

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)
 :
----- X

**DEBTORS' EMERGENCY MOTION FOR ENTRY OF
ORDER (I) AUTHORIZING PAYMENT OF (A) PREPETITION
CLAIMS OF THE CRITICAL VENDORS AND (B) 503(b)(9) CLAIMS;
(II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS
RELATED CHECKS AND TRANSFERS; AND (III) GRANTING RELATED RELIEF**

**EMERGENCY RELIEF HAS BEEN REQUESTED. A HEARING WILL BE
CONDUCTED ON THIS MATTER ON JULY 13, 2020 AT 3:30 P.M.
PREVAILING CENTRAL TIME IN COURTROOM 400, 4th FLOOR, 515
RUSK STREET, HOUSTON, TX 77002. IF YOU OBJECT TO THE RELIEF
REQUESTED OR YOU BELIEVE THAT EMERGENCY CONSIDERATION
IS NOT WARRANTED, YOU MUST EITHER APPEAR AT THE HEARING
OR FILE A WRITTEN RESPONSE PRIOR TO THE HEARING.
OTHERWISE, THE COURT MAY TREAT THE PLEADING AS
UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

RELIEF IS REQUESTED NOT LATER THAN JULY 13, 2020.

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.



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Please note that on March 24, 2020, through the entry of General Order 2020-10, the Court invoked the Protocol for Emergency Public Health or Safety Conditions.

It is anticipated that all persons will appear telephonically and also may appear via video at this hearing.

Audio communication will be by use of the Court's regular dial-in number. The dial-in number is +1 (832) 917-1510. You will be responsible for your own long-distance charges. You will be asked to key in the conference room number. Judge Jones' conference room number is 205691.

Parties may participate in electronic hearings by use of an internet connection. The internet site is www.join.me. Persons connecting by mobile device will need to download the free join.me application.

Once connected to www.join.me, a participant must select "join a meeting". The code for joining this hearing before Judge Jones is "judgejones". The next screen will have a place for the participant's name in the lower left corner. Please complete the name and click "Notify".

Hearing appearances should be made electronically and in advance of the hearing. You may make your electronic appearance by:

- 1) Going to the Southern District of Texas website;
- 2) Selecting "Bankruptcy Court" from the top menu;
- 3) Selecting "Judges' Procedures & Schedules";
- 4) Selecting "view home page" for Judge David R. Jones;
- 5) Under "Electronic Appearance," select "Click here to submit Electronic Appearance";
- 6) Select "Hi-Crush Inc., et al." from the list of Electronic Appearance Links; and
- 7) After selecting "Hi-Crush Inc., et al." from the list, complete the required fields and hit the "Submit" button at the bottom of the page.

Submitting your appearance electronically in advance of the hearing will negate the need to make an appearance on the record at the hearing.

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

RELIEF REQUESTED

1. By this Motion, the Debtors request entry of an order (the "**Order**"), substantially in the form attached hereto:

- (a) authorizing, but not directing, the Debtors to pay the prepetition fixed, liquidated, and undisputed claims owing to certain essential suppliers of goods and services, with whom the Debtors continue to do business and whose goods and services are critical and essential to the Debtors' operations, including the Software Vendors (as

defined herein), the Support Vendors (as defined herein), and the Temp Agencies (as defined herein) (together, collectively, the “**Critical Vendors**” and such claims, the “**Critical Vendor Claims**”), as more particularly described and on the terms set forth below;

- (b) authorizing, but not directing, the Debtors to pay the prepetition fixed, liquidated, and undisputed claims owing to various vendors from which the Debtors have received certain materials or other goods within the 20 days prior to the Petition Date, the value of which may be entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code (such claimants, the “**503(b)(9) Claimants**” and such claims, the “**503(b)(9) Claims**”);
- (c) authorizing the Debtors’ banks and financial institutions (collectively, the “**Banks**”) to receive, process, honor, pay, and, if necessary, reissue all prepetition and postpetition checks and fund transfers, including prepetition checks and electronic payment and transfer requests that the Debtors reissue or re-request postpetition, on account of obligations owed to the Critical Vendors and 503(b)(9) Claimants; and
- (d) authorizing the Banks to rely on the representations of the Debtors as to which checks and fund transfers should be honored and paid in respect of such obligations, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

2. The Debtors believe that, as of the Petition Date, they owe approximately \$182,000 on account of the Critical Vendors Claims and approximately \$494,000 on account of the 503(b)(9) Claims. As described below, payment of the Critical Vendor Claims and 503(b)(9) Claims is necessary to protect the Debtors’ assets and operations and preserve value for the Debtors’ estates and creditors.²

JURISDICTION AND VENUE

3. The United States Bankruptcy Court for the Southern District of Texas (the “**Court**”) has jurisdiction to consider this Motion under 28 U.S.C. § 1334. This is a core

² Concurrently herewith, the Debtors are seeking authority to pay certain other claims held by prepetition trade creditors pursuant to the *Debtors’ Emergency Motion for Entry of Order Under 11 U.S.S. §§ 105(a), 363(b), 503(b), 506(b), 541, 1107(a), and 1108 and Fed. R. Bankr. P. 6003 (I) Authorizing Debtors to Pay Certain Prepetition Claims of Shippers, Lien Claimants, and Royalty Interest Owners, (II) Confirming Administrative Expense Priority of Undisputed and Outstanding Prepetition Orders, and (III) Granting Related Relief*, filed contemporaneously herewith (the “**Lienholder Motion**”).

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. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), 363(b), 503(b)(9), 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), Rule 9013-1 of the Bankruptcy Local Rules for the Southern District of Texas (the “**Bankruptcy Local Rules**”), and the Procedures for Complex Chapter 11 Cases in the Southern District of Texas (the “**Complex Case Procedures**”).

BACKGROUND

5. 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 J. Philip McCormick, Jr., Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day Declaration**”),³ which is filed with the Court concurrently herewith and is fully incorporated herein by reference.

6. 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 been appointed.

³ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

7. 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.

BASIS FOR RELIEF

A. The Critical Vendor Claims

(i) Payment of the Critical Vendor Claims is in the Best Interests of the Debtors' Estates and Their Creditors

8. As more particularly described in the First Day 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, 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. In order to ensure the success of the Debtors' businesses, the Debtors necessarily rely on certain Critical Vendors that provide the Debtors with critical logistics software, crucial corporate overhead support, and temporary employees necessary to ensure the smooth functioning of the Debtors' businesses. Without the goods and services provided by the Critical Vendors, the Debtors would be unable to generate revenue through the efficient mining, processing, and supply of silica sand to their customers.

9. As further described below, the Debtors believe payment of the Critical Vendor Claims as requested herein is necessary due to the critical nature of the goods and services provided by the Critical Vendors. The Critical Vendors are comprised of vendors that provide either (i) crucial software services (the "**Software Vendors**"), (ii) crucial corporate overhead support vendors (the "**Support Vendors**"), or (iii) essential temporary employee staffing (the "**Temp**

Agencies”). The Software Vendors provide software that is vital to the company’s back-end functions, including accounting, operations, personnel, and many other key functions that are critical to the management of the Debtors’ day-to-day business operations. The Software Vendors also supply certain specialized tracking software that allows the Debtors to accurately manage their supply chain, including tracking sand throughout the shipping process from mining through delivery. The Support Vendors provide integral services with respect to public company reporting, investor relations, and registered agent services for the Debtors’ various entities. The Support Vendors’ services are essential for the Debtors to maintain their corporate and reporting requirements during the pendency of the Debtors’ Chapter 11 Cases. The Temp Agencies provide essential staffing to the Debtors and are frequently used to supplement the Debtors’ workforce by providing low-cost assistance on crucial, short-term projects that otherwise do not require the hiring of full-time employees but are essential to the Debtors’ on-going operations. The Temp Agencies also allow the Debtors to maintain workforce flexibility, supplement the skills of their workforce, and effectively manage costs related to employee wages and benefits.

10. The Critical Vendors provide specialized software, corporate support, and skilled employees that only a handful of vendors that are reasonably accessible to the Debtors have the means or skillset to provide. If these existing Critical Vendors were to stop doing business with the Debtors, it would be difficult for the Debtors to locate acceptable alternative vendors and suppliers. In addition, the software provided by the Software Vendors is highly integrated with the Debtors’ technology systems and the Debtors’ workforce is trained to use such software. Replacing the Software Vendors with alternative providers would require significant time and resources and would likely be cost-prohibitive. As a result, any inability to continue receiving goods or services from these specific vendors would greatly disrupt the Debtors’ businesses.

11. Unless the Debtors are authorized to pay the Critical Vendor Claims, the Debtors believe that the Critical Vendors may refuse to provide critical goods and services, resulting in a material disruption of the Debtors' operations. Such a disruption in operations could lead to a significant loss of business, erosion of goodwill with the Debtors' customers, and deterioration in the value of the Debtors' operations to the detriment of the Debtors' stakeholders.

12. The Debtors request authorization to pay the Critical Vendor Claims, subject to the criteria below, because payment of such claims is necessary to provide operational stability, achieve the Debtors' chapter 11 objectives, and preserve the value of their businesses for the benefit of all stakeholders. Furthermore, and as set forth below, to the extent possible, the Debtors propose to condition the payment of each Critical Vendor Claim on the agreement of the applicable Critical Vendor to continue supplying goods and/or services to the Debtors on the same or better trade terms (including, without limitation, credit limits, pricing, timing of payments, allowances, rebates, discounts, and other applicable terms and programs) than such Critical Vendor offered the Debtors immediately prior to the Petition Date, or, if more favorable, within the sixty-day period prior to the Petition Date (the "Customary Trade Terms"), or pursuant to such other trade practices and programs that are favorable to the Debtors.

(ii) Stringent Criteria Will Be Used to Identify Critical Vendors

13. Certain of the Debtors' employees and professionals who are responsible for maintaining, and have intimate knowledge of, the Debtors' vendor and service provider relationships, have conducted, and will continue to conduct, an extensive analysis and review of the Debtors' immediate needs for goods and services in order to properly identify the Critical Vendors.

14. As part of such analysis and review, the Debtors have used, and will continue to use, the following criteria to determine which of the Debtors' vendors and service providers should

be designated as Critical Vendors: (i) whether the vendor or service provider is a sole-source or limited source provider; (ii) whether the Debtors receive advantageous pricing or other terms from a vendor or service provider such that a postpetition replacement would result in significantly higher costs; (iii) whether quality requirements, geographic constraints, customizations, or other specifications prevent the Debtors from obtaining the necessary goods or services from alternative sources within a reasonable timeframe; (iv) if the vendor is not a sole source provider, whether the Debtors have insufficient inventory of goods or in-house capabilities to continue operations while a replacement is found; (v) whether the Debtors can afford the time and expense of an enforcement action if a vendor or service provider that is contractually obligated to continue to provide goods and services to the Debtors wrongfully refuses to perform; (vi) whether a vendor's prepetition claim is entitled to administrative expense status under section 503(b)(9) of the Bankruptcy Code; and (vii) whether a vendor or service provider meeting any of the aforementioned standards in (i) through (vi) refuses to, demands pricing or trade terms that constitute an effective refusal to, or is likely financially unable to, provide goods or services to the Debtors on a postpetition basis if the prepetition balances are not paid. The Debtors are confident that this process will result in designating only those vendors and service providers that are truly critical to the Debtors' estates as Critical Vendors.

(iii) Types of Goods and Services Giving Rise to Critical Vendor Claims Evidences Necessity for Payment

15. Among the Critical Vendors identified by the Debtors are certain providers of essential goods and services that the Debtors rely upon in the operation of their businesses. These vendors are critical to the Debtors' businesses because they (i) provide specialized services to the Debtors that are vital to the Debtors' operations, including crucial corporate overhead support, (ii)

provide computer software that is highly-integrated into the Debtors' existing technology systems, (iii) are located near the Debtors' operations, or (iv) provide some combination of the foregoing.

16. For instance, as noted previously, the services provided by the Critical Vendors are crucial to ensuring the Debtors' ability to effectively run their businesses. If the Critical Vendors cut off access to their services, the Debtors would be immediately harmed and would face significant repercussions. For example, if the Software Vendors ceased providing services to the Debtors, the Debtors' key systems would be significantly impaired, resulting in costly and unnecessary disruptions to the Debtors' payroll, accounting, and other essential operations. If the Support Vendors ceased providing services to the Debtors, the Debtors' ability to continue operating in compliance with various regulatory requirements would be severely impaired, and finding replacement vendors would be prohibitively costly and/or burdensome. And, if the Temp Agencies stop providing the Debtors with temporary staffing, certain projects that require short timelines or specialized tasks would be unachievable or otherwise cost the Debtors significant amounts of money to complete. Without access to the services provided by the Critical Vendors, the Debtors' revenue streams would be adversely impacted and the relationships with their customers could be damaged.

17. Finding replacements for the Critical Vendors would be challenging, costly, and could interrupt the Debtors operations if they are unable to locate replacements on a timely basis. Certain Critical Vendors may be the only provider, or one of only a handful of providers, that can provide, are licensed to provide, or are in close enough proximity to the Debtors to provide, the required services. Moreover, even if another vendor could ultimately be obtained, there would be substantial delay in switching vendors. With respect to the Software Vendors in particular, the Debtors would be required to expend material time and resources replacing the software on their

systems and training their workforce to use the alternative software. As a result, (i) it would be more expensive and, in certain instances, cost-prohibitive to locate a new vendor, and (ii) replacement of the vendor could result in curtailment or serious delays to the Debtors' operations.

18. The Critical Vendors satisfy the criteria described above. The Debtors believe that there is a high likelihood that the Critical Vendors will refuse to continue to do business with the Debtors if their outstanding prepetition claims are not paid. Any refusal by the Critical Vendors to provide essential goods or perform key services would have immediate and severe adverse repercussions, including jeopardizing or impairing the value of the Debtors' businesses. The Debtors maintain that paying the Critical Vendor Claims is both necessary and essential to their ability to achieve their chapter 11 objectives and preserve value for their various constituencies. The Debtors believe that approximately \$182,000 is owed to Critical Vendors as of the Petition Date.

(iv) Proposed Terms and Conditions for Payment of Critical Vendor Claims

19. The Debtors will attempt to condition the payment of Critical Vendor Claims on the agreement of individual Critical Vendors to continue supplying goods or services to the Debtors on Customary Trade Terms. The Debtors reserve the right to negotiate new trade terms (the "**Minimum Credit Terms**") with any Critical Vendor as a condition to payment of any Critical Vendor Claim, in the Debtors' sole discretion.

20. To ensure that the Critical Vendors transact with the Debtors on either Customary Trade Terms or Minimum Credit Terms, the Debtors propose that a letter agreement (a "**Trade Agreement**")⁴ substantially in the form attached hereto as Exhibit A be sent to the Critical Vendors for execution, together with a copy of the Order granting this Motion.

⁴ The Debtors' entry into a Trade Agreement will not change the nature or priority of the underlying Critical Vendor Claims and will not constitute an assumption or rejection of any executory contract or prepetition or

21. The Debtors propose that each Trade Agreement include, without limitation:

- (i) the amount of the relevant Critical Vendor's estimated Critical Vendor Claims, as applicable, accounting for any setoffs, other credits, and discounts thereto; *provided, however*, such amount shall be used only for the purposes of determining such Critical Vendor's claim subject to the Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Court;
- (ii) the Customary Trade Terms or Minimum Credit Terms applicable to such Critical Vendor, or such other terms as the Critical Vendor and the Debtors may agree, and the Critical Vendor's agreement to provide goods or services to the Debtors under such terms for the duration of the Chapter 11 Cases unless the Debtors fail to make timely payments under the agreed-upon trade terms;
- (iii) the Critical Vendor's agreement not to file or otherwise assert, directly or indirectly, against any or all of the Debtors, their estates, or any of their respective assets or property (real or personal), any Lien, a claim for reclamation (a "**Reclamation Claim**"), or a claim asserted under section 503(b)(9) of the Bankruptcy Code, regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or claim under section 503(b)(9) of the Bankruptcy Code may be asserted, related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date; and, to the extent the Critical Vendor, as applicable, has already obtained or otherwise asserted such a Lien, Reclamation Claim, or claim asserted under section 503(b)(9) of the Bankruptcy Code, the Critical Vendor shall take (at such vendor's own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or claim asserted under section 503(b)(9) of the Bankruptcy Code, unless the Critical Vendor's participation in the program to pay Critical Vendor Claims authorized by the Order is terminated;
- (iv) the Critical Vendor's agreement not to file a motion to compel assumption or rejection of any contract under which the Critical Vendor Claim arises; and
- (v) the Critical Vendor's acknowledgment that it has reviewed the terms and provisions of the Order sought hereby and is bound thereby.

postpetition agreement between the Debtors and a Critical Vendor.

22. By this Motion, the Debtors request only the authorization to enter into Trade Agreements when the Debtors determine, in their sole discretion, that payment of such Critical Vendor Claims is necessary to enable the Debtors to realize their chapter 11 objectives and that such Trade Agreements are advisable. The Debtors also request authorization to make payments on account of Critical Vendor Claims in the absence of a Trade Agreement if the Debtors determine, in their business judgment, that the failure to pay such Critical Vendor Claims will result in harm to the Debtors' businesses.⁵

23. In the event that a Critical Vendor party to a Trade Agreement refuses to supply goods and/or services to the Debtors on Customary Trade Terms or Minimum Credit Terms (or such other terms as are agreed by the parties) following receipt of payment on its Critical Vendor Claim, or otherwise fails to comply with its Trade Agreement with the Debtors, the Debtors reserve their rights to return the parties to the positions they held immediately prior to entry of the Order approving this Motion with respect to all prepetition claims. Further, the Debtors reserve their rights to and may seek approval of the Court to: (i) declare that any Trade Agreement between the Debtors and any Critical Vendor is terminated; (ii) declare that payments made to such Critical Vendor on account of its Critical Vendor Claims be deemed to have been in payment of then-outstanding (or subsequently accruing) postpetition claims of such Critical Vendor without further order of the Court or action by any person or entity; and (iii) recover or seek disgorgement of any payment made to such Critical Vendor on account of its Critical Vendor Claims to the extent that such payments exceed the value of the postpetition claims of such Critical Vendor, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or

⁵ Nothing in this Motion should be construed as a waiver by any of the Debtors of their rights to contest any claim of a Critical Vendor under applicable bankruptcy or non-bankruptcy law.

other defense. In addition, the Debtors reserve the right to seek damages or other appropriate remedies against any breaching Critical Vendor.

24. The Debtors further propose that any Trade Agreement terminated as a result of a Critical Vendor's refusal to comply with the terms thereof may be reinstated if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five business days following the Debtors' notification to the Critical Vendor of such a default; or the Debtors, in their sole discretion, reach a favorable alternative agreement with the Critical Vendor.

B. 503(b)(9) Claims

25. In the ordinary course of business, the Debtors have received certain materials or other goods, other than the goods specifically discussed in the Lienholder Motion, from the 503(b)(9) Claimants within the 20 days prior to the Petition Date, which are entitled to priority under section 503 of the Bankruptcy Code. Many of the Debtors' relationships with the 503(b)(9) Claimants are not governed by long-term contracts. Rather, the Debtors often obtain supplies on an order-by-order basis. As a result, a 503(b)(9) Claimant may refuse to supply new orders without payment of its prepetition claims, to the detriment of the Debtors' operations. As discussed further herein, payment of the 503(b)(9) Claims now only provides the 503(b)(9) Claimants with what they would ultimately be entitled to receive under a chapter 11 plan. Accordingly, the Debtors seek authority to pay the 503(b)(9) Claims in order to continue the operation of their businesses uninterrupted postpetition and ensure a smooth transition into chapter 11.

26. The Debtors believe that as of the Petition Date, they owe approximately \$494,000 on account of the 503(b)(9) Claims.

APPLICABLE AUTHORITY

27. The relief requested in this Motion is supported by several provisions of the Bankruptcy Code that authorize a debtor to honor prepetition obligations in certain circumstances. Courts have recognized each of these statutory provisions as valid authority for such payments.

A. The Court Should Authorize Payment of the Critical Vendor Claims as a Valid Exercise of the Debtors' Fiduciary Duties

28. Authority for the payment of the Critical Vendor Claims is found in sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors, operating their businesses as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor-in-possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.*

29. The *CoServ* court held that there are instances in which a debtor-in-possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* That court specifically held that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate,” and also when the payment was to “sole suppliers of a given product.” *Id.* at 497-98. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id.; see also *In re Scotia Dev., LLC*, No. 07-20027, 2007 WL 2788840, at *2 (Bankr. S.D. Tex. Sep. 21, 2007) (outlining the factors for when a critical vendor payment is necessary); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (“The ability of a Bankruptcy Court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.”).

30. Payment of the Critical Vendor Claims meets each element of the *CoServ* court’s standard. As described above, the Debtors have narrowly tailored the list of Critical Vendors to include those vendors and service providers that satisfy the criteria described above. The disruption of the Debtors’ operations would cause the Debtors’ estates to lose revenue, which could negatively impact the Debtors’ ability to achieve their chapter 11 objectives. The potential harm and economic disadvantage that would stem from the failure of any of the Critical Vendors to perform is grossly disproportionate to the amount of the prepetition claims that may be paid. Finally, with respect to each Critical Vendor, the Debtors have examined other options in place of payment of Critical Vendor Claims and have determined that, to avoid significant disruption of the Debtors’ business operations, there exists no practical or legal alternative to payment of the Critical Vendor Claims. Therefore, the Debtors can only meet their fiduciary duties as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of the Critical Vendor Claims.

B. The Court May Authorize Payment of the Critical Vendor Claims Under Sections 363 and 364 of the Bankruptcy Code

31. Additional authorization for the payment of the Critical Vendor Claims may be found through reliance on sections 363 and 364 of the Bankruptcy Code. With respect to the former, section 363(b)(1) of the Bankruptcy Code authorizes the trustee to use property of the estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. §

363(b)(1). Courts in the Fifth Circuit have indicated that the use of property of the estate outside of the ordinary course of business is proper where the debtor in possession has articulated a good business reason for such use. *See Institutional Creditors of Cont'l Airlines, Inc. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (holding that Section 363(b) requires that “there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business”); *In re Crutcher Res. Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987) (“A Bankruptcy Judge has considerable discretion in approving a § 363(b) sale of property of the estate other than in the ordinary course of business, but the movant must articulate some business justification for the sale”); *In re Terrace Gardens Park P’ship*, 96 B.R. 707, 714 (Bankr. W.D. Tex. 1989) (applying Continental to require “articulated business justification” for section 363 transaction). Where a debtor has articulated a valid business justification for a proposed transaction, courts generally apply the business judgment rule in evaluating such transaction. *See ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO L.L.C.)*, 650 F.3d 595, 601 (5th Cir. 2011) (“Section 363 of the Bankruptcy Code addresses the debtor’s use of property of the estate and incorporates a business judgment standard The business judgment standard in section 363 is flexible and encourages discretion”). Courts emphasize that the business judgment rule is not an onerous standard. “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 (N.D. Tex. 2005). As long as a transaction “appears to enhance a debtor’s estate, court approval of a debtor-in-possession’s decision to [enter into the transaction] should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the Bankruptcy Code.” *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) (citation and internal quotation marks omitted).

32. Courts have relied on such subsection to authorize the payment of prepetition claims held by vendors. *See, e.g., In re MPC Computers, LLC*, No. 08-12667 (PJW) (Bankr. D. Del. Nov. 10, 2008) (authorizing, pursuant to § 363, the payment of prepetition claims of some suppliers); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (district court affirmed bankruptcy court’s decision under section 363 of the Bankruptcy Code authorizing contractor to pay prepetition claims of some suppliers who were potential lien claimants).

33. Similarly, where, as here, the relief at issue involves a request impacting the trade terms among the Debtors and the vendor, the relief may, where the appropriate showing has been made, be approved pursuant to section 364 of the Bankruptcy Code. *See In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002) (essential trade motion relying upon section 363 of the Bankruptcy Code is consistent with the Bankruptcy Code; payments to critical trade vendors have further support when debtor seeks the extension of credit under section 364 on terms that include the payment of a prepetition obligation).

34. The relief requested in this Motion contemplates payments to be made to Critical Vendors who agree to provide goods or services on Customary Trade Terms or Minimum Credit Terms, to the extent possible. As a result, the payment of such Critical Vendor Claims is consistent with and appropriate under sections 363 and 364 of the Bankruptcy Code. As detailed above, the goods and services provided by the Critical Vendors are vital to the Debtors’ continuing business operations.

C. The Court May Rely on the “Necessity of Payment” Doctrine and its General Equitable Powers to Grant the Motion

35. The relief sought is further supported by the “doctrine of necessity.” The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of

certain prepetition claims prior to the completion of the chapter 11 case where the payment of such claims is necessary to the debtor's restructuring efforts. *CoServ*, 273 B.R. at 497 (stating that "this Court is prepared to apply the Doctrine of Necessity to authorize payment of prepetition claims in appropriate cases."); *In re Mirant Corp.*, 296 B.R. 427 (Bankr. N.D. Tex. 2003) (citing *CoServ*).

36. The Court's power to utilize the doctrine of necessity in chapter 11 cases derives from the Court's inherent equity powers and its statutory authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport, C. & S.W. R. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court's reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry.*, 657 F.2d 570, 581-82 (3d Cir. 1981) ("[I]n order to justify payment under the 'necessity of payment' rule, a real and immediate threat must exist that failure to pay will place the [debtor's] continued operation . . . in serious jeopardy.").

37. The Debtors submit that the requested relief represents a sound exercise of the Debtors' business judgment, is justified under the legal precedent described above, and is in line with the relief granted in this Court and in other courts. The Debtors and their professional advisors have, from the outset of this process, developed a rigorous process to identify Critical Vendors and ensure that payments are only made to vendors that are truly critical and pose a material risk of nonperformance postpetition. The relief requested provides a material benefit to creditors that are

not Critical Vendors as it will enhance the value of the Debtors' estates by ensuring that critical goods and services continue to be supplied on a postpetition basis on terms that will permit the Debtors to continue operations without significant interruption. If the Motion is not granted and certain Critical Vendors refuse to perform key services or supply essential goods, the Debtors' business operations could be severely impacted or they could be forced to spend significant time and money procuring replacements. The authority to pay Critical Vendor Claims as set forth herein is therefore necessary to maximize the value of the estates by ensuring that the Debtors continue to receive essential goods and services that are actually or practically unavailable from other sources while preserving critical relationships with key vendors and customers.

D. Payment of Certain of the Critical Vendor Claims is Justified Under Section 503(b)(9) of the Bankruptcy Code and the Court Should Authorize Payment of Claims Entitled to Priority Pursuant to Section 503(b)(9) of the Bankruptcy Code as Provided Herein

38. Certain of the Critical Vendors may have 503(b)(9) Claims for goods delivered to and received by the Debtors within 20 days before the Petition Date (the "**20-Day Goods**"). Section 503(b)(9) of the Bankruptcy Code provides administrative priority for the "value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9). These claims must be paid in full for the Debtors to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A). Consequently, payment of such claims now only provides such parties with what they would be entitled to receive under a chapter 11 plan.

39. Additionally, bankruptcy courts have held that the timing of the payment of administrative expenses allowed under section 503(b)(9) is within the discretion of the court. *See In re Tubular Techs., LLC*, 372 B.R. 820, 824 & n.4 (Bankr. D.S.C. 2007) (bankruptcy court may determine when section 503(b)(9) claim is paid); *In re Bookbinders' Rest., Inc.*, Case No. 06-12302, 2006 WL 3858020, at *3-4 (Bankr. E.D. Pa. Dec. 28, 2006) (timing of the payment of

section 503(b)(9) claim “is within the discretion of the bankruptcy court.”); *In re Global Home Prods., LLC*, No. 06-10340 (KG), 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (agreeing with parties that “the timing of the payment of that administrative expense claim is left to the discretion of the Court”). Thus, the Debtors submit that, under the circumstances, it would be appropriate for the Court to exercise its discretion to allow Critical Vendor Claims for 20-Day Goods to be paid in the ordinary course.

40. Further, the Debtors’ ongoing ability to obtain goods as provided herein is key to their survival and necessary to preserve the value of their estates. Absent their authority to pay 503(b)(9) Claims, in addition to Critical Vendor Claims for 20-Day Goods, at the outset of these Chapter 11 Cases—which merely accelerates the timing of payment and not the ultimate treatment of such claims—the Debtors could be denied access to the equipment and goods necessary to maintain the Debtors’ business operations. Failure to honor these claims in the ordinary course of business may also cause the Debtors’ vendor base to withhold support for the Debtors during the chapter 11 process. Such vendors could accelerate or eliminate favorable trade terms. Needless to say, such costs and distractions could impair the Debtors’ ability to stabilize their operations at this critical juncture to the detriment of all stakeholders. Accordingly, authorizing payment of the 503(b)(9) Claims and the payment Critical Vendor Claims for 20-Day Goods is in the best interest of the Debtors, their estates, and all parties in interest.

E. Cause Exists to Authorize the Debtors’ Financial Institutions to Honor Checks and Electronic Fund Transfers

41. The Debtors have sufficient funds to pay the Critical Vendor Claims and 503(b)(9) Claims described herein in the ordinary course of business by virtue of cash on hand and expected cash flows from ongoing business operations, including any debtor in possession financing. In addition, under the Debtors’ existing cash management system, the Debtors can readily identify

checks or wire transfer requests relating to an authorized payment in respect of the Critical Vendor Claims and 503(b)(9) Claims. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and that the Court should authorize the Banks, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested herein, solely to the extent that the Debtors have sufficient funds on deposit at such Banks to cover such payments, and such Banks may rely on the representations of the Debtors without any duty of further inquiry and without liability for following the Debtors' instructions.

EMERGENCY CONSIDERATION

42. Pursuant to Bankruptcy Local Rule 9013-1(i), the Debtors respectfully request emergency consideration of this Motion pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one (21) days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm." The Debtors believe an immediate and orderly transition into chapter 11 is critical to the viability of their operations and the success of the Chapter 11 Cases. As discussed in detail above and in the First Day Declaration, immediate and irreparable harm would result if the relief requested herein is not granted. Authorizing the Debtors to pay the Critical Vendor Claims and the 503(b)(9) Claims is vital to the Debtors' ability to continue to provide their goods and services on a timely basis to their customers and to maximize value for all stakeholders during their reorganization. The continuity and viability of the Debtors' business operations relies heavily on the uninterrupted delivery of the critical goods and services delivered by the Critical Vendors and 503(b)(9) Claimants. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 as well as the requirements of Bankruptcy

Local Rule 9013-1(i) and, therefore, respectfully request that the Court approve the relief requested in this Motion on an emergency basis.

BANKRUPTCY RULE 6004 SHOULD BE WAIVED

43. To the extent that any aspect of the relief sought herein constitutes a use of property under section 363(b) of the Bankruptcy Code, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors request in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their businesses and preserve the value of their estates. The Debtors respectfully request that the Court waive the notice requirements imposed by Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

RESERVATION OF RIGHTS

44. Nothing contained herein is or should be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute a Critical Vendor Claim, a 503(b)(9) Claim, or an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to the proposed Order once entered. Nothing contained in the Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

NOTICE

45. 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 that certain ad hoc group of holders of prepetition senior notes (the "**Ad Hoc Group**") (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; and (xi) 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.

46. 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' proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, at www.kccllc.net/hicrush.

[Remainder of page intentionally left blank]

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

Signed: July 12, 2020
Houston, Texas

Respectfully Submitted,

/s/ Timothy A. ("Tad") Davidson II
Timothy A. ("Tad") Davidson II (TX Bar No. 24012503)
Ashley L. Harper (TX Bar No. 24065272)
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- and -

George A. Davis (*pro hac vice* admission pending)
Keith A. Simon (*pro hac vice* admission pending)
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Proposed Counsel for the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I certify that on July 12, 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

EXHIBIT A

Trade Agreement

_____, 2020

TO: [Critical Vendor]
[Name]
[Address]

Trade Agreement

As you may be aware, on July 12, 2020 (the "**Petition Date**"), Hi-Crush Inc., together with certain of its affiliates (collectively, the "**Debtors**"), filed voluntary petitions to commence cases (the "**Bankruptcy Cases**") under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas (the "**Bankruptcy Court**"). On the Petition Date, we requested the Bankruptcy Court's authority to pay certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers. On [____], 2020, the Bankruptcy Court entered an order (the "**Order**") authorizing us, under certain conditions, to pay in the ordinary course prepetition claims of certain vendors and service providers that agree to be bound by the terms of the Order and to the terms set forth below. A copy of the Order is enclosed.

To receive payment in the ordinary course on pre-bankruptcy claims, we require you to agree to supply goods and/or services to the Debtors based on "Customary Trade Terms." Customary Trade Terms are trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date or, if more favorable, that existed within the sixty-day period prior to the Petition Date.

For purposes of administration of this trade program as authorized by the Bankruptcy Court (the "**Trade Payment Program**"), the Debtors and you agree as follows:

1. For purposes of this Trade Agreement, the estimated balance of your prepetition claim (accounting for any setoffs, credits or discounts) (the "**Prepetition Claim**") is \$[_____]. The Prepetition Claim will be paid as follows: [_____].
2. The open trade balance or credit line you will extend shall be on normal and customary terms on a historical basis for the period prior to the Petition Date or, if more favorable, within the sixty-day period prior to the Petition Date.
3. In consideration for the payment described herein, you agree not to file or otherwise assert, directly or indirectly, against any or all of the Debtors, their estates, or any of their respective assets or property (real or personal), any lien (a "**Lien**"), a claim for reclamation (a "**Reclamation Claim**"), or a claim under section 503(b)(9) of the Bankruptcy Code (a "**503(b)(9) Claim**"), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date. Any holders of potential 503(b)(9) Claims reserve all of their rights with respect to such claims until such claims are paid in full.

4. You will hereafter extend to the Debtors all Customary Trade Terms, which are:

[ADD INDIVIDUALIZED SET OF CUSTOMARY TRADE/SERVICE TERMS OR ATTACH/CROSS-REFERENCE TERM FROM EXISTING AGREEMENT]

Payment of your Prepetition Claim in the manner set forth in the Order may occur upon execution of this letter by a duly authorized representative of your company and the return of this letter to the Debtors. Your execution of this letter agreement and the return of the same to the Debtors constitute an agreement by you and the Debtors:

- (a) to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Prepetition Claim set forth above;
- (b) that, for at least during the pendency of the Bankruptcy Cases, you will continue to supply the Debtors with goods and/or services under the Customary Trade Terms and any terms set forth herein and that the Debtors will pay for such goods and/or services in accordance with the terms hereof;
- (c) that you have reviewed the terms and provisions of the Order and acknowledge that you are bound by such terms;
- (d) that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Prepetition Claim will be deemed to have been in payment of postpetition obligations owed to you, and the Debtors may take any and all appropriate steps to cause you to repay payments made to you on account of your Prepetition Claim to the extent that such payments exceed the postpetition amounts then owing to you, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense; and
- (e) that the Debtors reserve all of their rights with respect to such claims.

The Debtors and you also hereby agree that any dispute with respect to this agreement, the Order and/or your participation in the Trade Payment Program shall be determined exclusively by the Bankruptcy Court.

Please indicate your agreement to the terms hereof by returning a signed copy of this letter to [Name] at (____)_____ or [Name] at (____)_____.

Sincerely,

[Debtor]

By:

Its:

Agreed and Accepted by:

[Name of Critical Vendor/Service Provider]

By:

Its:

Dated:

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

	X	
In re:	:	Chapter 11
	:	
HI-CRUSH INC., <i>et al.</i> , ¹	:	Case No. 20-33495 (DRJ)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

**ORDER (I) AUTHORIZING PAYMENT OF (A) PREPETITION
CLAIMS OF THE CRITICAL VENDORS AND (B) 503(b)(9) CLAIMS;
(II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS
RELATED CHECKS AND TRANSFERS; 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, but not directing, the Debtors to pay, in the ordinary course of business, the prepetition fixed, liquidated, and undisputed claims of (a) the Critical Vendors, subject to the conditions described in the Motion, and (b) the 503(b)(9) Claimants, (ii) authorizing financial institutions to honor and process related checks and transfers, and (iii) granting certain related relief; and the Court having reviewed the Motion and the First Day Declaration; 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

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 shall have the meanings ascribed to such terms in the Motion.

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 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 this Order, it is hereby

ORDERED THAT:

1. The Debtors are authorized, but not directed, in their sole discretion, to pay, or cause to be paid, the Critical Vendor Claims of the Critical Vendors, subject to the terms and conditions of this Order.

2. The Debtors are authorized, but not directed, to undertake appropriate efforts to cause the Critical Vendors to enter into a Trade Agreement with the Debtors substantially similar to the form attached as Exhibit A to the Motion, as a condition of payment of each Critical Vendor Claim.

3. If a Critical Vendor, whether under a Trade Agreement or otherwise, refuses to supply goods and/or services to the Debtors on Customary Trade Terms or Minimum Credit Terms (or such other terms as are agreed by the parties) following receipt of payment on its Critical Vendor Claims or otherwise fails to comply with any Trade Agreement entered into between such Critical Vendor and the Debtors, then the Debtors reserve their rights to take any and all actions necessary to return the parties to the positions they held immediately prior to entry of this Order with respect to all prepetition claims, including but not limited to: (i) declaring that any Trade Agreement between the Debtors and such Critical Vendor is terminated; (ii) declaring that

payments made to such Critical Vendor on account of its Critical Vendor Claims shall be deemed to have been made in payment of then-outstanding (or subsequently accruing) postpetition claims of such Critical Vendor without further order of the Court or action by any person or entity; and (iii) recovering or seeking disgorgement of any payment made to such Critical Vendor on account of its Critical Vendor Claims to the extent that such payments exceed the value of the postpetition claims of such Critical Vendor, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense. Nothing herein shall constitute a waiver of the Debtors' rights to seek damages or other appropriate remedies against any breaching Critical Vendor.

4. Notwithstanding the foregoing, the Debtors may, in their sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five business days following the Debtors' notification to the Critical Vendor that such default has occurred or the Debtors, in their sole discretion, reach a favorable alternative agreement with the Critical Vendor.

5. The amount of each Critical Vendor Claim set forth in connection with a Trade Agreement shall be used only for purposes of determining such Critical Vendor Claim for purposes of this Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to the allowance of such claim shall be fully preserved until further order of the Court. Further, signing a Trade Agreement containing a claim amount for purposes of this Order shall not excuse such Critical Vendor from filing a proof of claim in these cases.

6. No claimant who receives payment in full on account of a Critical Vendor Claim is permitted to, with respect to such Critical Vendor Claim, file or perfect a Lien on account of such claim, assert a Reclamation Claim, and/or assert a 503(b)(9) Claim, and any such claimant shall

take all necessary action, at its expense, to remove any existing Lien relating to such claim, and to withdraw any Reclamation Claim or 503(b)(9) Claim, on account of such claim.

7. The Debtors are authorized, but not directed, in their sole discretion, to pay, or cause to be paid, the 503(b)(9) Claims of the 503(b)(9) Claimants or Critical Vendors.

8. Each of the Banks at which the Debtors maintain their accounts relating to the payment of the Critical Vendor Claims and 503(b)(9) Claims are authorized to: (i) receive, process, honor, and pay all checks presented for payment and to honor all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in those accounts; and (ii) accept and rely on all representations made by the Debtors with respect to which checks, drafts, wires, or automated clearing house transfers should be honored or dishonored in accordance with this or any other order of the Court, whether such checks, drafts, wires, or transfers are dated prior to, on, or subsequent to the Petition Date, without any duty to inquire otherwise.

9. The Debtors are authorized, but not directed, to issue new postpetition checks, or effect new electronic funds transfers, on account of the Critical Vendor Claims and 503(b)(9) Claims as set forth herein and to replace any prepetition checks or electronic fund transfer requests that may be lost or dishonored or rejected as a result of the commencement of the Debtors' Chapter 11 Cases.

10. Notwithstanding anything to the contrary contained herein, (i) any payment made, or to be made, or authorization contained hereunder shall be subject to the requirements imposed on the Debtors under any order approving a postpetition financing facility or any order regarding the use of cash collateral approved by this Court in these Chapter 11 Cases (collectively, the "**DIP Orders**"), and (ii) to the extent there is any inconsistency between the terms of the DIP Orders and any action taken or proposed to be taken hereunder, the terms of the DIP Orders shall control.

For the avoidance of doubt, the Debtors are not authorized to make any payments pursuant to this Order except as permitted by the Budget (as defined in the DIP Orders).

11. The Debtors shall maintain a matrix/schedule of amounts directly or indirectly paid, subject to the terms and conditions of this Order, including the following information: (a) the names of the payee; (b) the amount of the payment; (c) the category or type of payment, as further described and classified in the Motion; (d) the Debtor or Debtors that made the payment; and (e) the payment date. The Debtors shall provide a copy of such matrix/schedule to the U.S. Trustee, the Ad Hoc Group, and any statutory committee appointed in these Chapter 11 Cases every 30 days beginning upon entry of this Order.

12. Nothing in the Motion or this Order, or the Debtors' payment of any claims pursuant to this Order, shall be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim, a Critical Vendor Claim or a 503(b)(9) Claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Order. Nothing contained in this Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

13. Nothing in the Motion or this Order, nor the Debtors' implementation of the relief granted in this Order, shall be deemed to modify or waive any of the Debtors' rights with respect to goods and services requested or received from the Critical Vendors, including the Debtors'

rights to (i) cancel a purchase order, (ii) decline the acceptance of goods and/or services, (iii) return any defective, nonconforming, or unacceptable good, or (vi) contest the amount of any invoice or claims on any grounds.

14. Nothing herein shall impair or prejudice the rights of the U.S. Trustee, the Ad Hoc Group, and any statutory committee appointed in these Chapter 11 Cases, which are expressly reserved, to object to any payment made pursuant to this Order to an insider (as such term is defined in section 101(31) of the Bankruptcy Code), or an affiliate of an insider, of the Debtors. To the extent the Debtors intend to make a payment to an insider or an affiliate of an insider of the Debtors, the Debtors shall, to the extent reasonably practicable, provide three (3) business days' advance notice to, and opportunity to object by the U.S. Trustee, the Ad Hoc Group, and any statutory committee appointed in these Chapter 11 Cases; provided, that if any party objects to the payment, the Debtors shall not make such payment without further order of the Court.

15. The contents of the Motion satisfy the requirements of Bankruptcy Rules 6003(b) and 6004(a).

16. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, this Order shall be effective and enforceable immediately upon entry hereof.

17. The Debtors are authorized to take all action necessary to effectuate the relief granted by this Order.

18. The 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