**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| In re: | : | Chapter 11 |
| HI-CRUSH INC., *et al.*,[1] | : | Case No. 20-33495 (DRJ) |
| Debtors. | : | (Jointly Administered) |

**DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING AND APPROVING THE SETTLEMENT BY AND AMONG THE DEBTORS AND BLACK MOUNTAIN SAND, LLC, (II) AUTHORIZING THE DEBTORS' ENTRY INTO THE SETTLEMENT AGREEMENT, AND (III) GRANTING RELATED RELIEF**

**THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.**

**REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.**

The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") respectfully state the following in support of this motion (the "**Motion**"):

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC , Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.

## RELIEF REQUESTED

1. By this Motion, the Debtors seek entry of an order (the "**Order**") substantially in the form attached hereto (a) authorizing Debtor FB Industries USA, Inc. ("**FB**") to enter into the Mutual Release and Settlement Agreement (the "**Settlement Agreement**") with Black Mountain Sand, LLC ("**BMS**" and, together with FB, the "**Parties**," and each, a "**Party**"), attached as **Exhibit 1** to the Order, memorializing a settlement of certain claims and counterclaims amongst the Parties (the "**Settlement**"), and (b) granting related relief.

## JURISDICTION AND VENUE

2. The United States Bankruptcy Court for the Southern District of Texas (the "**Court**") has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b), and this Court may enter a final order consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**") and rule 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

## BACKGROUND

5. On July 12, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions in this Court commencing cases (the "**Chapter 11 Cases**") for relief under chapter 11 of the Bankruptcy Code. 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 J. Philip McCormick, Jr., Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* (the "**First Day Declaration**"), filed on the Petition Date.

6. The Debtors continue to manage and operate their business 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 been appointed.

## THE AGREEMENTS AND THE SETTLEMENT

### I. The Purchase and Sale and Equipment Leasing Agreements and the Related Lawsuit

7. On October 31, 2018, BMS and FB entered into (i) that certain Purchase and Sale Agreement (the "**PSA**") and (ii) that certain Equipment Leasing Agreement (collectively, the "**Agreements**"). Pursuant to the PSA, FB purchased BMS's last-mile service business, including a number of BMS's last-mile customer contracts, for an aggregate purchase price of $20,000,000. The PSA provided for a holdback of $1,000,000 from the purchase price at closing (the "**Holdback**"), which would become payable to BMS if certain conditions were met. The Debtors contend that such conditions were not met and to date have not paid the Holdback to BMS.

8. While the majority of BMS's contractual relationships were assigned to FB as "Purchased Contracts" pursuant to the PSA, certain contracts could not be assigned outright to FB. For example, BMS's contract with one customer was part of a broader sand supply agreement between such customer and a BMS affiliate and, as such, the contract could not be assigned to FB. The silo and conveyer equipment that BMS had used to provide last-mile services to such customer, however, were sold to FB pursuant to the PSA. Accordingly, the Parties entered into the Equipment Leasing Agreement pursuant to which they agreed, among other things, that FB would lease such equipment back to BMS for the remaining life of the customer contract in exchange for a monthly fee of $80,000. In December 2018, BMS informed FB that the customer had terminated its agreement with BMS. To date, BMS has not paid the monthly fee owed to FB from January 2019 through April 2019, resulting in a shortfall of $320,000. BMS contends that the alleged shortfall amount is not owed to FB.

9. On August 27, 2019, BMS commenced a suit in the District Court of Harris County, Texas, captioned *Black Mountain Sand, LLC v. FB Industries USA, Inc*., Cause No. 2019-60395 (the "**Lawsuit**"). In the Lawsuit, BMS asserts breach of contract claims against FB and seeks damages of $1,000,000, plus attorneys' fees and other costs. On September 23, 2019, FB filed an answer asserting counterclaims against BMS, including breach of contract and negligent misrepresentation claims, and seeking damages of $320,000, plus attorneys' fees and other costs.

10. The Lawsuit is currently stayed pursuant to section 362(a) of the Bankruptcy Code. Prior to and after the Petition Date, BMS and FB engaged in discussions to settle the Lawsuit, the result of which is the Settlement Agreement. As discussed in detail below, the Settlement Agreement contemplates a mutual release of the claims and counterclaims asserted in the Lawsuit, together with an agreement by each of the Parties to dismiss the Lawsuit.

## II. The Settlement Agreement

11. The Debtors have reviewed and analyzed the Settlement Agreement in consultation with their advisors. In their sound business judgment, the Debtors concluded that a settlement of the outstanding issues between the Parties was in the best interest of their estates and all parties in interest.

12. Under the terms of the Settlement Agreement, the Parties have each agreed to dismiss the Lawsuit, with prejudice as to all claims and counterclaims. In addition, under the terms of the Settlement Agreement, *inter alia*:[2]

a. BMS on its own behalf and on behalf of its owners, investors, partners, members, managers, managing directors, officers, directors, successors, assigns,

[2] The following summary is provided for illustrative purposes only and is qualified in its entirety by reference to the Settlement Agreement and the Order authorizing the Settlement.

predecessors, parent companies, subsidiaries, affiliates, and their respective members, managers, managing directors, officers, directors, employees, personal representatives and agents ("**BMS Releasors**"), would fully and finally release, acquit, and forever discharge FB and any and all of its respective affiliates, subsidiaries, owners, investors, and parent companies, and each of their respective officers, agents, directors, executives, and employees ("**FB Released Parties**") with respect to all liabilities, obligations, claims, actions, causes of action, demands, damages, losses, fees, costs and expenses, of any nature whatsoever, whether known or unknown, asserted or unasserted, ascertained or unascertained, suspected or unsuspected, accrued or unaccrued, matured or unmatured, liquidated or contingent, existing or claimed to exist that the BMS Releasors have or could have against any of the FB Released Parties concerning or relating to the Agreements, and/or the Lawsuit for any alleged conduct or breach of conduct whatsoever ("**Released Claims**");

b. BMS, on its own behalf and on behalf of the BMS Releasors, agrees and covenants that it is forever barred from initiating, prosecuting, participating in the assertion or prosecution of, maintaining, asserting or seeking to enforce any Released Claim against any of the FB Released Parties, whether directly or indirectly, whether on its own behalf or on behalf of any class or any other person or entity, and BMS agrees, on its own behalf and on behalf of the BMS Releasors, that these releases shall constitute complete defenses to any such Released Claim;

c. FB, on its own behalf and on behalf of its owners, investors, partners, members,

managers, managing directors, officers, directors, successors, assigns, predecessors, parent companies, subsidiaries, affiliates, and their respective members, managers, managing directors, officers, directors, employees, personal representatives and agents ("**FB Releasors**"), would fully and finally release, acquit, and forever discharge BMS and any and all of its respective affiliates, subsidiaries, owners, investors, and parent companies, and each of their respective officers, agents, directors, executives, and employees ("**BMS Released Parties**") with respect to all Released Claims; and

d. FB, on its own behalf and on behalf of the FB Releasors, agrees and covenants that it is forever barred from initiating, prosecuting, participating in the assertion or prosecution of, maintaining, asserting or seeking to enforce any Released Claim against any of the BMS Released Parties, whether directly or indirectly, whether on its own behalf or on behalf of any class or any other person or entity, and FB agrees, on its own behalf and on behalf of the FB Releasors, that these releases shall constitute complete defenses to any such Released Claim.

13. The Debtors believe entry into the Settlement Agreement is in the best interests of the Debtors and their estates. First, the Settlement Agreement resolves significant disputes between the Parties, the outcome of which is inherently uncertain, including the existence of and extent of damages arising under the Agreements. Second, the Settlement Agreement avoids costly litigation fees and expenses that would result from the Lawsuit.

14. Accordingly, the Debtors seek authorization to enter into the Settlement Agreement and implement its terms as set forth therein and in the Order.

## BASIS FOR RELIEF

### I. Settlements Are Favored in Bankruptcy, and the Debtors' Business Judgment Is Given Significant Deference.

15. Bankruptcy Rule 9019(a) provides, in relevant part:

> On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee. . . and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

16. "To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy." *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (internal quotations omitted). Settlements are considered a "normal part of the process of reorganization" and a "desirable and wise method[] of bringing to a close proceedings otherwise lengthy, complicated, and costly." *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citations omitted) (decided under the Bankruptcy Act). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, after appropriate notice and a hearing, approve a compromise or settlement so long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, approval of a compromise is within the "sound discretion" of the bankruptcy court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *see also Jackson Brewing Co.*, 624 F.2d at 602-03 (same). Generally, the role of the bankruptcy court is not to decide the issues in dispute when evaluating a settlement. *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). Instead, the court should determine whether the settlement as a whole is fair and equitable.

*Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).[3]

17. Further, the Bankruptcy Code authorizes the use and disposition of property outside the ordinary course of business with court approval and a valid business reason. Specifically, the Bankruptcy Code authorizes a debtor in possession to "use, sell, or lease, other than in the ordinary course of business, property of the estate," after notice and a hearing. 11 U.S.C. § 363(b)(1). It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business, if there is a good business reason for doing so. *See, e.g.*, *ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.C.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) ("[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.") (quoting *In re Cont'l Air Lines, Inc.*, 780 F.3d 1223, 1226 (5th Cir. 1986)); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1308 (5th Cir. 1985) (holding that the standard to assume a lease is the business judgment standard).

18. "Great judicial deference is given to the [debtor's] exercise of business judgment." *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp., Ltd.)*, 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005). "As long as [the decision] appears to enhance a debtor's estate, court approval of a debtor-in-possession's decision . . . should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code." *Richmond Leasing Co.*, 762 F.2d at 1309.

[3] Further, under section 105(a) of the Bankruptcy Code, the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Authorizing the Debtors to proceed with the Settlement falls squarely within the spirit of Bankruptcy Rule 9019, if not the letter, as well as the Bankruptcy Code's predilection for compromise. Thus, to the extent necessary, section 105(a) relief is appropriate in this instance and would best harmonize the settlement processes contemplated by the Bankruptcy Code.

## II. The Settlement Satisfies the Three-Factor Test Courts in the Fifth Circuit Employ to Analyze Proposed Settlements.

19. The Fifth Circuit has established a three-factor balancing test under which bankruptcy courts are to analyze proposed settlements. The factors a court must consider in determining whether a compromise is "fair, equitable, and within the best interest of the estate are: '(1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise.'" *In re Roqumore*, 393 B.R. 474, 479 (Bankr. S.D. Tex. 2008) (citing the factors set forth by the court in *Jackson Brewing*); s*ee also Age Ref. Inc.*, 801 F.3d at 540 (same).

20. Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. ***First***, the court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995); *see also Age Ref. Inc.*, 801 F.3d at 540 (noting the *Foster Mortgage* factors). "While the desires of the creditors are not binding, a court 'should carefully consider the wishes of the majority of the creditors.'" *Foster Mortgage*, 68 F.3d at 917 (quoting *In re Transcontinental Energy Corp.*, 764 F.2d 1296, 1299 (9th Cir. 1985)). ***Second***, the court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortg. Corp.*, 68 F.3d at 918 (citations omitted).

### a. The Debtors Are Not Certain to Succeed in Litigating the Issues Between the Debtors and BMS.

21. With respect to "the probability of success in litigating the claim subject to settlement," the Debtors, after consulting with their counsel, believe the likely outcome of the

Lawsuit is unclear. Indeed, the risk of succeeding in any resulting litigation is inherently uncertain as the parties barely commenced discovery, let alone the summary judgment or trial stages of the litigation.

22. Further, even if the Debtors achieved a successful outcome through litigation with BMS, the value realized through the Debtors' participation in such litigation would likely require significant expenditures that would reduce (or eliminate) any value otherwise generated thereby. Ultimately, despite the Debtors' confidence in their position, the Debtors may not be successful in the Lawsuit and, therefore, litigation could actually increase FB's costs without providing any benefit.

23. FB believes, in its sound business judgment, that the Settlement is an excellent outcome for the Debtors and provides certainty in a dispute that would otherwise have a highly uncertain and potentially unfavorable outcome.

**b. Continued Litigation with BMS Would Be Complex and Result in Delay and Distraction.**

24. With respect to "the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay," potential litigation with BMS likely would be costly and time consuming. Indeed, if the Debtors were to litigate the disputes at issue, it would require significant time and expense to determine the full extent of their rights, if any, under the Agreements and to quantify any resulting damages.

**c. The Settlement Is in the Best Interests of Creditors.**

25. The Settlement is also in the best interest of creditors. The Settlement Agreement will provide all parties with certainty regarding the resolution of the disputes associated with the Agreements, which could expose FB to liability of over $1,000,000, while avoiding the cost and expense of litigation related thereto. The Settlement therefore maximizes the value of the Debtors'

estates for all parties by avoiding the expense of litigation and bringing final resolution of the disputes between FB and BMS.

26. Finally, the Settlement arises out of arms-length negotiations between the Parties. The Parties have been engaged in ongoing discussions regarding a global settlement of the disputes between the Parties since before the commencement of these Chapter 11 Cases, and agreed on the terms of the Settlement Agreement following extensive negotiations.

27. Based on the foregoing considerations, the Debtors respectfully submit that the Settlement represents a fair and reasonable compromise that is in the best interest of the Debtors' estates. Pursuant to the Order, the Debtors will be able to avoid the expense, delay, and distraction of continued litigation that could result in a liability exceeding $1,000,000. Accordingly, the Debtors respectfully request that the Court authorize the Debtors to enter into and implement the terms of the Settlement Agreement as such action is a reasonable exercise of the Debtors' business judgment and in the best interest of their bankruptcy estates.

## WAIVER OF BANKRUPTCY RULE 6004(A) AND 6004(H)

28. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

## NOTICE

29. Notice of this Motion will be given to: (i) the United States Trustee for the Southern District of Texas; (ii) the parties included on the Debtors' consolidated list of the holders of the 30 largest unsecured claims against the Debtors; (iii) Simpson, Thacher & Bartlett LLP as counsel to the agent for the Debtors' prepetition and postpetition secured asset-based revolving credit facility;

(iv) U.S. Bank National Association, as indenture trustee for the Debtors' prepetition notes; (v) counsel to the Ad Hoc Noteholders Committee (a) Paul, Weiss, Rifkind, Wharton & Garrison LLP and (b) Porter Hedges LLP; (vi) Shipman & Goodwin LLP as counsel to the agent under the Debtors' postpetition term loan facility; (vii) the United States Attorney's Office for the Southern District of Texas; (viii) the Internal Revenue Service; (ix) the Securities and Exchange Commission; (x) the state attorneys general for states in which the Debtors conduct business; (xi) BMS; and (xii) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required or needed under the circumstances.

30. A copy of this Motion is available on (i) the Court's website: www.txs.uscourts.gov, and (ii) the website maintained by the Debtors' Voting and Claims Agent, Kurtzman Carson Consultants LLC, at www.kccllc.net/hicrush.

*[Remainder of Page Left Blank Intentionally]*

**WHEREFORE**, the Debtors respectfully request that the Court enter the Order granting the relief requested in the Motion and such other and further relief as may be just and proper.

Signed: August 21, 2020
Houston, Texas

Respectfully Submitted,

/s/ Timothy A. ("Tad") Davidson II

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*Counsel for the Debtors and Debtors in Possession*

**CERTIFICATE OF SERVICE**

I certify that on August 21, 2020, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices.

*/s/ Timothy A. ("Tad") Davidson II*
Timothy A. ("Tad") Davidson II

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| In re: | : | Chapter 11 |
| HI-CRUSH INC., *et al.*,[1] | : | Case No. 20-33495 (DRJ) |
| Debtors. | : | (Jointly Administered) |

**ORDER (I) AUTHORIZING AND APPROVING THE SETTLEMENT BY AND AMONG THE DEBTORS AND BLACK MOUNTAIN SAND, LLC, (II) AUTHORIZING THE DEBTORS' ENTRY INTO THE SETTLEMENT AGREEMENT, AND (III) GRANTING RELATED RELIEF**

**[Relates to Motion at Docket No. ___]**

Upon the motion (the "**Motion**")[2] of the Debtors for an Order (i) authorizing and approving the settlement by and among the Debtors and Black Mountain Sand, LLC, (ii) authorizing entry into the Settlement Agreement, and (iii) granting related relief; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §1334; 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 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

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC , Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Motion has been given and that no other or further notice is necessary; and all objections, if any, to entry of this Order having been withdrawn, resolved, or overruled; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in the Order, it is hereby

**ORDERED THAT:**

1. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved and shall be binding and effective on Debtor FB Industries USA, Inc. ("**FB**") and Black Mountain Sand, LLC ("**BMS**") upon entry of this Order.

2. FB is hereby authorized to enter into the Settlement Agreement on behalf of itself and each of the Debtors, and the Debtors are authorized to enter into, perform, execute, and deliver all documents, and take all actions, necessary to immediately and fully implement the Settlement in accordance with the terms, conditions, and agreements set forth in the Settlement Agreement, all of which are hereby approved.

3. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

4. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

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

Signed:_____, 2020

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

# EXHIBIT 1

## Settlement Agreement

# MUTUAL RELEASE AND SETTLEMENT AGREEMENT

THIS MUTUAL RELEASE AND SETTLEMENT AGREEMENT ("Mutual Release") is made and entered into as of the 20th day of August, 2020 ("Effective Date"), by and between Black Mountain Sand, LLC ("BMS") and FB Industries USA, Inc. ("FB"). BMS and FB together are referred to as the "Parties" and, where applicable, individually as "Party."

A. Whereas, BMS and FB were parties to a Purchase and Sale Agreement and Equipment Leasing Agreement, effective as of October 31, 2018 (collectively, the "Agreements").

B. Whereas, Various disputes arose under the Agreements; BMS asserted claims against FB, and FB asserted counterclaims against BMS in *Black Mountain Sand, LLC v. FB Industries USA, Inc.*, Cause No. 2019-60395, pending in the 125th Judicial District Court of Harris County, Texas ("the Lawsuit"). The Lawsuit is currently stayed pursuant to Section 362(a) of the United States Bankruptcy Code.

C. Whereas, the Parties have mutually decided to put their disputes and the Lawsuit behind them.

NOW, THEREFORE, in consideration of the Recitals, which are incorporated by this reference, and the mutual covenants contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, each of the Parties to this Mutual Release hereby agree as follows:

1. **Dismissal of Lawsuit**. Within 5 days of execution of this Mutual Release or the approval of this settlement by the Bankruptcy Court, whichever occurs later, the Parties will file a joint nonsuit of the Lawsuit, with prejudice as to all claims and counterclaims. Each Party shall bear its own share of fees and costs.

2. **Mutual Releases**.

a. **BMS**, on its own behalf and on behalf of its owners, investors, partners, members, managers, managing directors, officers, directors, successors, assigns, predecessors, parent companies, subsidiaries, affiliates, and their respective members, managers, managing directors, officers, directors, employees, personal representatives and agents ("**BMS Releasors**"), hereby fully and finally releases, acquits, and forever discharges **FB** and any and all of its respective affiliates, subsidiaries, owners, investors, and parent companies, and each of their respective officers, agents, directors, executives, and employees ("**FB Released Parties**") with respect to all liabilities, obligations, claims, actions, causes of action, demands, damages, losses, fees, costs and expenses, of any nature whatsoever, whether known or unknown, asserted or unasserted, ascertained or unascertained, suspected or unsuspected, accrued or unaccrued, matured or unmatured, liquidated or contingent, existing or claimed to exist that the **BMS Releasors** have or could have against any of the **FB**

**Released Parties** concerning or relating to the Agreements, and/or the Lawsuit for any alleged conduct or breach of conduct whatsoever ("Released Claims"). Notwithstanding anything to the contrary contained herein, Released Claims shall not include claims to enforce this Mutual Release, and no Party is releasing or being released from any claims, rights or obligations arising under this Mutual Release.

**BMS**, on its own behalf and on behalf of the **BMS Releasors**, agrees and covenants that it is forever barred from initiating, prosecuting, participating in the assertion or prosecution of, maintaining, asserting or seeking to enforce any Released Claim against any of the **FB Released Parties**, whether directly or indirectly, whether on its own behalf or on behalf of any class or any other person or entity, and **BMS** agrees, on its own behalf and on behalf of the **BMS Releasors**, that these releases shall constitute complete defenses to any such Released Claim.

b. **FB**, on its own behalf and on behalf of its owners, investors, partners, members, managers, managing directors, officers, directors, successors, assigns, predecessors, parent companies, subsidiaries, affiliates, and their respective members, managers, managing directors, officers, directors, employees, personal representatives and agents ("**FB Releasors**"), hereby fully and finally releases, acquits, and forever discharges **BMS** and any and all of its respective affiliates, subsidiaries, owners, investors, and parent companies, and each of their respective officers, agents, directors, executives, and employees ("**BMS Released Parties**") with respect to all liabilities, obligations, claims, actions, causes of action, demands, damages, losses, fees, costs and expenses, of any nature whatsoever, whether known or unknown, asserted or unasserted, ascertained or unascertained, suspected or unsuspected, accrued or unaccrued, matured or unmatured, liquidated or contingent, existing or claimed to exist that **FB Releasors** have or could have against any of the **BMS Released Parties** concerning or relating to the Agreements, and/or the Lawsuit for any alleged conduct or breach of conduct whatsoever ("Released Claims"). Notwithstanding anything to the contrary contained herein, Released Claims shall not include claims to enforce this Mutual Release, and no Party is releasing or being released from any claims, rights or obligations arising under this Mutual Release.

**FB**, on its own behalf and on behalf of the **FB Releasors**, agrees and covenants that it is forever barred from initiating, prosecuting, participating in the assertion or prosecution of, maintaining, asserting or seeking to enforce any Released Claim against any of the **BMS Released Parties**, whether directly or indirectly, whether on its own behalf or on behalf of any class or any other person or entity, and **FB** agrees, on its own behalf and on behalf of the **FB Releasors**, that these releases shall constitute complete defenses to any such Released Claim.

3. **Representations and Warranties**. Each Party represents and warrants to the other and agrees with the other as follows:

a. Each Party has carefully read and reviewed this Mutual Release and understands it fully, and each Party has reviewed the terms of this Mutual Release with one or more attorneys of the Party's choice prior to executing this Mutual Release;

b. Each Party specifically is not relying upon any statement, representation,

legal opinion, accounting opinion, or promise, express or implied, of any other Party or of any person representing such other Party in executing this Mutual Release, or in making the settlement provided for herein, except as expressly stated in this Mutual Release;

c. Each Party has made such investigation of the law and the facts pertaining to this Mutual Release, and of all the matters pertaining thereto, as it deems necessary;

d. This Mutual Release is the result of arm's-length negotiation between the Parties;

e. Each Party has full power and authority, and has been duly authorized, to enter into this Mutual Release and consummate the transactions contemplated by this Mutual Release; and

f. The person signing this Mutual Release has the full authority to bind the Party indicated.

4. **Interpretation**. This Mutual Release has been negotiated by the Parties and their respective attorneys and is to be interpreted according to its fair meaning as if the Parties had prepared it together and not strictly for or against any party.

5. **No Reliance**. The Parties acknowledge that they have read and understand the terms of this Mutual Release and have been advised by their respective counsel with respect thereto, understand the significance and consequences of this Mutual Release, have entered into this Mutual Release knowingly and voluntarily, and have not relied, and expressly disclaim any reliance, on any representation, declaration, promise or inducement other than as set forth in this Mutual Release.

6. **Further Actions**. Each Party agrees to execute any additional documents and to take any further action which reasonably may be required to consummate this Mutual Release or otherwise fulfill the intent of the Parties.

7. **Governing Law**. This Mutual Release shall be deemed to have been executed and delivered within the State of Texas, and the rights and obligations of the Parties hereunder shall be construed and enforced in accordance with and governed by the laws of the State of Texas without regard to choice-of-law principles or provisions thereof.

IN WITNESS WHEREOF, the Parties have executed this Mutual Release and Settlement Agreement as of the date first above written.

**Black Mountain Sand, LLC**

By: _____

Name: Hayden Gillespie

Title: CCO

**FB Industries USA, Inc.**

By: _____

Name: Mark C. Skolos

Title: General Counsel / Secretary