

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

Debtor FB Industries USA Inc.

United States Bankruptcy Court for the: Southern District of Texas  
(State)

Case number 20-33513

## 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 or 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**

1. Who is the current creditor?	<u>Black Mountain Sand LLC</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	<b>Where should notices to the creditor be sent?</b> Black Mountain Sand LLC Attn: Katherine T. Hopkins 201 Main Street, Suite 2500 Fort Worth, Texas 76102  Contact phone <u>8178789377</u> Contact email <u>See summary page</u>	<b>Where should payments to the creditor be sent? (if different)</b>   Contact phone _____ Contact email _____
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)  Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<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**

<b>6. Do you have any number you use to identify the debtor?</b>	<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:   __ __ __ __
<b>7. How much is the claim?</b>	\$ <u>at least 1,000,000.00</u> . <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).
<b>8. What is the basis of the claim?</b>	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 health care information.  <u>Assets sold/related causes of action</u>
<b>9. Is all or part of the claim secured?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. <b>Nature or property:</b>  <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle 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: _____  <b>Basis for perfection:</b> _____ 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.)  <b>Value of property:</b> \$ _____ <b>Amount of the claim that is secured:</b> \$ _____ <b>Amount of the claim that is unsecured:</b> \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.)  <b>Amount necessary to cure any default as of the date of the petition:</b> \$ _____  <b>Annual Interest Rate</b> (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
<b>10. Is this claim based on a lease?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <b>Amount necessary to cure any default as of the date of the petition.</b> \$ _____
<b>11. Is this claim subject to a right of setoff?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check all that apply:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Amount entitled to priority

\$ \_\_\_\_\_

☐ 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).

\$ \_\_\_\_\_

☐ 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).

\$ \_\_\_\_\_

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ \_\_\_\_\_

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ \_\_\_\_\_

☐ 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.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ \_\_\_\_\_

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 acknowledgement 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 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 08/04/2020  
MM / DD / YYYY

/s/Jacob Smith  
Signature

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

Name Jacob Smith  
First name Middle name Last name

Title Chief Financial Officer

Company Black Mountain Sand LLC  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 420 Commerce Street, Suite 500, Fort Worth, Texas, 76102

Contact phone \_\_\_\_\_ Email \_\_\_\_\_



# KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (866) 554-5810 | International (781) 575-2032

<b>Debtor:</b> 20-33513 - FB Industries USA Inc. <b>District:</b> Southern District of Texas, Houston Division		
<b>Creditor:</b> Black Mountain Sand LLC Attn: Katherine T. Hopkins 201 Main Street, Suite 2500  Fort Worth, Texas, 76102  <b>Phone:</b> 8178789377 <b>Phone 2:</b>  <b>Fax:</b>  <b>Email:</b> katherine.hopkins@kellyhart.com	<b>Has Supporting Documentation:</b> Yes, supporting documentation successfully uploaded <b>Related Document Statement:</b>	
	<b>Has Related Claim:</b> No <b>Related Claim Filed By:</b>	
	<b>Filing Party:</b> Creditor	
<b>Other Names Used with Debtor:</b>	<b>Amends Claim:</b> No <b>Acquired Claim:</b> No	
<b>Basis of Claim:</b> Assets sold/related causes of action	<b>Last 4 Digits:</b> No	<b>Uniform Claim Identifier:</b>
<b>Total Amount of Claim:</b> at least 1,000,000.00	<b>Includes Interest or Charges:</b> Yes	
<b>Has Priority Claim:</b> No	<b>Priority Under:</b>	
<b>Has Secured Claim:</b> No <b>Amount of 503(b)(9):</b> No <b>Based on Lease:</b> No <b>Subject to Right of Setoff:</b> No	<b>Nature of Secured Amount:</b> <b>Value of Property:</b> <b>Annual Interest Rate:</b> <b>Arrearage Amount:</b> <b>Basis for Perfection:</b> <b>Amount Unsecured:</b>	
<b>Submitted By:</b> Jacob Smith on 04-Aug-2020 11:30:46 a.m. Eastern Time <b>Title:</b> Chief Financial Officer <b>Company:</b> Black Mountain Sand LLC		
<b>Optional Signature Address:</b> Jacob Smith 420 Commerce Street, Suite 500  Fort Worth, Texas, 76102 <b>Telephone Number:</b> <b>Email:</b>		

United States Bankruptcy Court for the Southern District of Texas

Indicate Debtor against which you assert a claim by checking the appropriate box below. **(Check only one Debtor per claim form.)**

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Hi-Crush Inc. (Case No. 20-33495)                     | <input type="checkbox"/> Hi-Crush Holdings LLC (Case No. 20-33509)     | <input type="checkbox"/> Hi-Crush Whitehall LLC (Case No. 20-33498)            |
| <input type="checkbox"/> BulkTracer Holdings LLC (Case No. 20-33511)           | <input type="checkbox"/> Hi-Crush Investments Inc. (Case No. 20-33504) | <input type="checkbox"/> Hi-Crush Wyeville Operating LLC (Case No. 20-33500)   |
| <input type="checkbox"/> D & I Silica, LLC (Case No. 20-33501)                 | <input type="checkbox"/> Hi-Crush LMS LLC (Case No. 20-33503)          | <input type="checkbox"/> OnCore Processing LLC (Case No. 20-33496)             |
| <input checked="" type="checkbox"/> FB Industries USA Inc. (Case No. 20-33513) | <input type="checkbox"/> Hi-Crush Permian Sand LLC (Case No. 20-33505) | <input type="checkbox"/> PDQ Properties LLC (Case No. 20-33499)                |
| <input type="checkbox"/> FB Logistics, LLC (Case No. 20-33516)                 | <input type="checkbox"/> Hi-Crush PODS LLC (Case No. 20-33507)         | <input type="checkbox"/> Pronghorn Logistics Holdings, LLC (Case No. 20-33512) |
| <input type="checkbox"/> Hi-Crush Augusta LLC (Case No. 20-33497)              | <input type="checkbox"/> Hi-Crush Proppants LLC (Case No. 20-33506)    | <input type="checkbox"/> Pronghorn Logistics, LLC (Case No. 20-33515)          |
| <input type="checkbox"/> Hi-Crush Blair LLC (Case No. 20-33502)                | <input type="checkbox"/> Hi-Crush Services LLC (Case No. 20-33510)     | <input type="checkbox"/> PropDispatch LLC (Case No. 20-33514)                  |
| <input type="checkbox"/> Hi-Crush Canada Inc. (Case No. 20-33508)              |  |  |

## 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. Other than a claim under 11 U.S.C. § 503(b)(9), this form should not be used to make a claim for an administrative expense arising after the commencement of the case.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or 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.

### Part 1: Identify the Claim

1.	<b>Who is the current creditor?</b>	<u>Black Mountain Sand LLC</u> <small>Name of the current creditor (the person or entity to be paid for this claim)</small>  <small>Other names the creditor used with the debtor</small> _____	
2.	<b>Has this claim been acquired from someone else?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3.	<b>Where should notices and payments to the creditor be sent?</b>	<b>Where should notices to the creditor be sent?</b>  <u>Kelly Hart &amp; Hallman LLP; Attn: Katherine T. Hopkins</u> <small>Name</small> <u>201 Main Street, Suite 2500</u> <small>Number Street</small> <u>Fort Worth TX 76102</u> <small>City State ZIP Code</small> <small>Country</small> <small>Contact phone</small> <u>(817) 332-2500</u> <small>Contact email</small> <u>katherine.hopkins@kellyhart.com</u>  <small>Uniform claim identifier for electronic payments in chapter 13 (if you use one):</small> _____	<b>Where should payments to the creditor be sent? (if different)</b>  <small>Name</small> _____ <small>Number Street</small> _____ <small>City State ZIP Code</small> _____ <small>Country</small> _____ <small>Contact phone</small> _____ <small>Contact email</small> _____
4.	<b>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 <u>MM / DD / YYYY</u>	
5.	<b>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**

<b>6. Do you have any number you use to identify the debtor?</b>	<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:    _    _    _    _
<b>7. How much is the claim?</b>	\$ <u>at least \$1,000,000.00</u> <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).
<b>8. What is the basis of the claim?</b>	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 health care information.  <u>Assets sold and related causes of action</u>
<b>9. Is all or part of the claim secured?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. <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: _____  <b>Basis for perfection:</b> _____ 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.)  <b>Value of property:</b> \$ _____ <b>Amount of the claim that is secured:</b> \$ _____ <b>Amount of the claim that is unsecured:</b> \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.)  <b>Amount necessary to cure any default as of the date of the petition:</b> \$ _____  <b>Annual Interest Rate</b> (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
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<b>11. Is this claim subject to a right of setoff?</b>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ \_\_\_\_\_

☐ 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).

\$ \_\_\_\_\_

☐ 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).

\$ \_\_\_\_\_

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ \_\_\_\_\_

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ \_\_\_\_\_

☐ 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.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ \_\_\_\_\_

### 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 acknowledgement 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 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 08/03/2020  
MM / DD / YYYY

Signature

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

Name Jacob Smith  
First name Middle name Last name

Title Chief Financial Officer

Company Black Mountain Sand LLC  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 420 Commerce Street Suite 500  
Number Street

Fort Worth TX 76102  
City State ZIP Code Country

Contact phone 817-529-9451 Email jacob.smith@gmail.com

**ATTACHMENT A:**  
**CLAIM INFORMATION**

By filing this Proof of Claim, Black Mountain Sand LLC (“Black Mountain”) asserts a claim against FB Industries USA Inc. (the “Debtor” and collectively with Black Mountain, the “Parties”) in the amount of at least \$1,000,000.00 in connection with the Purchase and Sale Agreement between the Parties and related claims subject to the lawsuit styled as *Black Mountain Sand LLC v. FB Industries USA Inc.*, Cause No. 2019-60395, pending in the 125th Judicial District, Harris County, Texas (the “Lawsuit”). Black Mountain reserves its rights to assert any and all claims and/or causes of action to which it may be entitled to in connection with the Lawsuit.

**RESERVATION OF RIGHTS**

Black Mountain reserves the right to amend or modify this Proof of Claim for any reason including, without limitation, modification of the amount claimed to include interest, expenses, costs and/or attorneys’ fees. Black Mountain further reserves the right to supplement this Proof of Claim with additional documents as necessary. In filing this Proof of Claim, Black Mountain does not waive any right or rights it may have against any other entities, person or persons liable for all or any part of the claims described herein.

Filing this Proof of Claim is not:

- a. a waiver or release of its rights or claims against any person, entity or property;
- b. a waiver or release of its right to trial by jury in any proceeding, whether or not the same are designated legal or equitable rights in any case, controversy or proceeding relating hereto, notwithstanding the designation or not of such matters as “core proceedings” pursuant to 28 U.S.C. § 157(b)(2), and whether such jury trial right is pursuant to statute or the United States Constitution;
- c. a waiver or release of its right to have any and all final orders in any and all non-core matters or proceedings entered only after de novo review by a United States District Court Judge;
- d. a waiver or release of the right to move to withdraw the reference with respect to the subject matter of this Proof of Claim, any objection thereto or other proceedings commenced with respect thereto or any other proceeding which may be commenced in this case against or otherwise involving Debtor; or
- e. an election of remedy.



**ATTACHMENT B:**  
**PLAINTIFF'S ORIGINAL PETITION**

CAUSE NO. \_\_\_\_\_

<b>BLACK MOUNTAIN SAND LLC,</b>	§	<b>IN THE DISTRICT COURT OF</b>
	§	
<b>PLAINTIFF,</b>	§	
	§	
<b>V.</b>	§	<b>HARRIS COUNTY, TEXAS</b>
	§	
<b>FB INDUSTRIES USA INC.,</b>	§	
	§	
<b>DEFENDANT.</b>	§	<b>____ JUDICIAL DISTRICT</b>

**PLAINTIFF'S ORIGINAL PETITION**

**I. INTRODUCTION**

This case concerns FB Industries USA Inc.'s ("FB USA" or "Hi-Crush")<sup>1</sup> breach of the Purchase and Sale Agreement (the "PSA") with Black Mountain Sand LLC ("Black Mountain"). Per the terms of the PSA, Hi-Crush agreed to use commercially reasonable efforts to transact with Diamondback Energy, Inc. ("Diamondback") for last mile sand delivery services by June 30, 2019. Hi-Crush failed to use the required efforts. Instead, Hi-Crush stalled in directly providing such services to Diamondback until after the June 30<sup>th</sup> deadline, even though it offered to provide such services through a third-party before then. As a result of the breach, Hi-Crush wrongfully held back \$1,000,000.00 of the purchase price due to Black Mountain under the PSA for selling Hi-Crush its last mile service business. Thus, Black Mountain brings this action against Hi-Crush to recover the amount owed it under the PSA along with its attorneys' fees and costs.

**II. DISCOVERY CONTROL PLAN**

1. Pursuant to TEXAS RULE OF CIVIL PROCEDURE 190.4, Black Mountain intends to conduct discovery under a Level 3 Discovery Control Plan.

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<sup>1</sup> FB USA and Hi-Crush Inc. are affiliated entities under common ownership and control. Black Mountain negotiated and worked with Hi-Crush Inc. concerning the PSA. Thus, for purposes of this pleading, the reference to "Hi-Crush" identifies FB Industries USA Inc.

### **III. PARTIES**

2. Plaintiff Black Mountain is a Delaware limited liability company with its principal place of business at 420 Commerce Street, Suite 500, Fort Worth, Texas 76102.

3. Defendant FB USA is a Texas corporation with its principal place of business at 1330 Post Oak Blvd., Suite 600, Houston, Texas 77056. FB USA may be served with process through its registered agent CT Corporation System at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

### **IV. RULE 47 DISCLOSURE**

4. In accordance with Texas Rule of Civil Procedure 47, Black Mountain seeks monetary relief over \$1,000,000.

### **V. JURISDICTION AND VENUE**

7. Subject matter jurisdiction of this case is proper because the amount in controversy exceeds the Court's minimum jurisdictional requirement.

8. Venue is proper in this district pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(a)(3) because FB USA's principal office is in Harris County, Texas and pursuant to the PSA's venue clause identifying Harris County, Texas.

### **VI. FACTUAL BACKGROUND**

#### **A. Last Mile Sand Services.**

9. Black Mountain owns several sand mining facilities and is a leading supplier of in-basin frac sand to the oil and gas industry in the Permian, Eagle Ford, and Mid-Con regions. In order to address the logistics of getting frac sand from the mine to the wellsite, Black Mountain provided its customers with what is known as "last mile sand delivery services," which include delivering frac sand through Black Mountain's trucking fleet and storing the sand in silos

at the customer's wellsite. These services provide the customer with a constant sand supply and reduce the customer's nonproductive time in completing wells.

10. As relevant here, Black Mountain is the exclusive supplier of frac sand to Diamondback. In addition to supplying sand, for a certain period of time, Black Mountain provided last mile sand services to Diamondback through the use of its silo systems and conveyors. Diamondback, however, stopped using Black Mountain's last mile services, and sought those services from other parties in November 2018.

**B. The PSA Required Hi-Crush Use "Commercially Reasonable Efforts" Before the "End Date."**

11. Hi-Crush also owns several sand mining facilities and supplies frac sand to the oil and gas industry. Prior to its entrance into the PSA, Hi-Crush also provided last mile services at wellsites through movable storage containers as opposed to silos.

12. Hi-Crush became interested in purchasing Black Mountain's last mile services business. On or around October 31, 2018, Hi-Crush and Black Mountain entered into the PSA, pursuant to which Hi-Crush purchased from Black Mountain its last mile service business, including various related assets (i.e., silos, conveyors, trucks, etc.) and contracts.

13. The parties agreed Hi-Crush would pay Black Mountain an aggregate consideration of \$20,000,000 for Black Mountain's last mile service business (the "Purchase Price").<sup>2</sup>

14. Hi-Crush would retain \$1,000,000 of the Purchase Price at closing (the "Holdback Amount"). However, per Section 5.08(b) of the PSA, the Holdback Amount would become payable to Black Mountain "within 15 days after [Hi-Crush or its Affiliate] enters into an agreement to perform through completion, last mile sand delivery services, including trucking,

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<sup>2</sup> The parties agreed to adjust the Purchase Price for certain rents and expenses not relevant to this matter.

trucking coordination and wellsite operations, for the support of at least one oil and gas well for Diamondback Energy, Inc. (or its Affiliates).” Hi-Crush “agree[d] to use its commercially reasonable efforts to cause the requirements of Section 5.08(b) to be satisfied on or before June 30, 2019 (the ‘End Date’).”

**C. Hi-Crush Failed to Use “Commercially Reasonable Efforts.”**

15. In May 2019, Diamondback contacted Hi-Crush to provide last mile services. Hi-Crush, however, informed Diamondback that it would not be able to provide those services to Diamondback directly until July 1, 2019 (i.e., one day after the End Date for the Holdback Amount), but that Hi-Crush could provide those services *before* July 1 through a third-party service company.

16. On June 5, 2019, Black Mountain contacted Hi-Crush regarding Diamondback’s attempts to enter into an agreement with Hi-Crush for last mile services, and informed Hi-Crush that it was willing to facilitate an agreement between Diamondback and Hi-Crush because of its good relationship with Diamondback.

17. On June 14, 2019, Hi-Crush responded to Black Mountain that Diamondback was not interested in the silo equipment Hi-Crush purchased from Black Mountain because the equipment was allegedly defective. Hi-Crush did not state whether Diamondback was interested in any of its other last mile sand delivery services.

18. On July 23, 2019, Hi-Crush notified Black Mountain in writing that it did not enter into an agreement with Diamondback to provide last mile sand delivery services and thus it would not pay the Holdback Amount to Black Mountain.

19. All conditions precedent to recovery sought herein have been met or have been waived by Hi-Crush.

## **VII. CAUSES OF ACTION**

### **COUNT I – BREACH OF CONTRACT**

20. Black Mountain incorporates and re-alleges in full the preceding paragraphs of this Petition.

21. As described above, Hi-Crush breached the PSA by failing to use its commercially reasonable efforts to cause the requirements of Section 5.08(b) to be satisfied on or before June 30, 2019. In fact, Hi-Crush attempted to circumvent the PSA by informing Diamondback that it could only provide last mile services to the company directly on July 1, 2019.

22. Hi-Crush's breach caused Black Mountain to suffer actual damages in an amount of \$1,000,000.00. Black Mountain is entitled to recover these damages along with pre- and post-judgment interest, reasonable and necessary attorneys' fees, and costs of court.

### **COUNT II – ATTORNEYS' FEES**

23. As a result of Hi-Crush's wrongful conduct described above, Black Mountain was forced to retain the undersigned counsel in relation to this action. Pursuant to TEXAS CIVIL PRACTICE & REMEDIES CODE § 38.001, Black Mountain seeks an award of reasonable and necessary attorneys' fees and costs incurred through trial and appeal of this cause.

## **VIII. PRAYER FOR RELIEF**

For the reasons set forth herein, Black Mountain respectfully requests that:

- (i) On final trial of this cause, Black Mountain receives a judgment against Hi-Crush for \$1,000,000.00;
- (ii) On final trial of this cause, Black Mountain receives a judgment against Hi-Crush for costs of court;
- (iii) On final trial of this cause, Black Mountain receives a judgment against Hi-Crush for its reasonable and necessary attorneys' fees;

- (iv) On final trial of this cause, Black Mountain receives pre and post-judgment interest as allowed by law; and
- (v) The Court award all other relief at law or in equity to which Black Mountain may show itself entitled to at law or in equity.

Respectfully submitted,

/s/ James C. Scott

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