURISDICTION**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363, and 365(a) of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006.

### **BACKGROUND**

2. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of Bryan Gaston, Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings*, filed with the Court concurrently herewith (the “**Gaston Declaration**”), and is fully incorporated herein by reference.<sup>2</sup>

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<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Gaston Declaration.

3. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have yet been appointed.

4. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration of the Chapter 11 Cases.

### **RELIEF REQUESTED**

5. By this Motion, the Debtors seek entry of the Order authorizing the Debtors to (i) reject the Rejected Railcar Leases effective as of the Petition Date, and (ii) enter into the New Railcar Leases effective as of the Petition Date.<sup>3</sup>

### **BASIS FOR RELIEF**

#### **A. The Rejected Railcar Leases**

6. As more particularly described in the Gaston Declaration, the Debtors operate businesses throughout North America that are primarily engaged in the businesses of mining, processing, and distributing high-quality silica sand — a key input for the hydraulic fracturing of oil and natural gas wells. The Debtors' ordinary course operations generally involve the mining of silica sand from open pit environments, the processing of the sand at wet and dry plant facilities designed to separate the sand from unusable materials, and the distribution of sand to customers.

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<sup>3</sup> Because the Debtors negotiated the New Railcar Leases with the Counterparties with the expectation of rejecting all of the Rejected Railcar Leases and entering into all of New Railcar Leases, and because the terms of the New Rail Car Leases reflect this assumption, should the relief herein not be granted in its entirety, the Debtors reserve their rights to seek Court approval to (i) reject all or some of the Rejected Railcar Leases effective as of the Petition Date, and/or (ii) enter into all or some of the New Railcar Leases effective as of the Petition Date.

7. At the peak of the Debtors' business, the Debtors required a substantial number of railcars in order to ship northern white sand ("NWS") from their operations in Wisconsin to their customers across North America. To that end, the Debtors have, over time, built a significant fleet of company-leased and customer-committed railcars. As of the Petition Date, the Debtors leased a total of approximately 4,910 railcars.

8. As more particularly described in the Gaston Declaration, in the time since the Debtors entered into the Rejected Railcar Leases, there has been a sharp decline in demand for NWS, resulting in a material over-supply of leased railcars. In addition to an excess number of railcars in the Debtors' possession or control, the Debtors are further contractually bound to lease additional railcars that are of no use or benefit to the Debtors. Because the Debtors hold excess, unused railcars, the Debtors incur significant costs associated with the extraneous railcars. These costs include what are now above market, monthly rental rates as well as storage costs, exceeding approximately \$3,000,000 per month in the aggregate. Such costs are detrimental to the Debtors' business and their estates, especially during this critical time.

9. As such, in the lead up to the Chapter 11 Cases, the Debtors undertook an initial analysis of certain of their railcar leases. As a result of this ongoing analysis, the Debtors determined, in conjunction with their advisors and the Counterparties, that certain of their railcar leases were on above-market terms that were unfavorable and/or burdensome to the Debtors and unnecessary for the Debtors' business.

**i. The Trinity Railcar Leases**

10. Debtor Superior Silica Sands LLC ("SSS") is party to thirty railcar lease agreements with Trinity, including any amendments or modifications thereto (collectively, the

“**Trinity Railcar Leases**”).<sup>4</sup> The Trinity Railcar Leases were entered into between 2014 and 2016. As of the Petition Date, the Debtors are obligated to lease approximately 4,891 railcars from Trinity pursuant to the Trinity Railcar Leases.

**ii. The MUL Railcar Leases**

11. SSS is party to six railcar lease agreements with MUL, including any amendments or modifications thereto (collectively, the “**MUL Railcar Leases**”).<sup>5</sup> The MUL Railcar Leases were entered into on November 1, 2016. As of the Petition Date, the Debtors are obligated to lease approximately 400 railcars from MUL pursuant to the MUL Railcar Leases.

**iii. The CIT Railcar Leases**

12. SSS is party to two railcar lease agreements with CIT, including any amendments or modifications thereto (collectively, the “**CIT Railcar Leases**”).<sup>6</sup> The CIT Railcar Leases were entered into in 2014. As of the Petition Date, the Debtors are obligated to lease approximately 998 railcars from CIT pursuant to the CIT Railcar Leases.

**B. New Railcar Leases**

13. As described in the Gatson Declaration, the Debtors and their advisors have been in constant, parallel, arm’s-length negotiations with the Counterparties, to re-negotiate the terms of the various railcar leases, since at least 2016. More specifically, in the months leading up to the Chapter 11 Cases, these negotiations picked up in earnest in order to reach terms more favorable to the Debtors. As a result of such negotiations, the Debtors and the Counterparties have agreed to the relief request herein.

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<sup>4</sup> A list of the Trinity Railcar Leases is attached to the Order as Schedule 1.

<sup>5</sup> A list of the MUL Railcar Leases is attached to the Order as Schedule 2.

<sup>6</sup> A list of the CIT Railcar Leases is attached to the Order as Schedule 3.

14. Specifically, pursuant to certain separate letter agreements (the “**Letter Agreements**”), between the Debtors and each of the individual Counterparties, each Counterparty has agreed to support the rejection of their respective Rejected Railcar Leases and enter into the New Railcar Leases subject to the terms set forth on the terms sheets (the “**Term Sheets**”),<sup>7</sup> attached to the respective Letter Agreements. The New Railcar Leases contain terms that are significantly more favorable for the Debtors, including amongst other things, a reduction in the number of railcars the Debtors are contractually obligated to lease and more favorable lease rates.

15. By consenting to the rejection of the Rejected Railcar Leases and agreeing to simultaneously enter into the New Railcar Leases, the Counterparties have agreed to reduce the burden on the Debtors under the Rejected Railcar Leases and provide for more favorable lease terms in an effort to better serve the Debtors’ business needs. Each of the Counterparties, fully support the relief requested herein.

16. Accordingly, the Debtors request that the Court enter the Order authorizing the Debtors to (i) reject the Rejected Railcar Leases effective as of the Petition Date, and (ii) enter into the New Railcar Leases effective as of the Petition Date, for the benefit of their estates, creditors and the Counterparties.

#### **APPLICABLE AUTHORITY**

##### **A. The Rejection of the Rejected Railcar Leases is an Appropriate Exercise of the Debtors’ Business Judgment**

17. Section 365(a) of the Bankruptcy Code provides that a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the

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<sup>7</sup> The New Railcar Leases and Term Sheets are confidential but will be provided to the Court, the Office of the United States Trustee for the District of Delaware, and any statutory committees appointed in these Chapter 11 Cases upon request on a confidential basis.

debtor.” 11 U.S.C. § 365(a). The bankruptcy court should approve a debtor’s rejection of an executory contract or unexpired lease if such rejection is an exercise of the debtor’s sound business judgment, benefits its estate, and is not made in bad faith. *See In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff’d*, 465 U.S. 513 (1984) (“[t]he usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”); *Sharon Steel Corp. v. Nat’l Fuel Gas Distr. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989) (affirming rejection of a service agreement as sound exercise of debtor’s business judgment where bankruptcy court found rejection would benefit estate); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (holding the business judgment standard applicable, absent bad faith, whim, or caprice). In applying the business judgment standard, bankruptcy courts afford great deference to a debtor’s decision to assume or reject executory contracts or unexpired leases. *See In re Summit Land Co.*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

18. The Debtors have determined, in the sound exercise of their business judgment, that rejection is proper because (i) the rental rates under the Rejected Railcar Leases are well-above market and it is unlikely that a third party would be willing to assume or purchase the Rejected Railcar Leases under current market conditions and (ii) the current state of the Debtors’ business does not require as extensive a fleet of railcars as the Debtors’ required at the time they entered into the Rejected Railcar Leases. Additionally, the decision to reject the Rejected Railcar Leases was the result of extensive negotiations with the Counterparties, and is a required condition of entering into the New Railcar Leases, which terms are in the best interests

of the Debtors' estates and their creditors, evidencing the Debtors' exercise of their business judgment.

19. Moreover, absent the relief requested herein, the Debtors will continue to incur administrative expenses arising under the Rejected Railcar Leases without any corresponding benefit to their estates. The rejection of the Rejected Railcar Leases will allow the Debtors to rid themselves of the burdensome leases, thereby minimizing any liability under section 365(d) of the Bankruptcy Code and maximizing the value of their estates for their creditors and, thus, is in the best interests of the Debtors' estates and their creditors. Accordingly, authorizing the Debtors to reject the Rejected Railcar Leases as of the Petition Date (and the further relief requested herein) constitutes an exercise of the Debtors' sound business judgment.

**B. Section 363 of the Bankruptcy Code Supports the Relief Requested Herein**

20. The Debtors believe that entering into the New Railcar Leases are ordinary course transactions and therefore is permitted without Court order pursuant to section 363(c)(1) of the Bankruptcy Code. However, given the importance of the New Railcar Leases, out of an abundance of caution, the Debtors are asking this Court to confirm that the Debtors may enter into such leases in the ordinary course of business pursuant to such section.

21. Alternatively, to the extent that the Court finds that entering into the New Railcar Leases is not properly characterized as transactions in the ordinary course of the Debtors' business, the Debtors respectfully request that the Court authorize them to enter into such leases pursuant to sections 105(a) and 363(b) of the Bankruptcy Code.

**i. Entering into the New Railcar Leases is Permitted under Section 363(c)(1)**

22. Section 363(c) of the Bankruptcy Code authorizes a debtor in possession operating its business pursuant to Bankruptcy Code Section 1108 to “enter into transactions in the ordinary course of business without notice or a hearing, and . . . use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). Section 363 of the Bankruptcy Code is designed to allow a debtor “to continue its daily operations without excessive court or creditor oversight and protect[] secured creditors and others from dissipation of the estate’s assets.” *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. 592, 599 (M.D. Tenn. 1990) (citations omitted); *see also In re Cook & Sons Mining, Inc.*, No. Civ.A. 05-19, 2005 WL 2386238, at \*3 (E.D. Ky. Sept. 28, 2005) (“Code § 363 is designed to allow a Chapter 11 debtor the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary.”) (quoting *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3rd Cir. 1992)). Moreover, the “‘ordinary course of business’ standard is intended to allow a debtor the flexibility it needs to run its business and respond quickly to changes in the business climate.” *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. at 598 (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 617 (Bankr. S.D.N.Y. 1986)).

23. The Bankruptcy Code does not define “ordinary course of business.” However, “through a synthesis of case law, courts have developed a workable analytical framework for determining whether an activity is within the debtor’s ‘ordinary course of business.’” *In re Husting Land & Dev., Inc.*, 255 B.R. 772, 778 (Bankr. D. Utah 2000), *aff’d*, 274 B.R. 906 (D. Utah 2002). An important characteristic of an “ordinary” postpetition business transaction is its similarity to a prepetition business practice. *Marshack v. Orange Comm. Credit (In re Nat’l Lumber & Supply, Inc.)*, 184 B.R. 74, 79 (B.A.P. 9th Cir. 1995) (to qualify as

ordinary course, payment must be consistent with the past practices and industry standards), (*abrogated on other grounds by Office of the U.S. Tr. v. Hayes (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 104 F.3d 1147, 1148 (9th Cir. 1997)). Relevant factors in determining whether a transaction is ordinary include the type of business a debtor is engaged in as well as the size and nature of the business and transaction in question. *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. at 598.

24. The Debtors and their competitors regularly enter in railcar lease agreements in the ordinary course of business and the entrance into the New Railcar Leases is thus an ordinary course transaction consistent with the Debtors' past practices. Thus, the Debtors submit that section 363(c)(1) of the Bankruptcy Code provides sufficient authority for their entry into the New Railcar Leases.

**ii. Alternatively, Entering into the New Railcar Leases Should be Authorized under Section 363(b)**

25. Even if entry into the New Railcar Leases is not in the ordinary course of the Debtors' business and otherwise authorized under section 363(c)(1) of the Bankruptcy Code, the Debtors submit that they are still authorized to enter into such leases under section 363(b) of the Bankruptcy Code because doing so is a sound exercise of the Debtors' business judgment. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Courts have indicated that a debtor's decision to use, sell or lease assets outside the ordinary course of business must be based upon the sound business judgment of the debtor. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this [Section 363(b)], courts require the debtor to show that a sound business purpose

justifies such actions.”) (internal citations omitted); *see also In re Phx. Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (requiring “good business reason” for use under section 363(b) of the Bankruptcy Code).

26. Courts emphasize that the business judgment rule is not an onerous standard and may be satisfied “as long as the proposed action *appears* to enhance the debtor’s estate.” *Crystalin, LLC v. Selma Props. Inc. (In re Crystalin, LLC)*, 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003) (emphasis in original, internal alterations and quotations omitted); *see also In re AbitibiBowater*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (the business judgment standard is “not a difficult standard to satisfy”); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.”). The business judgment rule “reflects the reality that corporate decisions are better left to those who are close to the facts and have the experience to weigh the significance of those facts in an increasingly complex business environment.” *Brown v. Ferro Corp.*, 763 F.2d 798, 800 n. 2 (6th Cir. 1985) (internal citations and quotations omitted). Moreover, “[b]ankruptcy courts should be no more willing to second guess competent, disinterested trustees and debtors-in-possession than other courts are willing to second guess competent, disinterested directors” because the “reorganization or liquidation of a distressed debtor requires as much, if not more, creativity and risk-taking as the management of a healthy entity.” *See In re Engman*, 331 B.R. 277, 299 (Bankr. W.D. Mich. 2005); *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir. 1997) (“[w]here the [debtor’s] request is not manifestly unreasonable or made in bad faith, the court should normally grant approval as long as the proposed action appears to enhance the debtor’s estate.”) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985)).

27. The Debtors can demonstrate that execution of the New Railcar Leases is an exercise of sound business judgment. The New Railcar Leases are the result of extensive negotiations with the Counterparties that has resulted in significantly more favorable terms for the Debtors, including amongst other things, a reduction in the amount of railcars the Debtors are contractually obligated to lease and more favorable lease rates. Furthermore, the Debtors have conducted an analysis of alternative strategies as it relates to reducing their railcar fleet and associated costs, and have concluded that, if the Debtors chose an alternative solution, they would incur significant additional expenses and would not be in the best interests of the Debtors and the Counterparties. As such, the Debtors submit that the requested relief represents a sound exercise of the Debtors' business judgment and, to the extent such section is applicable, should be approved under section 363(b) of the Bankruptcy Code.

**C. The Rejection of the Rejected Railcar Leases *Nunc Pro Tunc* to the Petition Date and Entry into the New Railcar Leases Effective as of the Petition Date Is Appropriate Under the Circumstances**

28. Section 365 of the Bankruptcy Code does not restrict a bankruptcy court from applying rejection retroactively. *See Adelpia Bus. Solutions, Inc. v. Abnos*, 485 F.3d 602 (2d Cir. 2007) (affirming the bankruptcy court's equitable authority to authorize the retroactive rejection of a nonresidential lease of real property where advance notice is provided); *In re Jamesway Corp.*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 does not include "restrictions as to the manner in which the court can approve rejection"). Courts have held that a bankruptcy court may, in its discretion, authorize rejection retroactively to a date prior to entry of an order authorizing such rejection where the balance of equities favors such relief. *See In re Thinking Machs. Corp.*, 67 F.3d 1021, 1028–29 (1st. Cir. 1995) (stating "rejection under section 365(a) does not take effect until judicial approval is secured, but the approving court has the

equitable power, in suitable cases, to order a rejection to operate retroactively”); *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (stating “the court’s power to grant retroactive relief is derived from the bankruptcy court’s equitable powers so long as it promotes the purposes of § 365(a)”); *BP Energy Co. v. Bethlehem Steel Corp.*, 2002 WL 31548723, at \*3 (S.D.N.Y. Nov. 15, 2002) (“We cannot conclude . . . that a bankruptcy court’s assignment of a retroactive rejection date falls outside of its authority when the balance of the equities favors this solution.”).

29. The balance of the equities favors rejection *nunc pro tunc* to the Petition Date. The Counterparties subject to the relief requested herein, fully support such relief. Additionally, the Debtors’ and Counterparties’ intend to enter into the New Railcar Leases effective as of the Petition Date and as such, none of the Counterparties will be harmed as a result of granting the relief *nunc pro tunc* to the Petition Date. Moreover, because the New Railcar Leases provide better terms (including better economic terms) than the Rejected Railcar Leases, authorizing the Debtors to enter into the New Railcar Leases effective as of the Petition Date is beneficial to the Debtors and their estates and creditors. Further, absent retroactive rejection, the Debtors may incur unnecessary administrative charges and other obligations under the Rejected Railcar Leases without any reciprocal benefits to their estates or the Counterparties. Accordingly, the Debtors submit and the Counterparties agree, that it is fair and equitable for the Court to reject the Rejected Railcar Leases *nunc pro tunc* to the Petition Date and authorize the Debtors and the Counterparties to enter into the New Railcar Leases effective as of the Petition Date.

**D. Section 105 of the Bankruptcy Code and the Doctrine of Necessity Supports the Relief Requested**

30. Moreover, section 105(a) of the Bankruptcy Code gives this Court broad authority under its equitable powers to fashion any order or decree that would preserve or protect the value of the Debtors' assets. *See In re VII Holdings Co.*, 362 B.R. 663 (Bankr. D. Del. 2007) (Shannon, J.) (*citing In re Combustion Engineering, Inc.*, 391 F.3d 90 (3d Cir. 2004)). As described in detail above the relief requested herein is necessary to protect the value of the Debtors' estates.

**E. Waiver of Bankruptcy Rule 6004(h)**

31. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of fourteen days after the entry of the order, unless the court orders otherwise." For the reasons set forth herein, the Debtors submit that they have established cause to, and hereby request that the Court, waive the fourteen (14) day stay period under Bankruptcy Rule 6004(h), to the extent such stay is applicable.

**CONSENT TO JURISDICTION**

32. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that the Court would lack Article III jurisdiction to enter such final judgment or order absent consent of the parties.

**NOTICE**

33. Notice of this Motion will be given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the creditors listed on the Debtors' consolidated list of

thirty creditors holding the largest unsecured claims; (v) counsel to the DIP Agent and the Prepetition Agents; (vii) the Counterparties; and (viii) all parties entitled to notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is required.

34. A copy of this Motion is available on (i) the Court's website: [www.deb.uscourts.gov](http://www.deb.uscourts.gov), and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, at <https://www.kccllc.net/EmergeEnergy>.

**NO PRIOR REQUEST**

35. No previous motion for the relief sought herein has been made to this or any other court.

**WHEREFORE**, the Debtors respectfully request that the Court enter an Order substantially in the form attached hereto as Exhibit A granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: July 15, 2019  
Wilmington, Delaware

/s/ Zachary I. Shapiro

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*Proposed Counsel for Debtors and Debtors-in-Possession*

**EXHIBIT A**

**Proposed Order**

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

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 In re: : Chapter 11  
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 EMERGE ENERGY SERVICES LP, *et al.*,<sup>8</sup> : Case No. 19-\_\_\_\_\_ (\_\_\_\_\_)  
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 Debtors. : (Jointly Administered)  
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**ORDER AUTHORIZING THE DEBTORS TO (I) REJECT CERTAIN RAILCAR  
LEASE AGREEMENTS *NUNC PRO TUNC* TO THE PETITION DATE AND  
(II) ENTER INTO PROPOSED NEW RAILCAR LEASE  
AGREEMENTS EFFECTIVE AS OF THE PETITION DATE**

Upon the motion (the “**Motion**”),<sup>9</sup> of the Debtors for entry of an Order authorizing the Debtors to (i) reject certain railcar lease agreements, including any amendments or modifications thereto, each as set forth on Schedule 1, Schedule 2 and Schedule 3 attached hereto (collectively, the “**Rejected Railcar Leases**”) *nunc pro tunc* to the Petition Date and (ii) enter into new railcar lease agreements (collectively, the “**New Railcar Leases**”) with the Counterparties, effective as of the Petition Date, all as more fully described in the Motion; and the Court having reviewed the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States

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<sup>8</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>9</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and it appearing that the relief requested in the Motion is in the best interests of the Debtors and their respective estates and creditors; and the Court having determined that there is good and sufficient cause for the relief granted in this Order, it is hereby

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The Motion is GRANTED as set forth herein.
2. The Debtors are authorized to reject the Rejected Railcar Leases, identified on Schedule 1, Schedule 2 and Schedule 3 attached hereto, including, to the extent applicable, any agreements, amendments, modifications, and subleases related thereto, effective as of the Petition Date.
3. Consistent with the limitations of section 362 of the Bankruptcy Code, and any other applicable law, the Counterparties are prohibited from setting off or otherwise utilizing any amounts deposited by the Debtors with any of the Counterparties as a security deposit or pursuant to another similar arrangement, or owed to the Debtors by any of the Counterparties under the Rejected Railcar Leases or other agreements between the same parties, without further order of this Court.
4. Pursuant to sections 105(a) and 365(a) of the Bankruptcy Code, the Rejected Railcar Leases are rejected, *nunc pro tunc* to the Petition Date.
5. The Debtors are authorized to enter into the New Railcar Leases, effective as of the Petition Date.

6. Any claims based on the rejection of the Rejected Railcar Leases shall be filed in accordance with the bar date for filing proofs of claims, to be established by the Court at a later date.

7. Nothing herein shall prejudice the rights of the Debtors to argue that any of the Rejected Railcar Leases were terminated prior to the Petition Date or that any claim for damages arising from the rejection of the Rejected Railcar Leases is limited to the remedies available under any applicable termination provision of such contract or lease, as applicable, or that any such claim is an obligation of a third party and not that of the Debtors or their estates.

8. Nothing in the Motion or this Order shall be deemed or construed as an approval of an assumption of any lease, sublease, or contract pursuant to section 365 of the Bankruptcy Code.

9. Adequate notice of, and an opportunity for a hearing on, the Motion has been provided, and such notice satisfies the requirements of Bankruptcy Rule 6004(a).

10. Notwithstanding any applicability of Bankruptcy Rule 6004(h) the terms and conditions of this Order are immediately effective and enforceable upon its entry. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

11. The Debtors are hereby authorized to take such actions and to execute such documents as may be necessary to implement the relief granted by this Order, including but not limited to executing the New Railcar Leases.

12. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: \_\_\_\_\_, 2019  
Wilmington, Delaware

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

**Schedule 1****Rejected Trinity Railcar Leases**

<b>No.</b>	<b>Debtor Name</b>	<b>Counterparty</b>	<b>Contract Name</b>	<b>Contract Description</b>	<b>Contract Date</b>
1.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.2 to Rider One (1)	Railcar Lease Rider One (1), as Amended May 23, 2016	5/23/2016
2.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Two (2)	Railcar Lease Rider Two (2), as Amended May 23, 2016	5/23/2016
3.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Three (3)	Railcar Lease Rider Three (3), as Amended May 23, 2016	5/23/2016
4.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Four (4)	Railcar Lease Rider Four (4), as Amended May 23, 2016	5/23/2016
5.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Five (5)	Railcar Lease Rider Five (5), as Amended May 23, 2016	5/23/2016
6.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Eight (8)	Railcar Lease Rider Eight (8), as Amended May 23, 2016	5/23/2016
7.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Nine (9)	Railcar Lease Rider Nine (9), as Amended May 23, 2016	5/23/2016
8.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Ten (10)	Railcar Lease Rider Ten (10), as Amended May 23, 2016	5/23/2016
9.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Twelve (12)	Railcar Lease Rider Twelve (12), as Amended May 23, 2016	5/23/2016
10.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.2 to Rider Thirteen (13)	Railcar Lease Rider Thirteen (13), as Amended May 23, 2016	5/23/2016
11.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.2 to Rider Fourteen (14)	Railcar Lease Rider Fourteen (14), as Amended May 23, 2016	5/23/2016
12.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Fifteen (15)	Railcar Lease Rider Fifteen (15), as Amended May 23, 2016	5/23/2016

No.	Debtor Name	Counterparty	Contract Name	Contract Description	Contract Date
13.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Sixteen (16) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 16	10/6/2014
14.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Seventeen (17) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 17	10/6/2014
15.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Eighteen (18) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 18	10/6/2014
16.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Nineteen (19) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 19	10/6/2014
17.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty (20) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 20	10/6/2014
18.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-One (21) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 21	10/6/2014
19.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Acknowledgement of Termination Notice	Trinity Railcar Lease Rider 22, Terminated April 13, 2015	4/13/2015
20.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Three (23) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 23	2/10/2015
21.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Four (24) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 24	2/10/2015
22.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Five (25) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 25	2/10/2015
23.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Six (26) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 26	2/10/2015
24.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Seven (27) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 27	2/10/2015
25.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Eight (28) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 28	2/10/2015
26.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Twenty-Nine (29) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 29	2/10/2015

No.	Debtor Name	Counterparty	Contract Name	Contract Description	Contract Date
27.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Thirty (30) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 30	2/10/2015
28.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Thirty-One (31) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 31	2/10/2015
29.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Rider Thirty-Two (32) to Railroad Car Lease Agreement	Trinity Railcar Lease Rider 32	2/10/2015
30.	Superior Silica Sands LLC	Trinity Industries Leasing Company	Amendment No.1 to Rider Thirty-Four (34)	Trinity Railcar Lease Rider 34	5/23/2016

**Schedule 2****Rejected MUL Railcar Leases**

<b>No.</b>	<b>Debtor Name</b>	<b>Counterparty</b>	<b>Contract Name</b>	<b>Contract Description</b>	<b>Contract Date</b>
1.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 1	11/1/2016
2.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 2	11/1/2016
3.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 3	11/1/2016
4.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 5	11/1/2016
5.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 7	11/1/2016
6.	Superior Silica Sands LLC	MUL Railcar Leasing LLC	Lease Amendment Agreement Lease Schedules No. 1, 2, 3, 5, 7 And 9	MUL Railcar Lease Rider 9	11/1/2016

**Schedule 3**

**Rejected CIT Railcar Leases**

A. CIT Bank leases

Master Railcar Lease, dated as of February 13, 2014 (“Master Lease”), between CIT Rail LLC and Superior Silica Sands LLC (“SSS”), and the following lease schedules thereto: (i) Schedule No. 01 dated as of February 13, 2014 (SSSA02001); (ii) Schedule No. 02 dated as of February 13, 2014 (SSSA02002), (iii) Schedule No. 03 dated as of February 13, 2014 (SSSA02003); (iv) Schedule No. 04 dated as of February 13, 2014 (SSSA02004); and (v) Schedule No. 06 dated as of October 30, 2014 (SSSA02006), between CIT Bank, N.A. (as assignee of CIT Rail LLC) and SSS

B. CIT/EF leases

The Master Lease and the following lease schedules thereto: (i) Schedule No. 05 dated as of October 30, 2014 (SSSA02005); (ii) Schedule No. 07 dated as of October 30, 2014 (SSSA02007); and (iii) Schedule No. 09 dated as of October 30, 2014 (SSSA02009), between The CIT Group/Equipment Financing, Inc. (as assignee of CIT Rail LLC) and SSS