

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.*,<sup>1</sup> : Case No. 20-33495 (DRJ)  
: :  
Debtors. : (Jointly Administered)  
: :  
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**DEBTORS' EMERGENCY MOTION FOR ENTRY OF ORDER  
(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**

**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.**

<sup>1</sup> 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.



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](http://www.join.me). Persons connecting by mobile device will need to download the free [join.me](http://www.join.me) application.

Once connected to [www.join.me](http://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,
  - (i) authorizing, but not directing, the Debtors to pay certain prepetition claims held by Shippers (as defined herein), Lien Claimants (as defined herein), and Royalty Interest Owners (as defined herein);

- (ii) confirming the administrative expense priority status of Outstanding Orders (as defined herein) and authorizing, but not directing, the Debtors to pay prepetition amounts related to the Outstanding Orders (as defined herein);
- (iii) authorizing financial institutions to honor and process related checks and transfers; and
- (iv) granting certain related relief.

### **JURISDICTION AND VENUE**

2. 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 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.

3. The bases for the relief requested herein are sections 105(a), 363(b), 503(b), 506(b), 541, 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**

4. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases (the “**Chapter 11 Cases**”) for relief under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of J. Philip McCormick, Jr., Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day**

**Declaration**”),<sup>2</sup> which is filed with the Court concurrently herewith and is fully incorporated herein by reference.

5. 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.

6. 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**

7. An estimate of the prepetition claims held by Lien Claimants is set forth below:

	<b>Claim Amount</b>
<b>Shipping Claims</b>	<b>\$10,950,000</b>
<b>Lien Claims</b>	<b>\$18,490,000</b>
<b>Royalty Payments</b>	<b>\$1,080,000</b>

8. As more particularly described in the First Day Declaration, the Debtors operate throughout North America and are primarily engaged in the mining, processing, and distribution of high-quality silica sand — a key input for the hydraulic fracturing of oil and natural gas wells. The Debtors’ ability to operate their business without interruptions is dependent upon the Debtors’ vendors, suppliers, shippers, and warehousemen, each of which either provides the Debtors with the materials and supplies necessary to ensure safe mining conditions, extract and process silica sand, transport silica sand among the Debtors’ mines and plants, or deliver silica sand to the Debtors’ customers.

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

9. The Debtors utilize the services of a number of service providers who, by the nature of their business and the work that they perform for the Debtors, may be able to assert that prepetition amounts owed to them are secured by statutory liens on property of the Debtors, and in some cases their customers' property, that is either in the possession of the service provider or that has been improved upon by the provider.

10. The Debtors are also obligated to make royalty payments to certain royalty interest owners who may assert that prepetition royalty payments owed to them are secured by liens on the Debtors' property. Moreover, amounts held by the Debtors on account of the royalty interests may not be property of the Debtors' bankruptcy estates.

11. In addition, the claims of certain providers of goods to the Debtors may be entitled to priority under section 503 of the Bankruptcy Code because such goods were delivered within 20 days prior to the Petition Date. In order to continue the operation of their business uninterrupted postpetition, the Debtors seek to pay the prepetition claims of certain of these claimants, each of which may be entitled to priority over general unsecured creditors.

12. As a condition to receiving any payment pursuant to the relief requested herein, a payee shall maintain or apply, as applicable, terms during the pendency of these Chapter 11 Cases that are at least as favorable as those terms existing as of the Petition Date or otherwise satisfactory to the Debtors ("**Customary Terms**"). The Debtors will also use reasonable efforts to confirm that all payees agree to maintain or apply the Customary Terms as a condition to receiving a payment pursuant to the relief requested in this Motion. Lastly, if a payee, after receiving a payment pursuant to the relief requested herein, ceases to provide Customary Terms, then the Debtors request that they may, in their sole discretion, deem such payment to apply instead to any

postpetition amount that may be owing to such payee or treat such payment as an avoidable postpetition transfer of property.

13. The Debtors further request that the Court (i) authorize all applicable financial institutions (collectively, the “**Banks**”) to receive, process, honor, and pay all checks presented for payment and electronic payment requests relating to the foregoing to the extent directed by the Debtors in accordance with this Motion and to the extent the Debtors have sufficient funds standing to their credit with such Bank, whether such checks were presented or electronic requests were submitted before or after the Petition Date, and (ii) authorize all Banks to rely on the Debtors’ designation of any particular check or electronic payment request as appropriate pursuant to this Motion, without any duty of further inquiry and without liability for following the Debtors’ instructions.

**A. The Shipping and Lien Claims**

**i. Shipping Claims**

14. In operating their silica sand business, the Debtors rely on their network of common carriers, shippers, transloaders, rail car operators, expeditors, consolidators, transportation service providers, and other related parties (collectively, the “**Transporters**”) to transport, ship, and deliver silica sand and other goods and products between the Debtors’ mines, plants, and distribution terminals, or from the Debtors to their customers. In addition, in connection with the transport of their goods, the Debtors often temporarily store silica sand with third party storage facilities, transloading facilities, logistics providers and warehouses (collectively, the “**Warehouses**”) and together with the Transporters, the “**Shippers**”). Many of the Shippers currently hold prepetition claims against the Debtors (collectively, the “**Shipping Claims**”).

15. The operation of the Debtors’ business requires a multitude of shipments of silica sand between the Debtors’ mines and plants to terminals, transloading facilities, and the Debtors’

vendors and customers. The Debtors' silica sand is frequently in the possession of logistics providers, rail car operators, truckers, and transloaders who assist the Debtors in transporting goods and materials, including finished product, throughout the supply chain, from origin to destination. In the case of shipments of silica sand to customers, the Debtors lease rail cars in order to transport silica sand from their plants via railroads. Transloading facilities may be used to transport the silica sand shipments from rail car operator to rail car operator in order for such sand to reach the end customer. In addition, depending on the final customer destination, logistics providers and truckers are utilized to transport the silica sand shipments from the rail lines to the customers' wellsites.

16. Under some state laws, Shippers may have a possessory lien on the goods and sand in their possession, which secures payment of claims incurred in connection with the storage or transportation of goods.<sup>3</sup> In addition, pursuant to section 363(e) of the Bankruptcy Code, the Shippers, as bailees, may be entitled to adequate protection for valid possessory liens. If the Debtors fail to pay the Shippers in a timely manner, the Shippers may seek to assert liens against the silica sand or other goods in their possession, which could potentially block the Debtors' access to the goods that are in transport. While the Debtors reserve all rights to contest such actions, it cannot be disputed that such actions would severely damage the Debtors' ability to operate their businesses for the benefit of all stakeholders. Thus, the relief requested by this Motion is essential to the Debtors' ability to transition their operations into chapter 11 in a commercially reasonable manner. The Debtors further believe that the cost of replacing or re-constructing their existing

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<sup>3</sup> For example, both Texas's and Wisconsin's relevant statutes provide, in pertinent part: "A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." Tex. Bus. & Com. Code Ann. § 7.307 and Wis. Stat. Ann. § 407.307.

transportation network far exceeds the aggregate amount of Shipping Claims. With millions of dollars' worth of silica sand in transit at any given time, the cost of a disruption to the Debtors' estates that could be caused by the Shippers' retention of silica sand likely far outweighs the outstanding Shipping Claims. Thus, the Debtors seek authority, but not direction, to pay the prepetition Shipping Claims.

**ii. Lien Claims**

17. In addition to the Shippers, the Debtors routinely transact business with a number of third party service providers or contractors (collectively, the "**Lien Claimants**") who may be permitted to assert statutory or possessory liens against the Debtors' equipment, sand, and other property if the Debtors fail to pay for those parties' various services.<sup>4</sup> For example, certain of the Lien Claimants provide mining services, while others manufacture, maintain and/or repair specialized equipment and provide parts at the Debtors' mines and plants. Many of the Lien Claimants are not required to perform future services, but rather perform work and related services on an order-by-order basis. Finally, several Lien Claimants are railcar operators, transloaders, terminal facilities, or other carriers and storage sites that ship, transmit, transload, or temporarily store the Debtors' silica sand. If the Debtors become delinquent in their payments for such services rendered, the Lien Claimants may assert liens, including mining liens,<sup>5</sup> mechanic's liens, artisan's liens, materialman's liens, possessory liens, and other similar liens against the Debtors' property for the amounts owed (collectively, the "**Lien Claims**"). Pursuant to section 362(b)(3) of the

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<sup>4</sup> The Debtors own an approximately 42% non-controlling ownership interest in one of the Lien Claimants.

<sup>5</sup> For example, under the relevant Texas statute, "a mineral contractor or subcontractor has a lien to secure payment for labor or services related to the mineral activities." Tex. Prop. Code Ann. § 56.002.



Bankruptcy Code, the act of perfecting mechanics' liens, to the extent consistent with section 546(b) of the Bankruptcy Code, is expressly excluded from the automatic stay.<sup>6</sup>

18. Unless the Debtors are able to satisfy the Lien Claims as provided herein, these parties may refuse to provide services to the Debtors or may seek to enforce priority claims against their chapter 11 estates on account of such claims. Accordingly, the Debtors seek authority to pay and discharge, on a case-by-case basis, Lien Claims that the Debtors believe have created, or could give rise to, a lien against the Debtors' property or equipment, regardless of whether such Lien Claimants already have perfected their interests.

## **B. Royalty Interests**

19. As part of their silica sand business, the Debtors enter into royalty lease agreements. Such agreements generally consist of an interest in silica sand in place on a parcel of property and the exclusive right to explore, mine, produce and otherwise capture silica sand from the land. Through a written agreement, owners of the silica sand interests ("**Royalty Interest Owners**") may lease or otherwise convey the exclusive right to capture silica sand to a third party in exchange for either a share of production or payments in lieu of a share of production. The nature of the interest retained by the Royalty Interest Owners (the "**Royalty Interests**") represents a share of the revenue derived from the sale of such silica sand, subject to the terms of the applicable agreement.<sup>7</sup> Pursuant to agreements with Royalty Interest Owners, the Debtors periodically make payments to Royalty Interest Owners at a monthly rate or based upon the volume of silica sand mined, or a minimum annual payment if certain volumes of sand are not mined by the Debtors

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<sup>6</sup> Under section 546(b) of the Bankruptcy Code, a debtor's lien avoidance powers "are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." 11 U.S.C. § 546(b)(1)(A).

<sup>7</sup> The characterization of any interest or other payment obligation as a Royalty Interest in this Motion is the Debtors' view and such characterization shall not be binding on any other party, notwithstanding any party's receipt of a payment authorized under the proposed Order.

(collectively, the “**Royalty Payments**”). The Debtors are party to approximately 31 royalty lease agreements with Royalty Interest Owners located in Wisconsin, Texas, Arkansas, and North Carolina.

20. Royalty payments may be governed by statutory frameworks that set strict payment deadlines and contain enforcement mechanisms including interest, fines, recovery of costs and attorneys’ fees and treble damages. *See, e.g.*, Tex. Bus. & Com. Code Ann. § 9.343 (West). Failure to make such payments can also result in actions seeking the forfeiture, cancellation or termination of the agreements with the Royalty Interest Owners. In addition, the Debtors believe that the Royalty Interest Owners may be able assert that they are entitled to statutory or other liens in the event that the Debtors fail to make the Royalty Payments. It is likely that the Royalty Interest Owners may be able assert that the funds held by the Debtors on account of the Royalty Interests are not property of the estate, but are instead held in trust for the benefit of the Royalty Interest Owners.

21. The Debtors seek authority, but not direction, to pay prepetition obligations owed to the Royalty Interest Owners. Given the various rights afforded to Royalty Interest Owners, the Debtors believe that granting the requested relief will merely affect the timing of Royalty Payments and that Royalty Interest Owners will not receive more than they would receive under a plan of reorganization.

### **C. Outstanding Orders**

22. Prior to the commencement of the Chapter 11 Cases, the Debtors placed various orders for goods that will not be delivered until on or after the Petition Date (collectively, the “**Outstanding Orders**”). The suppliers of these goods may be concerned that because the Debtors’ obligations under the Outstanding Orders arose prior to the Petition Date, such obligations will be treated as general unsecured claims in the Chapter 11 Cases. To prevent

disruption to the Debtors' operations, the Debtors request entry of an order (i) confirming administrative expense priority under section 503(b)(1) of the Bankruptcy Code for all undisputed obligations of the Debtors arising from the acceptance of goods included in the Outstanding Orders, and (ii) authorizing the Debtors to satisfy such obligations in the ordinary course of business.

### **APPLICABLE AUTHORITY**

#### **A. Payment of the Shipping Claims, Lien Claims, and Royalty Payments Is Warranted Under Section 363(b)(1) of the Bankruptcy Code**

23. To the extent that payment of the Shipping Claims, Lien Claims, and Royalty Payments would be deemed to constitute a use of property outside the ordinary course of business, a basis for authorizing such payment is found under section 363 of the Bankruptcy Code. 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).

24. 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).

25. Here, as discussed above, it is the Debtors’ business judgment that the failure to pay the Shipping Claims, Lien Claims, and Royalty Payments could have a material adverse impact on the day-to-day operations of their businesses. In particular, the Debtors’ ability to maintain their relationships with the Shippers, Lien Claimants, and Royalty Interest Owners that supply services to the Debtors in the ordinary course of the Debtors’ business is essential to minimizing disruption to the Debtors’ operations and preserving the overall value of the Debtors’ estates. In addition, certain of the Shipping Claims, Lien Claims, and Royalty Payments may be entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code to the extent materials or other goods were received by the Debtors within the 20 days prior to the Petition Date. Such claims must be paid in full for the Debtors to confirm a chapter 11 plan and, therefore,

payment of such amounts now only provides such parties with what they would be entitled to receive under a plan. *See* 11 U.S.C. § 1129(a)(9)(A). For these reasons, and to avoid a major interruption of their businesses, and to maximize the value of their estates for the benefit of all stakeholders, the Debtors respectfully request that the Court authorize them to pay such claims.

**B. Payment of the Shipping Claims, Lien Claims, and Royalty Payments Is Warranted Under Sections 506(b) and 546(b) of the Bankruptcy Code**

26. In addition, the Debtors believe that their failure to pay the Shipping Claims, Lien Claims, and Royalty Payments may result in the assertion of liens by many of the Shippers, Lien Claimants, and Royalty Interest Owners under applicable state law with respect to certain of the Debtors' property (collectively, the "**Liens**"). Pursuant to section 362(b)(3) of the Bankruptcy Code, acts to perfect such Liens or interests, to the extent consistent with section 546(b) of the Bankruptcy Code, are expressly excluded from the automatic stay otherwise established by section 362(a) of the Bankruptcy Code. Moreover, under section 546(b) of the Bankruptcy Code, a debtor's lien avoidance powers "are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." Therefore, notwithstanding the automatic stay established by section 362 of the Bankruptcy Code, many of the Shippers, Lien Claimants, and Royalty Interest Owners may assert and attempt to perfect Liens or interests against the Debtors' property. Thus, there is a risk that they would be deemed to hold secured claims under section 506(b) of the Bankruptcy Code that would, in any event, be required to be paid in full under section 1129(b)(2)(A) of the Bankruptcy Code.

27. Moreover, to protect any asserted Lien rights, such counterparties may refuse to release goods or property in their possession unless and until their Shipping Claims, Lien Claims, and/or Royalty Payments have been satisfied. Therefore, notwithstanding the automatic stay

imposed by section 362 of the Bankruptcy Code, many of these parties: (i) may be entitled to assert and perfect Liens against the Debtors' property, which would entitle them to payment ahead of other general unsecured creditors in any event; and (ii) may hold the property subject to the asserted Liens pending payment, to the direct detriment of the Debtors and their estates. The time and resources that would be required for the Debtors to contest Liens would detract from the value of the estates and could impair the Debtors' ability to stabilize their operations.

28. Furthermore, since the amount of the Shipping Claims, Lien Claims, and/or Royalty Payments is likely materially less than the value of any property securing those claims, any such party holding a Lien arguably is a fully secured creditor. For any Shipping Claims, Lien Claims, and Royalty Payments that are deemed secured claims, section 1129(b)(2)(A) of the Bankruptcy Code requires that they be satisfied through deferred cash payments totaling at least the allowed amount of each such claim, of a value as of the effective date of the plan equal to the value of the collateral securing the claim, with a continuation of the Liens against the collateral; or if the collateral is to be sold, that the Lien securing the claim attach to the proceeds of sale; or that the holder realize the indubitable equivalent of the claim. 11 U.S.C. § 1129 (b)(2)(A).

29. Additionally, under section 506(b) of the Bankruptcy Code, fully secured creditors are entitled to receive postpetition interest accruing on their claims to the extent that such claims are oversecured. Consequently, payment of those of Shipping Claims, Lien Claims, and/or Royalty Payments that are subject to valid Liens should give such counterparties no more than that to which they otherwise would be entitled under a plan and save the Debtors the interest costs that otherwise may accrue on the Shipping Claims, Lien Claims, and/or Royalty Payments during the Chapter 11 Cases.

**C. Payment of the Shipping Claims, Lien Claims, and Royalty Payments Is Authorized Under Sections 1107(a) and 1108 of the Bankruptcy Code**

30. Authority for payment of the Shipping Claims, Lien Claims, and Royalty Payments also may be 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.*

31. The *CoServ* court has noted 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.*; see also *In re Mirant Corp.*, 296 B.R. 427, 429-30 (Bankr. N.D. Tex. 2003) (allowing debtors to pay claims “reasonably believe[d]” to be authorized under the *CoServ* test or whose payment was necessary “in the exercise of their business judgment . . . in order for [the] [d]ebtors to continue their respective businesses”). That court specifically noted 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,” *CoServ*, 273 B.R. at 497, and also when the payment was to “sole suppliers of a given product.” *Id.* at 498. 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.*

32. Payment of the Shipping Claims, Lien Claims, and Royalty Payments meets each element of the *CoServ* court's standard. First, the shutdown of the Debtors' operations would cost the Debtors' estates substantial amounts in lost revenues. The harm and economic disadvantage that would stem from the Debtors' failure to pay any of their Shippers, Lien Claimants, or Royalty Interest Owners is grossly disproportionate to the amount of the prepetition claims that would have to be paid. In addition, the Debtors have examined other options short of paying the Shipping Claims, Lien Claims, and Royalty Payments and have determined that to avoid significant disruption of the Debtors' business operations there exists no practical or legal alternative to payment of certain of the Shipping Claims, Lien Claims, and Royalty Payments. Therefore, the Debtors only can meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of certain of the Shipping Claims, Lien Claims, and Royalty Payments.

**D. Section 105 of the Bankruptcy Code and the Doctrine of Necessity Support Payment of the Shipping Claims, Lien Claims, and Royalty Payments**

33. Additionally, the Debtors' proposed payment of certain of the Shipping Claims, Lien Claims, and Royalty Payments should be authorized under section 105(a) of the Bankruptcy Code and the "doctrine of necessity." Under section 105(a) of the Bankruptcy Code, this Court "may issue any order . . . that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. 105(a). For the reasons set forth above, and in light of the need for the Debtors to preserve the going concern value of their businesses, the relief requested herein is proper and should be granted.

34. 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 restructuring efforts. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (recognizing the “doctrine of necessity”);<sup>8</sup> *see also In re CEI Roofing, Inc.*, 315 B.R. 50, 56, 60–61 (Bankr. N.D. Tex. 2004) (holding that payment of certain prepetition claims under the doctrine of necessity is “based on both common sense and the express provisions of the Bankruptcy Code”); *In re Mirant Corp.*, 296 B.R. 427, 429 (Bankr. N.D. Tex. 2003) (authorizing the debtors to pay certain prepetition claims because “the court d[id] not wish Debtors’ businesses seriously damaged.”); *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment).

35. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. *See Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); *In re Payless Cashways, Inc.*, 268 B.R. 543, 546–47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

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<sup>8</sup> 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. Loqansport, C. & Sw. Ry. 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.”).

36. For the reasons discussed herein, it is evident that payment of the Shipping Claims, Lien Claims, and Royalty Payments is necessary and critical to the Debtors' efforts to maximize estate value. In particular, if the Debtors fail to pay the Shipping Claims, Shippers may exercise possessory liens and block the Debtors' access to, or delivery of, silica sand that is in transport. If the Debtors fail to pay the Lien Claims, the Lien Claimants could assert liens against the Debtors, or in some instances the Debtors' customers, goods, equipment, or other property for the amounts owed on account of the Lien Claims, and the Lien Claimants may also refuse to provide future services for the Debtors. If the Debtors fail to pay the Royalty Payments, the Royalty Interest Owners may assert liens against the Debtors' property for the amounts owed on account of the Royalty Payments and may seek to terminate the underlying royalty agreements, in effect restricting the Debtors' ability to conduct mining operations at the applicable locations. Thus, the Debtors' failure to pay certain of the Shipping Claims, Lien Claims, and Royalty Payments could severely impair the Debtors' ability to operate their business for the benefit of all stakeholders.

**E. To the Extent Funds in the Debtors' Possession Are Related to Royalty Interests, Such Funds May Not Be Property of the Debtors' Estates**

37. With certain exceptions, section 541 of the Bankruptcy Code provides that all property to which a debtor has a legal or equitable interest becomes property of the estate upon the commencement of a chapter 11 case. *See* 11 U.S.C. § 541(a)(1). However, Section 541 does not by itself create new legal or equitable interests in property; instead, “[p]roperty interests are created and defined by state law.” *Butner v. United States*, 440 U.S. 48, 54-55 (1979) (noting that “Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law”). Further, Congress was clear that section 541(a)(1) of the Bankruptcy Code “is not intended to expand the debtor’s rights against others more than they existed at the commencement of the case.” H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 367-68 (1977); *see also Moody v. Amoco*

*Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) (holding that the “rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less”). Thus, if a debtor holds no legal or equitable interest in property as of the commencement of the case, such property does not become property of the debtor’s estate under section 541 of the Bankruptcy Code and the debtor is prohibited from distributing such property to its creditors. *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962) (“The Bankruptcy Act simply does not authorize a [debtor] to distribute other people’s property among a bankrupt’s creditors. . . .[S]uch property rights existing before bankruptcy in persons other than the bankrupt must be recognized and respected in bankruptcy.”); see also *Boyd v. Martin Exploration Co. (In re Martin Exploration Co.)*, 56 B.R. 776, 779 (E.D. La. 1986) (holding that debtor had neither legal nor equitable title to the royalty interests it had conveyed).

38. Section 541(d) of the Bankruptcy Code provides that a debtor who holds only bare legal title to property but not equitable interest in such property as of the commencement of the case does not obtain equitable interest in such property pursuant to section 541(d) of the Bankruptcy Code. Specifically, that section states:

Property in which the debtor holds, as of the commencement date of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

39. To the extent the Debtors have proceeds of the Royalty Interests in their possession, the Debtors may hold bare legal title to such funds and may potentially hold *no* legal title to the percentage of the silica sand production attributable to the Royalty Interest Owners. The Royalty Interest Owners may be able to assert that the Debtors only take possession of proceeds from the

sale of the Royalty Interest Owners' share of silica sand production because they market and sell the silica sand on behalf of the Royalty Interest Owners before remitting the Royalty Payments to them. *See, e.g., Vess Oil Corp. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 418 B.R. 98, 106 (Bankr. D. Del. 2009) (holding that funds in debtors' possession held on behalf of royalty interest owners were held in a resulting trust for such parties, debtors only held bare legal title, and such funds were not property of the estate); *see also In re MCZ, Inc.*, 82 B.R. 40, 42 (Bankr. S.D. Tex. 1987) ("Where Debtor merely holds bare legal title to property as agent or bailee for another, Debtor's bare legal title is of no value to the estate . . ."). The Supreme Court has held that property held by debtors for a third party (such as funds held on account of a resulting trust) is not property of the estate. *Begier v. I.R.S.*, 496 U.S. 53, 59 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'"); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983) (noting that "Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition" from the bankruptcy estate). Thus, property held by the Debtors on account of the Royalty Interests may not be property of the Debtors' estates within the meaning of section 541 of the Bankruptcy Code.

40. Further, because the Royalty Payments may not be property of the estate, it is unclear whether the automatic stay would prevent any action by a Royalty Interest Holder to obtain possession or exercise control over the Royalty Payments. *See* 11 U.S.C. § 362(a)(3) (providing that the automatic stay is applicable to all entities for "any act to obtain possession of property of the estate or to exercise control over property of the estate"). Failure to grant the relief requested by this Motion could subject the Debtors to unnecessary litigation, either in or outside of this Court, at a time when their resources are already subject to enormous strain. As such, the Debtors believe

payment of certain of the Royalty Payments in the ordinary course of business is in the best interests of the Debtors and their creditors, and should be authorized by the Court. Moreover, the Debtors believe that no creditors are prejudiced by this Motion. The Debtors believe that they may have no right to distribute any funds on account of the Royalty Interests to their creditors because the Royalty Interests may not be property of the estate. Accordingly, for the reasons set forth above, the Debtors respectfully request that the Court authorize the Debtors to make the Royalty Payments to the Royalty Interest Owners in the ordinary course of business, for obligations incurred both prepetition and postpetition on account of the Royalty Interests.

**F. The Court Should Confirm the Administrative Priority of the Outstanding Orders and Authorize Payment Thereof**

41. Pursuant to section 503(b) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery of goods and services—including goods ordered prepetition—are, in fact, administrative expense priority claims because they benefit the estate postpetition. 11 U.S.C. § 503(b)(1)(A); *see also In re John Clay & Co.*, 43 B.R. 797, 809–10 (Bankr. D. Utah 1984) (holding that goods ordered prepetition but delivered postpetition are entitled to administrative expense priority). Thus, granting the relief sought herein with respect to the Outstanding Orders will not afford such claimants any greater priority than they otherwise would have if the relief requested herein were not granted and will not prejudice any other party in interest. Absent such relief, however, the Debtors may be required to expend substantial time and effort reissuing the Outstanding Orders to provide certain suppliers with assurance of such administrative priority. Such a disruption to the continuous and timely flow of critical inventory and other goods to the Debtors would force the Debtors to potentially halt operations and production, damage the Debtors' business reputation, erode the Debtors' customer base, and ultimately lead to a loss of revenue, all to the detriment of the Debtors and their creditors.

Accordingly, the Debtors submit that the Court should confirm the administrative expense priority status of the Outstanding Orders and should authorize the Debtors to pay the Outstanding Orders in the ordinary course of business.

**G. Cause Exists to Authorize Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers**

42. The Debtors have sufficient funds to pay the amounts related to the Shipping Claims, Lien Claims, Royalty Payments, and Outstanding Orders in the ordinary course of business by virtue of expected cash flows from ongoing business operations and existing cash on hand. In addition, under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the Shipping Claims, Lien Claims, Royalty Payments, and Outstanding Orders. 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**

43. 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. The Debtors believe that without such relief, the Shippers, Lien Claimants, and Royalty Interest Owners may be permitted to assert liens against the Debtors' property, which could block the Debtors' access to such property and severely damage the Debtors' ability to operate their businesses for the benefit of all stakeholders. 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**

44. 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**

45. 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 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

46. 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.

47. A copy of this Motion is available on (i) the Court's website: [www.txs.uscourts.gov](http://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](http://www.kccllc.net/hicrush).



**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  
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-and-

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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

**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> , <sup>1</sup>	:	Case No. 20-33495 (DRJ)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

**ORDER (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**

[Relates to Motion at Docket No. \_\_\_\_ ]

Upon the motion (the "**Motion**")<sup>2</sup> of the Debtors for an Order (i) authorizing the Debtors to pay the Shipping Claims, Lien Claims, and Royalty Payments, as provided in the Motion; (ii) confirming the administrative expense priority status of Outstanding Orders and authorizing the Debtors to pay prepetition amounts related to the Outstanding Orders; and (iii) granting 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 final order consistent with Article III of the United States

<sup>1</sup> 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.

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

Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and all objections, if any, to entry of this Order having been withdrawn, resolved, or overruled; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in the Order, it is hereby

**ORDERED THAT:**

1. The Debtors are authorized, but not directed, to pay the prepetition Shipping Claims, Lien Claims, and Royalty Payments in the ordinary course of business and consistent with prepetition practices.

2. All undisputed obligations related to the Outstanding Orders for goods that are delivered after the filing of the Debtors' petitions in the Chapter 11 Cases are granted administrative expense priority status in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

3. The Debtors are authorized, but not directed, to pay all undisputed obligations related to the Outstanding Orders in the ordinary course of business and consistent with prepetition practices.

4. Each of the Banks at which the Debtors maintain their accounts relating to the payment of the Shipping Claims, Lien Claims, and Royalty Payments, 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.

5. The Debtors are authorized, but not directed, to issue new postpetition checks, or effect new electronic funds transfers, on account of Shipping Claims, Lien Claims, and Royalty Payments 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.

6. 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; (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 may be owed.

7. 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).

8. As a condition to receiving any payment under this Order, a payee shall maintain or apply, as applicable, Customary Terms. The Debtors shall use reasonable efforts to confirm that all payees agree to maintain or apply the Customary Terms as a condition to receiving a payment under this Order. If a payee, after receiving a payment under this Order, ceases to provide Customary Terms, then the Debtors may, in their sole discretion, deem such payment to apply instead to any postpetition amount that may be owing to such payee or treat such payment as an avoidable postpetition transfer of property.

9. 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.

10. Nothing herein shall impair or prejudice the rights of the U.S. Trustee and the 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 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.

11. 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.

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

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

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

15. 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