Docket #0014 Date Filed: 1/7/2021

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

In re:	§	**Chapter 11**
Hi-Crush Inc., *et al.*,	§	**Case No. 20-33495 (DRJ)**
Debtors.[1]	§	**(Jointly Administered)**
Hi-Crush Permian Sand LLC,	§	
Plaintiff,	§	
v.	§	**Adversary No. 20-3471 (DRJ)**
EOG Resources, Inc.,	§	
Defendant.	§	

HI-CRUSH PERMIAN SAND LLC'S FIRST AMENDED COMPLAINT

Hi-Crush Permian Sand LLC, a reorganized debtor in the above-captioned bankruptcy proceedings and plaintiff in this adversary proceeding ("***Hi-Crush***" or the "***Debtor***") files this First Amended Complaint against EOG Resources, Inc. ("***EOG***"), respectfully stating as follows:

NATURE OF THE ACTION

1. Hi-Crush brings this action to prevent EOG from shirking its contractual obligations and to protect Hi-Crush from losing no less than $45 million as a result of EOG's invalid contract termination and refusal to perform.

[1] The reorganized debtors in the bankruptcy 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.

20334952101120000000000002

2. Hi-Crush seeks declaratory relief and damages because EOG unjustifiably attempted to terminate the long-term Sand Purchase Agreement (defined below) between Hi-Crush and EOG (the "***Parties***"). Specifically, EOG sought to take advantage of Hi-Crush Inc.'s[2] disclosure in a Form 10-Q that Hi-Crush Inc. had defaulted on a ***financial covenant*** in its ABL Credit Facility, which could potentially trigger the acceleration of certain debt and note obligations. Hi-Crush Inc. also disclosed, however, that it and certain affiliates had entered into a forbearance agreement and ABL Credit Facility amendment with its ABL lenders, which forestalled the acceleration of its debt and note obligations. Ignoring the obvious effect of the forbearance agreement and ABL Credit Facility amendment, EOG promptly sought to terminate the Sand Purchase Agreement under an early termination clause premised on Hi-Crush's "insolvency." EOG took the meritless position that Hi-Crush was insolvent even though nothing in the Form 10-Q stated that Hi-Crush was insolvent or unable to pay its debts as they fell due.

3. EOG's actions were a blatant attempt to avoid its firm obligation to purchase significant quantities of sand annually from Hi-Crush at a fixed price (or make specified shortfall payments if it failed to do so). Hi-Crush quickly rejected EOG's purported notice of termination and demanded that EOG perform. But EOG remained entrenched.

4. EOG has refused to perform its purchase obligations not only during 2020, but for the remaining [redacted] years to come. Additionally, EOG has refused to pay Hi-Crush the shortfall amounts owed under the agreement for EOG's failure to purchase requisite quantities of sand during 2020. Because of EOG's blatant breaches, Hi-Crush has sustained millions in damages, which will continue to grow if EOG does not resume performance during 2021. Accordingly, and in addition to monetary damages that accrued at the end of 2020 in the amount of at least

[2] Hi-Crush Inc. is the parent company of Hi-Crush.

$5,360,000, Hi-Crush seeks (i) a declaratory judgment that the Sand Purchase Agreement remains in effect, (ii) a declaratory judgment that Hi-Crush properly assumed the Sand Purchase Agreement under 11 U.S.C. § 365, and (iii) an order requiring EOG's specific performance of its contractual obligations or, in the alternative to specific performance, Hi-Crush requests additional damages for the remainder of the agreement's term, which amount to no less than $40,000,000. Finally, Hi-Crush asserts an alternative cause of action for fraudulent transfer because assuming, *arguendo*, that EOG properly terminated the agreement based on Hi-Crush's "insolvency," the termination deprived Hi-Crush of valuable contract rights and Hi-Crush received nothing in return.

JURISDICTION AND VENUE

5. On July 12, 2020, Hi-Crush Inc. and certain of its affiliates, including Hi-Crush Permian Sand LLC, filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Court" or "Bankruptcy Court").

6. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). This adversary proceeding is commenced pursuant to (i) Bankruptcy Rules 7001(1), 7001(2), 7001(9), (ii) sections 105(a), 365, 544, 548 of the Bankruptcy Code, and (iii) 28 U.S.C. § 2201.

7. Pursuant to Federal Rule of Bankruptcy Procedure 7008 and Bankruptcy Local Rule 7008-1, the Debtor consents to the entry of final orders or judgments by this Court if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

8. The Court has personal jurisdiction over EOG because the actions giving rise to this adversary proceeding occurred in Texas and because EOG has its principal place of business

in Texas.

9. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409.

PARTIES

10. The Debtor is a Delaware limited liability company having its principal place of business at 1330 Post Oak Boulevard, Suite 600, Houston, Texas 77056.

11. Defendant EOG is a corporation organized under the laws of the State of Delaware and registered to do business in the State of Texas, with its principal place of business located at 1111 Bagby Street, Sky Lobby 2, Houston, Texas 77002. EOG has been served with process, and the parties have agreed to extend EOG's deadline to answer or otherwise respond to Plaintiff's First Amended Complaint until January 29, 2021.

FACTUAL BACKGROUND

12. Hi-Crush Inc. and its affiliates, including Hi-Crush, are a leading supplier of premium proppant (also known as "frac sand"), used in hydraulic fracturing of oil and gas wells, and logistics services to exploration and production companies, service companies, and pressure pumping companies. They own and operate six sand production facilities, with four in Wisconsin and two in West Texas. These facilities, coupled with Hi-Crush Inc.'s world-class processing technology and systems, allow Hi-Crush Inc. and its affiliates to provide high-quality proppant to their customers with preferred delivery to all major U.S. shale basins. EOG is one of those customers.

13. EOG is engaged in the exploration and production of hydrocarbons with assets both abroad and in the United States, including in the Permian Basin of West Texas. Upon information and belief, EOG utilizes frac sand during the process of drilling and completing unconventional oil and gas wells.

14. On February 13, 2017, Permian Basin Sand Company, LLC and EOG entered into a Sand Purchase Agreement, which was amended effective June 1, 2018 ("***Sand Purchase Agreement***") (attached hereto as Exhibit 1),[3] and governed by Texas law. Sand Purchase Agreement, ¶ 10. Upon information and belief, EOG entered into the Sand Purchase Agreement in order to obtain a reliable, long-term supply of premium frac sand at fixed prices. Indeed, at that time, EOG locked in frac sand pricing that was substantially below then-current spot prices of $70 - $80 per ton.

15. Weeks later, in what was one of its largest acquisitions ever, Hi-Crush acquired Permian Basin Sand Company, LLC for $275 million (the "***Permian Sand Acquisition***"), which increased Hi-Crush's sand reserves by more than 55 million tons. The Permian Sand Acquisition purchase price was based, in part, on the significant value of the recently-executed Sand Purchase Agreement with EOG.

16. Contemporaneously with the Permian Sand Acquisition and in reliance on EOG's commitments under the Sand Purchase Agreement, Hi-Crush promptly spent approximately $50 million to construct a mining facility that would be used to service EOG, among certain other key customers.

17. With Hi-Crush having invested approximately $325 million and without a dollar invested by EOG, at the time of the mine facility's completion in July 2017, EOG was purchasing sand from Hi-Crush at prices significantly below market prices for delivered sand in the Permian Basin.

[3] The original party to the Sand Purchase Agreement was Permian Basin Sand Company, LLC, which was later acquired by Hi-Crush. In the Parties' June 1, 2018 First Amendment to the Sand Purchase Agreement, they agreed that all references to "Permian Basin Sand Company LLC" throughout the Sand Purchase Agreement shall be replaced by "Hi-Crush Permian Sand LLC" and all references to "PBS" throughout the Sand Purchase Agreement shall be replaced by "Hi-Crush." First Amendment to Sand Purchase Agreement (included with Exhibit 1), Section 1.01.

A. Terms of the Sand Purchase Agreement

18. Under the Sand Purchase Agreement, EOG is required to purchase a minimum amount of [redacted] tons of sand per Contract Year ("***Annual Minimum***") at a purchase price of $[redacted] per ton. Sand Purchase Agreement, ¶¶ 1(a), 2(a)(i). A "Contract Year" is any one calendar year beginning on January 1 and ending on December 31, with the term of the agreement lasting until at least [redacted] (the "***Primary Term***"), subject to extension. *Id.* ¶¶ 1(h)(i), (3)(a).

19. The Sand Purchase Agreement is akin to a "take or pay" agreement. Should EOG fail to purchase and take delivery of the Annual Minimum during any Contract Year, the Sand Purchase Agreement obligates EOG to make annual shortfall payments to Hi-Crush. *See id.* ¶ 2(b). Hi-Crush relied on these shortfall payments to ensure that it would recoup a portion of the $50 million mining facility and $275 million Permian Sand Acquisition investments that Hi-Crush made so that it could obtain business and fulfill sand orders from certain major customers, including EOG.

20. EOG's shortfall payments are calculated based on a contractually-agreed upon formula of "the positive difference, if any, between (A) the Annual Minimum and (B) the amount of Sand that EOG purchased during such Contract Year multiplied by the amount of [redacted] per Ton." *Id.* ¶ 2(b). For further clarity, the Sand Purchase Agreement provides an example of applying that formula: if EOG only purchases and receives [redacted] tons of sand during Contract Year 1, EOG shall pay Hi-Crush [redacted] times [redacted] for a total of [redacted]. *Id.* The Sand Purchase Agreement is, therefore, a highly valuable asset of Hi-Crush because it guarantees Hi-Crush at least $[redacted] annually from EOG even if EOG chooses not to purchase any sand during the Contract Year.

21. Although the Primary Term of the Sand Purchase Agreement extends through [redacted], the agreement contains certain early termination provisions, but only in the event particular events occur or certain accelerated shortfall payments are made. *See, e.g., id.* ¶¶ 3(b), 7(b). In an apparent attempt to avoid making any shortfall payments upon termination, EOG purportedly terminated the Sand Purchase Agreement under Section 7(b), which provides as follows:

> In the event either Party shall (i) make an assignment or any general arrangement for the benefit of creditors; (ii) file a petition or otherwise commence, authorize, or acquiesce in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or have such petition filed or proceeding commenced against it; ***(iii) otherwise become bankrupt or insolvent (however evidenced); (iv) be unable to pay its debts as they fall due; or*** (v) have a receiver, provisional liquidator, conservator, custodian, trustee or other similar official appointed with respect to it or substantially all of its assets, then the other Party shall have the right to immediately terminate this Agreement.

Id. ¶ 7(b) (emphasis added). As explained below, EOG had no basis to rely on Section 7(b).

B. <u>The Parties' Performance</u>

22. For Contract Years 1 and 2, both parties fulfilled their contractual duties, with EOG purchasing and Hi-Crush selling and delivering the Annual Minimum of frac sand. However, at times EOG resisted complying with its purchase obligations as frac sand prices dropped, necessitating significant effort on Hi-Crush's part to ensure EOG's performance. In hindsight, EOG's reluctance to meet its contractual obligations were but a preview of EOG's future conduct.

23. For 2020 (*i.e.*, Contract Year 3), EOG purchased only [redacted] tons of sand, less than half the Annual Minimum. Accordingly, since EOG fell [redacted] tons short of its required Annual Minimum, EOG must pay $5,360,000 in shortfall damages. *See* Sand Purchase Agreement ¶¶ 1(a), 1h(i), 2(b). Additionally, the Sand Purchase Agreement remains in full force and effect for [redacted], through the end of [redacted], obligating EOG to purchase [redacted] tons

of sand annually or pay $[redacted] in annual shortfall payments if it fails to purchase any sand during the remainder of the Primary Term. *Id.* ¶ 3(a).

24. Hi-Crush has always honored its duties under the Sand Purchase Agreement by satisfying all of EOG's frac sand orders. Indeed, given its obligations under the Sand Purchase Agreement and its reliance on EOG's annual minimum volume commitment, Hi-Crush invested approximately $50 million to construct a mining facility on the sand reserves (obtained through the Permian Basin Acquisition) that were used, in part, to satisfy EOG's orders. Hi-Crush remains ready, willing, and able to continue performance of its contractual obligations. In light of recent events, the same cannot be said of EOG.

C. Hi-Crush Inc.'s 10-Q

25. On June 25, 2020, Hi-Crush Inc., the parent of Hi-Crush, filed a quarterly 10-Q for the first quarter of 2020[4] (attached, in relevant part, hereto as Exhibit 2), wherein it provided a narrative of the enterprise's financial situation and expectations for the future. In particular, it described Hi-Crush Inc.'s decrease in borrowing base and associated June 22, 2020 default under the ABL Credit Facility "due to its failure to be in compliance with the springing fixed charge coverage ratio ***financial covenant*** under the ABL Credit Facility." 10-Q at p.11 (emphasis added). In the 10-Q, Hi-Crush Inc. noted that this financial covenant default "***could result*** in the acceleration of all obligations and termination of all commitments thereunder at the option of the lenders" and potentially other Senior Note indebtedness becoming accelerated and due. *Id.* (emphasis added). Moreover, it recognized that there was not sufficient liquidity to pay the

[4] Hi-Crush's Form 10-Q was originally due on May 11, 2020, but Hi-Crush (like other registrants) was permitted by the SEC to delay the filing of its quarterly report for the first quarter of 2020 by 45 days in light of the COVID-19 pandemic.

$450,000,000 principal amount of the Senior Notes (as described therein), "***should they be accelerated***" in the future. *Id.* (emphasis added).

26. However, those debts were not accelerated. Instead, Hi-Crush Inc. and certain of its affiliates entered into a forbearance agreement and amendment to the ABL Credit Facility, whereby the lenders agreed to forebear from exercising default-related rights and remedies. *Id.* In turn, by avoiding acceleration, this forbearance agreement made it easier for Hi-Crush to continue paying debts as they became due in the ordinary course of business.

27. Hi-Crush Inc. also made disclosures in the 10-Q concerning the engagement of advisors and negotiations relating to a potential prearranged bankruptcy filing, and that "[r]egardless of whether the terms and conditions of a prearranged filing can be agreed upon with the debt holders, the Company expects to file for protection from its creditors under the United States Bankruptcy Code." *Id.* at p.12. Hi-Crush Inc. did not disclose a specific date for a bankruptcy filing or indicate that such a filing was imminent.

D. EOG's Improper Termination

28. EOG took note of Hi-Crush's affiliate's 10-Q filing, albeit opportunistically. Two days after the filing and by letter dated June 27, 2020, EOG sent Hi-Crush a purported notice of immediate termination of the Sand Purchase Agreement ("***Termination Notice***") (attached hereto as Exhibit 3). In its letter, EOG attempted to base its termination on Section 7(b)(iii) and 7(b)(iv) of the Sand Purchase Agreement and "Hi-Crush's insolvency and inability to pay its debts as they fall due." *See* Termination Notice.

29. For context, Section 7(b)(iii) and (iv) of the Sand Purchase Agreement provides: "In the event either Party shall . . . (iii) otherwise become bankrupt or insolvent (however

evidenced); [or] (iv) be unable to pay its debts as they fall due . . ., then the other Party shall have the right to immediately terminate this Agreement." Sand Purchase Agreement ¶¶ 7(b)(iii), (iv).

30. As supposed evidence that Hi-Crush was insolvent or unable to pay its debts, EOG referenced the 10-Q's disclosure that the company was in default under its ABL Credit Facility; had entered into a forbearance agreement; "***absent an extension*** of the Forbearance Agreement," would be in default under its Senior Notes "should they be accelerated;" and had "plans to file for bankruptcy." *See* Termination Notice (emphasis added).

31. However, EOG's Termination Notice notably omits the portion of the disclosure wherein the default under the ABL Credit Facility was described as a covenant default, rather than a payment default. Unlike a payment default, a covenant default does not equate to an inability or failure to pay.

32. Likewise, EOG failed to point to any debts that Hi-Crush had failed to pay or was unable to pay when due. This is likely because there were not any debts due or coming due in the near future that Hi-Crush was not able to pay, especially in light of the referenced forbearance agreement that forestalled acceleration of the Senior Notes. Instead, EOG cherry-picked projections from the 10-Q of hypothetical risks – "***absent an extension*** of the Forbearance Agreement," "***should*** they be accelerated" – rather than the actual course of events. Termination Notice (emphasis added).

33. Further, the 10-Q provided no basis for EOG to contend that Hi-Crush Inc. and its affiliates, including Hi-Crush, were insolvent. To the contrary, the consolidated balance sheet in the 10-Q showed that assets exceeded liabilities by over $250,000,000 at the end of the first quarter of 2020. 10-Q at p.4.

34. The 10-Q disclosure relied upon by EOG as the only basis for its termination of the Sand Purchase Agreement is not evidence of insolvency of or inability to pay debts as they fall due by either Hi-Crush Inc. (the entity who filed the 10-Q) or Hi-Crush (the entity who is the counterparty to the Sand Purchase Agreement).

35. Given the baseless nature of EOG's Termination Notice, Hi-Crush disputed it, and rightly so. On July 1, 2020, Hi-Crush sent a letter responding to EOG's Termination Notice ("***Response Letter***") (attached hereto as Exhibit 4) identifying it for what it was – ineffective. "EOG's letter purports, albeit ineffectively, to terminate the Sand Purchase Agreement. . . . The Agreement is still in effect, and Hi-Crush expects EOG to honor its obligations under the Agreement." Response Letter.

36. However, following that Response Letter, EOG has shown no intent to honor its contractual obligations under the Sand Purchase Agreement. EOG has not ordered one ounce of frac sand, has stated that it will not pay any shortfall damages that accrued at the end of 2020, and has objected to Hi-Crush's assumption of the Sand Purchase Agreement under 11 U.S.C. § 365. Despite this, Hi-Crush remains ready, willing, and able to perform.

E. Hi-Crush's Bankruptcy

37. On July 12, 2020, the Debtor filed voluntary petitions in this Court commencing cases for relief under chapter 11 of Title 11 of the United States Code.

38. On September 4, 2020, Hi-Crush included the Sand Purchase Agreement on the *Notice of Cure Amounts* (ECF No. 344) for agreements it intended to assume pursuant to the *Joint Plan of Reorganization for Hi-Crush Inc. and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (the "***Plan***"). Two weeks later, EOG filed an *Objection to Assumption of the*

Sand Purchase Agreement ("***Cure Objection***") (ECF No. 386), contending that the agreement had been terminated pre-petition and could not be assumed.

39. On September 23, 2020, the Court entered an order ("***Confirmation Order***") confirming the Plan. Paragraph 62 of the Confirmation Order preserved the Parties' dispute regarding whether Hi-Crush could assume the Sand Purchase Agreement.[5] Thus, instead of litigating the validity of EOG's Notice of Termination during the pendency of Hi-Crush's bankruptcy proceedings, Hi-Crush and EOG agreed to delay resolution until after Plan confirmation. Hi-Crush now commences this action to address this unresolved issue by seeking a declaratory judgment that Hi-Crush properly assumed the Sand Purchase Agreement and that it remains in full force and effect.

F. <u>EOG Should Not Be Able to Avoid its Contractual Obligations</u>

40. Upon information and belief, EOG's end goal in attempting to terminate the Sand Purchase Agreement was to avoid its fixed, long-term obligations to Hi-Crush so that EOG would be free to purchase lower quantities of frac sand on more favorable terms. While EOG was happy to commit to fixed pricing in 2017 (when spot prices greatly exceeded $[redacted] per ton), EOG now apparently seeks to avoid its firm obligations so that it can purchase frac sand for less than $[redacted] per ton. In order to accomplish this objective, EOG seized upon and contorted a public disclosure in order to manufacture the claim that Hi-Crush was insolvent and unable to pay its debt as they came due. However, EOG's opportunistic attempts should not be rewarded, and certainly should not leave Hi-Crush penalized for disclosing a covenant default and forbearance agreement to the market.

[5] *See, e.g.,* Confirmation Order (ECF No. 420) ¶ 62 ("Notwithstanding any other provision in this Confirmation Order or the Plan to the contrary, nothing in this Confirmation Order or the Plan . . . shall eliminate, alter or impair any of the objections of EOG Resources Inc. . . . including, but not limited to EOG's position that the Sand Purchase Agreement . . . was properly terminated prior to the Petition Date.").

41. Simply put, EOG had no legitimate basis for its contention that Hi-Crush was insolvent or unable to pay its debts as they became due at the time it sent the Termination Notice. These contentions were false and, as a result, EOG's attempt to terminate the Parties' agreement was invalid. Hi-Crush has been damaged by EOG's refusal to perform its obligations under the Sand Purchase Agreement, both for this year and in the [redacted] years to come. Accordingly, Hi-Crush asserts the following claims for relief to remedy the harm EOG has inflicted upon Hi-Crush.

CLAIMS FOR RELIEF

COUNT I

(Declaratory Judgment that EOG's Purported Termination Under Section 7(b) Was Invalid)

42. Hi-Crush realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

43. Under 28 U.S.C. § 2201, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

44. An actual, justiciable controversy exists between Hi-Crush and EOG regarding (i) the validity of EOG's alleged termination of the Sand Purchase Agreement under Section 7(b), and (ii) whether Hi-Crush can assume the Sand Purchase Agreement under 11 U.S.C. § 365 notwithstanding EOG's Termination Notice. This dispute is evidenced by EOG's Termination Notice and Hi-Crush's Response Letter, each of which asserted contradictory positions as to the effect of EOG's Termination Notice, and EOG's Cure Objection.

45. EOG had no right to terminate the Sand Purchase Agreement under Section 7(b), and any attempts to do so were invalid. EOG contends that, at the time of the Termination Notice,

Hi-Crush was insolvent or unable to pay its debts as they fell due. *See* Termination Notice. EOG pointed to Hi-Crush Inc.'s 10-Q filing as the sole support for these brazen claims. But, as described herein, EOG's reliance on the 10-Q was misplaced, and it shows that EOG used the 10-Q as a mere pretext for termination. Indeed, EOG's assertions regarding Hi-Crush's insolvency and inability to pay its debts were baseless assumptions, which were contrary to the then-existing facts and circumstances. In turn, EOG has no support in law for its attempts at terminating the Sand Purchase Agreement under Section 7(b), and Hi-Crush had the right to (and did) assume this agreement.

46. Accordingly, Hi-Crush requests that the Court enter a declaratory judgment holding that:

(i) EOG's attempted termination of the Sand Purchase Agreement under Section 7(b) was invalid;

(ii) The Sand Purchase Agreement remains in full force and effect for the remainder of its Primary Term, as defined therein;

(iii) Hi-Crush had the right to assume the Sand Purchase Agreement under 11 U.S.C. § 365 and did properly assume it during the course of the bankruptcy case;

(iv) The cure amount for Hi-Crush's assumption of the Sand Purchase Agreement is $0; and

(v) Hi-Crush is entitled to its reasonable attorneys' fees and costs as provided for under Section 37.009 of the Texas Civil Practice and Remedies Code, and reasonable attorneys' fees and costs as provided for by Section 17 of the Sand Purchase Agreement.

COUNT II

(Breach of Contract – Sand Purchase Agreement)

47. Hi-Crush realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

48. The Sand Purchase Agreement was a valid, binding, and enforceable agreement between Hi-Crush and EOG.

49. Hi-Crush performed all of its obligations under the Sand Purchase Agreement by selling and delivering sand to EOG, which EOG accepted.

50. EOG breached the Sand Purchase Agreement by refusing to order the Annual Minimum of sand for Contract Year 3 or make requisite shortfall payments. *See* Sand Purchase Agreement, ¶¶ 1(a), 2(b).

51. EOG also breached the Sand Purchase Agreement by purportedly terminating it under Section 7(b) without a valid basis to do so.

52. EOG's breaches injured Hi-Crush, which has sustained damages of at least $5,360,000 for Contract Year 3, plus millions of additional damages that will accrue if the agreement is not assumed and EOG is not compelled to perform throughout the remaining term of the agreement.

53. As pleaded herein, Hi-Crush has performed its obligations under the Sand Purchase Agreement and remains ready, willing, and able to continue to perform under the Sand Purchase Agreement. Accordingly, Hi-Crush seeks specific performance of the Sand Purchase Agreement by EOG for the remainder of the Primary Term.

54. Alternatively, and should EOG not be ordered to specifically perform the remainder of the Primary Term of the Sand Purchase Agreement, then EOG's breach will result in damages of at least $45,000,000.

55. Because of EOG's breach, Hi-Crush seeks and is entitled to its reasonable attorneys' fees and costs as provided for under Chapter 38 of the Texas Civil Practice and Remedies Code, and reasonable attorneys' fees and costs as provided for by Section 17 of the Sand Purchase Agreement.

COUNT III

(In the alternative, Avoidance of Constructively Fraudulent Transfer)

56. Hi-Crush realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

57. As set forth above, Hi-Crush contends that EOG's purported termination of the Sand Purchase Agreement was invalid because Hi-Crush was solvent and able to pay its debts as they came due. However, presuming, *arguendo*, the Court finds that EOG had the right to terminate the Sand Purchase Agreement because Hi-Crush was insolvent, EOG's termination of the Sand Purchase Agreement should be avoided as a constructively fraudulent transfer. *See* 11 U.S.C. §§ 544, 548(a)(1)(B); Tex. Bus. & Comm. Code §§ 24.005(a)(2) and 24.006(a).

58. The term "transfer" is broadly defined to encompass every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property, and the term includes the pre-petition termination of valuable contract rights. *See In re EBC I, Inc.*, 356 B.R. 631, 634 (Bankr. D. Del. 2006).

59. Hi-Crush had valuable contract rights under and property interests in the Sand Purchase Agreement, including the right to be paid an aggregate amount of over $45 million in

shortfall payments during the remaining Primary Term if EOG chose not to order any more sand. *See also* 11 U.S.C. 541(c)(1)(B). These shortfall payments were necessary to ensure that Hi-Crush recouped a portion of the approximately $325 million in investments that it made, in part, in reliance on the Parties' commitments under the Sand Purchase Agreements.

60. Hi-Crush consistently performed its obligations under the Sand Purchase Agreement and, at the time of termination, Hi-Crush stood ready, willing, and able to continue selling sand pursuant to its terms.

61. EOG's termination of the Sand Purchase Agreement constitutes a transfer of Hi-Crush's interests in the Sand Purchase Agreement, depriving Hi-Crush of its right to continue fulfilling sand orders at fixed prices and/or receive shortfall payments if EOG failed to purchase the Annual Minimum.

62. This transfer occurred on June 27, 2020, less than a month before the Petition Date and within the applicable statute of limitations.

63. Hi-Crush received far less than reasonably equivalent value in exchange for the termination of the Sand Purchase Agreement. Specifically, Hi-Crush received nothing, even though it made millions in capital expenditures in order to service and benefit EOG. And Hi-Crush lost valuable contract rights that would have generated at least $45 million during the remaining Primary Term.

64. As noted above, Hi-Crush assumes for the purposes of this alternative cause of action that it was insolvent at the time of the transfer (as alleged by EOG) or became insolvent as a result of the transfer. Hi-Crush asserts this cause of action in the alternative if the Court denies the relief requested in the preceding causes of action.

65. Accordingly, the termination of the Sand Purchase Agreement is an avoidable fraudulent transfer. Hi-Crush is entitled to reinstatement of the Sand Purchase Agreement or, if the Court so orders, return of the value of the agreement from EOG, which is no less than $45 million. *See* 11 U.S.C. § 550(a).

CONDITIONS PRECEDENT

66. All conditions precedent to filing this suit have occurred or have been performed.

PRAYER FOR RELIEF

WHEREFORE, the Debtor respectfully demands judgment against EOG and requests the following relief:

a. Entry of a declaratory judgment that EOG's attempted termination of the Sand Purchase Agreement under Section 7(b) was invalid;

b. Entry of a declaratory judgment that the Sand Purchase Agreement remains in full force and effect for the remainder of its Primary Term, as defined therein;

c. Entry of a declaratory judgment that Hi-Crush had the right to assume the Sand Purchase Agreement under 11 U.S.C. § 365 and did properly assume it during the course of the bankruptcy case;

d. Entry of a declaratory judgment that the cure amount for Hi-Crush's assumption of the Sand Purchase Agreement is $0;

e. Entry of a declaratory judgment that Hi-Crush is entitled to its reasonable attorneys' fees and costs as provided for under Section 37.009 of the Texas Civil Practice and Remedies Code, and attorneys' fees and costs as provided for by Section 17 of the Sand Purchase Agreement;

f. An award of damages in the amount of at least $5,360,000 for EOG's breach of its obligation to buy sand from Hi-Crush and failure to pay shortfall damages for Contract Year 3;

g. Specific performance requiring EOG to perform under the Sand Purchase Agreement for the remainder of the Primary Term, as defined therein; in the alternative, an award of additional damages in the amount of at least $40,000,000 for EOG's refusal to buy its Annual Minimum and failure to pay shortfall damages owed for the remaining term;

h. In the alternative to the relief requested in Counts I and II, a judgment avoiding the termination of the Sand Purchase Agreement and (i) reinstating the Sand Purchase Agreement, or (ii) awarding Hi-Crush the value of the Sand Purchase Agreement, which is no less than $45,000,000.00;

i. Pre- and post-judgment interest, costs of court, and reasonable attorneys' fees incurred in prosecuting this adversary proceeding; and

j. All such other relief as the Court may find just and proper, including but not limited to, equitable relief under 11 U.S.C. § 105.

Dated: January 7, 2021

Respectfully submitted,

/s/ Joseph W. Buoni

Joseph W. Buoni (TX Bar No. 24072009)
Timothy A. ("Tad") Davidson II (TX Bar No. 24012503)
Ashley L. Harper (TX Bar No. 24065272)
Ashley S. Lewis (TX Bar No. 24079415)
HUNTON ANDREWS KURTH LLP
600 Travis Street, Suite 4200
Houston, Texas 77002
Tel: (713) 220-4200
Fax: (713) 220-4285
Email: josephbuoni@huntonak.com
taddavidson@huntonak.com
ashleyharper@huntonak.com
ashleylewis@huntonak.com

Counsel for Plaintiff Hi-Crush Permian Sand, LLC

CERTIFICATE OF SERVICE

I certify that on January 7, 2021, a true and correct copy of the foregoing document was served (i) by the Electronic Case Filing System for the United Stated Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices; and (ii) via electronic mail on counsel for EOG, Sarah Link Schultz, David F. Staber, and Laura Warrick, at sschultz@akingump.com, dstaber@akingump.com, and lwarrick@akingump.com.

/s/ Joseph W. Buoni
Joseph W. Buoni

Exhibit 1

Sand Purchase Agreement

[Filed Under Seal]

Exhibit 2

Hi-Crush Inc.'s 10-Q

Exhibit 3

EOG's Termination Notice

EOG Resources, Inc.
1111 Bagby
Sky Lobby 2
Houston, Texas 77002

P.O. Box 4362
Houston, Texas 77210-4362

VIA EMAIL AND FEDEX

June 27, 2020

Hi-Crush Permian Sand LLC
Attention: General Counsel
1330 Post Oak Blvd, Suite 600
Houston, Texas 77056
Email: legal@hicrush.com

Re: Notice of Termination of Sand Purchase Agreement dated February 13, 2017, and as amended by the First Amendment to Sand Purchase Agreement entered into and effective on June 1, 2018, by and between EOG Resources, Inc. ("EOG") and Hi-Crush Permian Sand LLC, formerly known as Permian Basin Sand Company, LLC ("Hi-Crush") (the "Sand Purchase Agreement") Pursuant to Section 7

To Whom It May Concern:

We write to notify Hi-Crush that EOG hereby terminates the above-referenced Sand Purchase Agreement, effective immediately, pursuant to Section 7(b).

Section 7(b) of the Sand Purchase Agreement provides:

> In the event either Party shall (i) make an assignment or any general arrangement for the benefit of creditors; (ii) file a petition or otherwise commence, authorize, or acquiesce in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or have such petition filed or proceeding commenced against it; (iii) ***otherwise become bankrupt or insolvent (however evidenced)***; (iv) ***be unable to pay its debts as they fall due***; or (v) have a receiver, provisional liquidator, conservator, custodian, trustee or other similar official appointed with respect to it or substantially all of its assets, then the other Party shall have the right to immediately terminate this Agreement.

(Sand Purchase Agreement § 7(b) (emphases added).)

EOG terminates the Sand Purchase Agreement pursuant to subparts (iii) and (iv) of Section 7(b) based on Hi-Crush's insolvency and inability to pay its debts as they fall due.

EOG's right to terminate under Section 7(b) is supported, at a minimum, by Hi-Crush's June 25, 2020 10-Q wherein Hi-Crush described, among other things, the Company's (defined therein as

Hi-Crush Inc. together with its subsidiaries) default under a credit facility and plans to file for bankruptcy.

The 10-Q states that, "Effective June 22, 2020, with the submission of its May 31, 2020 borrowing base certificate under the ABL Credit Facility, the Company was in default under the ABL Credit Facility…" The Company entered into a Forbearance Agreement, under which ABL Lenders have agreed to forbear from exercising default-related rights for a period of time. However, "absent an extension of the Forbearance Agreement, the Company will be in default under [its] Senior Notes, and currently does not have sufficient liquidity to repay the $450,000 principal amount of the Senior Notes, should they be accelerated." These statements demonstrate Hi-Crush's inability to pay its debts as they fall due.

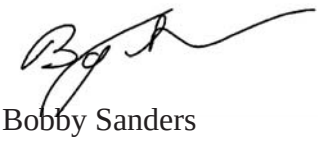
Additionally, Hi-Crush explains in the 10-Q that: "Regardless of whether the terms and conditions of a prearranged filing can be agreed upon with the debt holders, the Company expects to file for protection from its creditors under the United States Bankruptcy Code."

Pursuant to Section 7(e), upon terminating the Agreement pursuant to Section 7(b), EOG shall have "no obligation to make any Shortfall Payment or payment pursuant to Section 3(b)." *See also* Section 3(b)(v) ("The provisions of Section 3(b) shall not apply to a termination by EOG pursuant to Sections 6 (Force Majeure) and/or 7 (Default).")

EOG reserves all rights and remedies available to it.

Sincerely,

EOG Resources Inc.



Bobby Sanders
Director, Shared Services

Exhibit 4

Hi-Crush's Response Letter

July 1, 2020

Via overnight delivery and via e-mail

EOG Resources, Inc.
1111 Bagby
Sky Lobby 2
Houston, Texas 77002

EOG Resources, Inc.
Manager, Shared Services
19100 Ridgewood Parkway, Bldg. 2
San Antonino, TX 78259

Bobby_Sanders@eogresources.com

Attention: Bobby Sanders
Director, Shared Services

Re: EOG's correspondence of June 27, 2020

Dear Mr. Sanders:

Hi-Crush Permian Sand LLC ("Hi-Crush") is in receipt of the letter from EOG Resources ("EOG") dated June 27, 2020. EOG's letter purports, albeit ineffectively, to terminate the Sand Purchase Agreement dated February 13, 2017 (the "Agreement"). The Agreement is still in effect, and Hi-Crush expects EOG to honor its obligations under the Agreement.

Hi-Crush does not waive any rights with this letter.

Sincerely,

Mark C. Skolos
General Counsel/ Secretary
Hi-Crush Inc.