

**Fill in this information to identify the case:**

Debtor 1 <u>Superior Silica Sands LLC</u>
Debtor 2 (Spouse, if filing)
United States Bankruptcy Court <u>District of Delaware</u>
Case number: <u>19-11566</u>

**FILED**  
 U.S. Bankruptcy Court  
 District of Delaware  
 7/30/2019  
 Una O'Boyle, Clerk

**Official Form 410  
 Proof of Claim**

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

**Part 1: Identify the Claim**

<b>1. Who is the current creditor?</b>	<u>CAI Rail, Inc.</u>	
	Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
<b>2. Has this claim been acquired from someone else?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
<b>3. Where should notices and payments to the creditor be sent?</b>  Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	<b>Where should notices to the creditor be sent?</b>	<b>Where should payments to the creditor be sent? (if different)</b>
	<u>CAI Rail, Inc.</u>	_____
	Name	Name
	<u>Simms Showers LLP 201 International Circle, Suite 250 Cockeysville, MD 21030</u>	_____
	Contact phone <u>4107835795</u>	Contact phone _____
	Contact email <u>jssimms@simmsshowers.com</u>	Contact email _____
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
<b>4. Does this claim amend one already filed?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
<b>5. Do you know if anyone else has filed a proof of claim for this claim?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



**Part 2: Give Information About the Claim as of the Date the Case Was Filed**

<p><b>6. Do you have any number you use to identify the debtor?</b></p>	<p><input checked="" type="checkbox"/> No  <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____</p>
<p><b>7. How much is the claim?</b></p>	<p>\$ <u>3295303.00</u></p> <p><b>Does this amount include interest or other charges?</b>  <input type="checkbox"/> No  <input checked="" type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).</p>
<p><b>8. What is the basis of the claim?</b></p>	<p>Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).                  Limit disclosing information that is entitled to privacy, such as healthcare information.</p> <p style="text-align: center;"><u>Leases</u></p>
<p><b>9. Is all or part of the claim secured?</b></p>	<p><input checked="" type="checkbox"/> No  <input type="checkbox"/> Yes. The claim is secured by a lien on property.</p> <p><b>Nature of property:</b>  <input type="checkbox"/> Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i>.  <input type="checkbox"/> Motor vehicle  <input type="checkbox"/> Other. Describe: _____</p> <p><b>Basis for perfection:</b> _____</p> <p>Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)</p> <p><b>Value of property:</b> \$ _____</p> <p><b>Amount of the claim that is secured:</b> \$ _____</p> <p><b>Amount of the claim that is unsecured:</b> \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)</p> <p><b>Amount necessary to cure any default as of the date of the petition:</b> \$ _____</p> <p><b>Annual Interest Rate</b> (when case was filed) _____ %</p> <p><input type="checkbox"/> Fixed  <input type="checkbox"/> Variable</p>
<p><b>10. Is this claim based on a lease?</b></p>	<p><input type="checkbox"/> No  <input checked="" type="checkbox"/> Yes. <b>Amount necessary to cure any default as of the date of the petition.</b> \$ <u>3295303.00</u></p>
<p><b>11. Is this claim subject to a right of setoff?</b></p>	<p><input checked="" type="checkbox"/> No  <input type="checkbox"/> Yes. Identify the property: _____</p>

<b>12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <i>Check all that apply.</i>	<b>Amount entitled to priority</b>
A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
	<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)(_) that applies	\$ _____
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		

**Part 3: Sign Below**

**The person completing this proof of claim must sign and date it. FRBP 9011(b).**

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

**A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.**

Check the appropriate box:

- I am the creditor.
- I am the creditor's attorney or authorized agent.
- I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this Proof of Claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this Proof of Claim and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 7/30/2019  
MM / DD / YYYY

/s/ J. Stephen Simms

Signature

Print the name of the person who is completing and signing this claim:

Name J. Stephen Simms

First name Middle name Last name

Title Counsel to Creditor

Company Simms Showers LLP

Identify the corporate servicer as the company if the authorized agent is a servicer

Address 201 International Circle, Suite 250

Number Street

Baltimore, MD 21030

City State ZIP Code

Contact phone 4107835795 Email jssimms@simmsshowers.com

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAI RAIL, INC.,	)	Civil Action No.
a Delaware Corporation,	)	3:19-cv-03001-JSC
	)	
Plaintiff,	)	
vs.	)	<b>AFFIDAVIT OF</b>
	)	<b>FREDDY FERNANDEZ</b>
SUPERIOR SILICA SANDS LLC,	)	<b>SUPPORTING MOTION FOR</b>
a Texas limited liability company,	)	<b>SUMMARY JUDGMENT</b>
	)	
Defendant.	)	

Freddy Fernandez certifies under penalties of perjury as follows:

1. I am over 18 years old and competent to make this affidavit.
2. I am Vice President, Operations of CAI Rail, Inc. (“CAI”) and

through my position have personal knowledge of each fact which this affidavit sets out.

3. CAI as Lessor and Superior Silica Sands, LLC as Lessee as of November 7, 2014 entered into a Master Lease and related agreements (“Lease”) for railroad cars. A true and correct copy of the Master Lease is **Exhibit A** to CAI’s complaint herein. The Master Lease states that Emerge Energy Services LP (“EMES”), a Delaware limited partnership, is also a party to the Lease and that “[e]ach of SSS and EMES shall hereinafter be jointly and severally liable for the obligations of Lessee hereunder, and agree to be bound by any actions or decisions of any of the foregoing required or permitted under this Master Lease.” EMES therefore is not a necessary party to this suit.

4. The Master Lease provides as follows for the exclusive venue and jurisdiction of litigation concerning the Lease to be in and with this Court, and that Superior waives any jury trial right: “(b) the site of any litigation concerning any provision of this Master Lease shall be the appropriate state or federal court, located in the City of San Francisco, State of California, as selected by Lessor from time to time. Lessee hereby (i) consents to the exclusive jurisdiction of the state and federal courts therein located and (ii) waives any defense that such jurisdiction is not a convenient forum for litigation of disputes; and (c) . . . WAIVES ANY RIGHT TO TRIAL BY A JURY as to any such litigation.” (emphasis in original).

5. The Master Lease, **Exhibit A to the Complaint**, further provides as follows:

1. LEASE. Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor, the railroad cars (herein referred to collectively as "Cars" and individually as "Car") described in schedules hereto, executed by the parties concurrently herewith or at any time hereafter (herein referred to collectively as "Schedules" and individually as Schedule"). Each Schedule shall incorporate the terms of this Master Lease by reference and shall constitute a separate and distinct lease of the Cars subject thereto. The terms of each Schedule, if and to the extent they are different from the terms set forth herein, shall modify the terms set forth herein as to the Cars subject thereto. Each Schedule is intended to be a lease for federal income tax purposes and no party will take any action inconsistent therewith.

True and correct copies of the Schedules to the Master Lease are **Exhibits B**

(November 7, 2014), **C** (February 17, 2016 ) and **D** (January 17, 2019 ) to CAI’s Complaint herein.

7. The Lease ( collectively, the Master Lease and Schedules) is signed by all parties and is a valid and enforceable contract.

8. CAI is as a party to the Lease, a party to bring suit for breach of contract.

9. CAI duly performed and tendered performance of its contractual obligations. Specifically, CAI tendered performance by providing rail cars to Superior at or near Superior's facilities in Texas, beginning on the date of the Lease and thereafter.

10. Superior breached the contract by failing to pay monthly rent for each Car which CAI had provided to Superior under the Lease and to make payment as the Lease provides, despite notice and demand. Specifically, Superior breached the requirements of the Lease including the following, as set out in the Master Lease:

### 3. RENT.

(a) Lessee shall pay Lessor monthly rent for each Car as set forth in the applicable Schedule (the "Rent"), in advance on the first day of each full calendar month during the Term, plus pro rata Rent for the portion of the month in which the Date of Arrival occurs (such pro rata Rent shall be paid on the first day of the following month, together with the Rent due for that month).

(b) Lessee shall pay Rent, amounts specified herein as "Additional Rent" and other amounts due hereunder to Lessor in U. S. currency, at Lessor's principal office as indicated on the last page of this Master Lease, or to such other address or payee as Lessor may, from time to time, direct in writing. Lessee's obligations to pay Rent, Additional Rent and other amounts due hereunder shall be absolute and unconditional and not subject to any abatement, setoff, counterclaim, defense, recoupment, deduction, reduction

or offset of any kind or any reason whatsoever. Rent shall be payable by Lessee without invoicing, notice or demand by Lessor.

(c) Lessee shall pay Lessor, without demand, interest on any overdue installment of Rent, Additional Rent or other amount due to Lessor under this Master Lease or any Schedule from the due date thereof until paid in full, calculated at the rate of 10% per annum or the highest rate permitted by law as compensation for late payment. Any amount payable hereunder upon demand by Lessor shall be overdue if not paid within three days after demand.

11. The Lease requires Superior as Lessee to pay Rent and other charges to CAI as Lessor. The Master Lease states in pertinent part that:

If Lessee (i) fails to pay when due any Rent, Additional Rent or other amount required to be paid under any Schedule [of the Lease] and such failure continues for a period of five (5) days . . . then, and in such event, Lessee shall, without further notice, be in default and Lessor may exercise anyone or more of the following remedies: (i) sue for and recover (A) all Rent, Additional Rent and other amounts as they become due, and (at Lessor's election) . . . (C) the net present value of all amounts as may thereafter accrue for the balance of the Term (in determining net present value, Lessor shall use a discount rate equal to [the one year Treasury Constant Maturity rate as published in the Selected Interest Rates table of the Federal Reserve statistical release H.15-(519) for, at Lessor's election, either (A) the week prior to the Delivery Date for the Cars or (B) the week the Lessor declares the Master Lease in default] . . . .

12. The Lease further provides that Lessee Superior shall pay CAI all costs and expenses, including reasonable attorneys' fees and expenses and court costs, which CAI incurs in exercising any of its rights or remedies under the Lease or enforcing any Lease provisions.

13. The Lease further provides that Lessee Superior shall pay CAI, without demand, interest on any overdue installment of Rent, Additional Rent or other amount due to CAI under the Lease from the due date thereof until paid in

full, calculated at the rate of 10% per annum or the highest rate permitted by law as compensation for late payment.

14. In the Schedule to the Master Lease dated January 17, 2019 (**Exhibit D to CAI's Complaint**) CAI as Lessor and Superior as Lessee agreed further in pertinent part that:

Upon execution of this Agreement, Lessee's obligation to pay the monthly Rent and other charges applicable to each Car is absolute and unconditional, and shall not be subject to any abatement, reduction, set-off, defense, counterclaim, interruption, deferment or recoupment. Each Rent or other payment made by Lessee hereunder shall be final and Lessee shall not seek to recover all or any part of such payment from Lessor. The Rent and other sums payable by Lessee hereunder shall be paid without notice or demand and Lessee's commitment to make timely payment for the full Term hereunder for all Cars that have been accepted by Lessee in accordance with Section 4 ("Inspection") of the Master Car Lease Agreement is absolute and unconditional.

15. Lessee Superior, however, has failed to make Lease payments due as of January 30, 2019 and afterwards and are in default of the Lease.

16. CAI has performed all Lease obligations to Lessee Superior except those obligations CAI was prevented or excused from performing.

17. Lessee Superior has breached its obligations under the Lease to pay CAI. CAI therefore proceeds here to recover all Lease delinquent amounts due



and the net present value of all amounts as may thereafter accrue for the balance of the Term, as defined in the Lease.

18. As of the date of this Complaint, Lessee Superior owes CAI pursuant to the Lease, and is delinquent upon Rent of at least \$173,740. The net present value of all amounts as may thereafter accrue for the balance of the Term, as defined in the Lease is \$2,961,563. Movement charges and costs of repair are currently estimated \$160,000.

19. Superior therefore owes CAI an overdue amount of not less than \$3,295,303.00, plus pre- and post-judgment interest, rent charges or other amounts that are continuing to accrue, attorneys' fees, costs, expenses, and such other and further relief as allowable by law.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 2019.

