UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Hi-Crush Partners L.P. Securities Litigation

No. 12-Civ-8557 (CM)

DECISION AND ORDER APPROVING SETTLEMENT AND AWARDING ATTORNEY'S FEES AND EXPENSES

I. INTRODUCTION

Lead counsel for the plaintiffs having moved for approval of the settlement of this class action, and no class member having either objected or opted out, the court approves the settlement and awards attorney's fees to counsel in the sum of $1,266,666.67, plus any accrued interest, together with $106,451.20 for litigation expenses actually incurred.

II. PROCEDURAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

A. Procedural Background

Between November 21, 2012 and December 18, 2012, plaintiffs Shirley Horn, Douglas Goodhart, Leona Sesholtz, Alexander W. Thiele, and Peter A. Luebke filed four separate putative class action lawsuits against Hi-Crush, its general partner, certain of its officers and directors, and the underwriters of Hi-Crush's Initial Public Offering ("IPO"): *Horn v. Hi-Crush Partners, L.P., et al.*, 12-CV-8557 (S.D.N.Y.) (the "Horn Action"); *Goodhart v. Hi-Crush Partners, L.P., et al.*, 12-CV-8574 (S.D.N.Y.) (the "Goodhart Action"); *Sesholtz, at al. v. Hi-Crush Partners, L.P., et al.*, 12-CV-8610 (S.D.N.Y.) (the "Sesholtz Action"); and *Luebke v. Hi-Crush Partners, L.P., et al.*, 12-CV-9212 (S.D.N.Y.) (the "Luebke Action"). These lawsuits alleged violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") in connection with Hi-Crush's

IPO, against Hi-Crush Partners LP, the company's investment bankers (Barclays Capital Inc., Credit Suisse Securities (USA) LLC, Morgan Stanley & Co. LLC, RBC Capital Markets, LLC, Raymond James & Associates, Inc., Robert W. Baird & Co. Incorporated, UBS Securities LLC), and Individual Defendants (Jeffries V. Alston, III ("Alston"), Robert L. Cabes, Jr. ("Cabes"), Laura C. Fulton ("Fulton"), John R. Huff ("Huff"), Robert E. Rasmus ("Rasmus"), Trevor M. Turbidy ("Turbidy"), Steven A. Webster ("Webster"), and James M. Whipkey ("Whipkey")).

Pursuant to the PSLRA (15 U.S.C. § 78u-4(a)(3)(B)), several members of the putative class moved for appointment as lead plaintiff on or before January 22, 2013.

Plaintiffs in the *Goodhart* Action and *Sesholtz* Action voluntarily dismissed their lawsuits on December 10, 2012 and February 7, 2013, respectively.

By an order dated February 11, 2013 (the "Order") (Docket #54), the Court consolidated the *Horn* Action and *Luebke* Action under the caption *In re Hi-Crush Partners, L.P. Securities Litigation*, 12 Civ. 8557 (the "Consolidated Action"). In the Order, the Court appointed the HITE Funds as the Lead Plaintiffs, and Kirby McInerney LLP as lead counsel for the putative class in the Consolidated Action. The Court also directed Lead Counsel to file any consolidated or amended complaint on or before February 15, 2013.

On February 15, 2013, Lead Plaintiffs filed a consolidated amended complaint (the "Consolidated Complaint"), adding Hi-Crush GP as a defendant. The Consolidated Complaint alleged violations of Sections 11, 12 and 15 of the Securities Act, and added claims for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated under Section 10(b), which had not been asserted in any of the previously filed complaints.

On March 22, 2013, all of the named defendants moved to dismiss the Consolidated Complaint. On April 12, 2013, Lead Plaintiffs filed their Opposition to the defendants' motions

to dismiss the Consolidated Complaint. Defendants filed replies in support of their motions to dismiss on April 19, 2013.

On December 2, 2013, the Court issued a Decision and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("Decision and Order"). Specifically, the Court dismissed the claims asserted under Sections 11, 12 and 15 of the Securities Act, but denied dismissal as to the claims asserted under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5, relating to investments in Hi-Crush common units during the period from September 25, 2012 through November 12, 2012. As a result of the Decision and Order, certain defendants, including the named underwriter defendants (who had only been named in the Securities Act claims) and certain of the individual defendants, were dismissed from the Consolidated Action.

On January 13, 2014, the remaining Defendants (Hi-Crush, Hi-Crush GP, Alston, Fulton Rasmus, and Whipkey) filed their answer to the Amended Complaint, denying the allegations therein.

From February to June 2014, the parties engaged in discovery that included the production and exchange of documents, and the taking and defense of deposition testimony.

On April 15, 2014, Lead Plaintiffs filed a Motion for Class Certification and Appointment of Class Representative and Class Counsel ("Class Certification Motion"). On May 15, 2014, Defendants filed their Opposition to Plaintiffs' Class Certification Motion and Plaintiffs filed their reply on June 17, 2014.

During the pendency of Lead Plaintiffs' motion for class certification, the parties agreed to explore a negotiated resolution through mediation. On June 25, 2014, the Settling Parties participated in mediated settlement negotiations before the Mediator. After an intensive day long mediation session, which was attended by Defendants' insurers, the Mediator made a proposal to settle the Action for $3.8 million in cash, subject to the execution of a formal stipulation and the

Court's approval. Shortly thereafter, the parties accepted the Mediator's proposal. The Stipulation of Settlement ("Stipulation") together with exhibits and certain other documents referred to herein, has been duly executed and reflects the final and binding agreement between the parties. *See* Press Decl. Ex. 1.

On September 12, 2014, Lead Plaintiffs moved for preliminary approval of the Settlement, certification of a settlement class and approval of the Settlement. (Docket #100.) On September 16, 2014, the Court granted Lead Plaintiffs' motion. (Docket #104.)

B. Substantive Allegations

The factual allegations of the Complaint have been summarized and discussed at length in the Court's decision on Defendants' motion to dismiss. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12 Civ. 8557 (CM), 2013 WL 6233561, at *1-5 (S.D.N.Y. Dec. 2, 2013). In support of the claims that survived Defendant's motions to dismiss, Lead Plaintiffs pled that, prior to November 13, 2012, Defendants wrongfully concealed that Baker Hughes Inc. ("Baker Hughes") repudiated its Supply Agreement with Hi-Crush in September 2012. Moreover, in public statements following that repudiation, Defendants continued to reference Hi-Crush's relationship with Baker Hughes, and they did not even hint at the possibility that this customer relationship, which comprised a significant proportion of Hi-Crush's revenues, was endangered.

On November 13, 2012, Hi-Crush issued a press release and filed a Form 8-K with the U.S. Securities and Exchange Commission ("SEC"). These filings for the first time publicly disclosed that, on September 19, 2012, Baker Hughes had purported to repudiate its Supply Agreement with Hi-Crush. The release additionally disclosed that, in response to Baker Hughes' purported repudiation, Hi-Crush had formally terminated the Supply Agreement and had filed a lawsuit against Baker Hughes on November 12, 2012.

On the first day of trading following this disclosure, Hi-Crush's common units lost

approximately 26% of their value on extremely high trading volume of more than 3.3 million units. The price fell from $20.35 per unit on November 12, 2012 to $15.00 per unit on November 13, 2012.

III. REASONS FOR THE SETTLEMENT

The principal reason advanced for the Settlement is the significant benefit that it provides to the Settlement Class now. This benefit must be weighed against the risk that the Settlement Class would have received no recovery had Plaintiffs elected to continue litigating and been defeated at the class certification or summary judgment phases, trial, or appeal.

IV. THE TERMS OF THE SETTLEMENT

The Settlement resolves all claims of Lead Plaintiffs and the Settlement Class against all Released Parties. The Defendants have agreed to cause $3.8 million in cash to be paid into a Settlement Fund on behalf of Lead Plaintiffs and the Settlement Class. The Settlement Fund will be deposited into an escrow account within thirty days after the entry of the Preliminary Approval Order in accordance with the payment instructions to be provided by Lead Counsel and will then earn interest until distributed to the Settlement Class.

V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Applicable Standard

The settlement of claims brought by a certified class is subject to court approval after reasonable notice and a hearing. *See* Fed. R. Civ P. 23(e)(1)-(2). A court will approve a settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotations omitted).

This determination falls within the Court's sound discretion. *See Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991); *In re Visa Check/MasterMoney AntitGCG Litig.*, 297 F. Supp. 2d 503, 509 (E.D.N.Y. 2003). In

exercising such discretion, a court should be mindful of the "strong judicial policy in favor of settlements." *Wal-Mart*, 396 F.3d at 116 (internal quotations omitted); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983).

"Courts determine the fairness of a settlement by looking both at the terms of the settlement and the negotiation process leading up to it." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); s*ee Wal-Mart*, 396 F.3d at 116 (citations omitted). With respect to process, a class action settlement enjoys a strong "presumption of fairness" where it is the product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery. *See Wal-Mart*, 396 F.3d at 116; *see also City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014); *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831 (CM)(MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993). This is particularly true in complex class actions, where "the courts have long recognized that such litigation 'is notably difficult and notoriously uncertain,' and that compromise is particularly appropriate." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (internal citations omitted).

With respect to the substantive terms of a settlement, courts in this Circuit analyze the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), which include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the

> proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Wal-Mart, 396 F.3d at 117 (quoting *Grinnell*, 495 F.2d at 463) (citations omitted)).

In applying the *Grinnell* factors, a court should not substitute its judgment for those of the parties who negotiated the settlement, or conduct a "mini-trial" on the action's merit. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982).

Here, the proposed Settlement is fair, reasonable and adequate when measured under the *Grinnell* factors. Counsel for the parties have thoroughly weighed the strengths and weaknesses of the claims and defenses thereto and, after a formal mediation session and extensive negotiations facilitated by an independent and experienced mediator, have reached an informed compromise.

B. The Settlement Is Procedurally Fair as it Was Negotiated at Arm's Length and Is Supported by Lead Plaintiffs and Experienced Counsel

The Settlement was negotiated at arm's length by counsel who are experienced in complex securities litigation and who were acting in an informed manner. Discovery was well underway when the parties agreed to mediate this matter. During the mediation process, the parties submitted confidential mediation statements and participated in a full day mediation session, which was attended by Defendants' insurers. After the conclusion of the mediation, the parties accepted the Mediator's proposal to settle and release all claims for $3.8 million in cash. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("mediator's involvement . . . ensure[d] that the proceedings were free of collusion and undue pressure"); *see also In re Advanced Battery Techs., Sec. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014) ("[A] strong initial presumption of fairness attaches to the proposed settlement, if, as here, the settlement is reached by experienced counsel after arm's-length negotiations."); *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689 (SAS),

2003 WL 22244676, *4 (S.D.N.Y. Sept. 29, 2003) ("[T]hat the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.").

Moreover, the recommendation of Lead Plaintiffs, which are sophisticated institutional investors, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is entitled to an even greater presumption of reasonableness." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (internal citation omitted). The HITE Funds are managed by a sophisticated institutional investment management company that manages hedge fund portfolios. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including during discovery and participation in settlement negotiations. *See, e.g.* Press Decl. at ¶¶27-28, 32. Lead Plaintiff approves of the Settlement without reservation. *Id.* at ¶55.

Lead Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair, reasonable and adequate, but is an excellent result for Lead Plaintiff and the Class. *See* Press Decl. ¶¶12, 49, 72. This opinion is entitled to "great weight." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) *aff'd*, 117 F.3d 721 (2d Cir. 1997) (citation omitted); *see also Vecco*, 2007 WL 4115809, at *12.

All of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

C. The Settlement Terms are Fair, Reasonable, and Adequate and Satisfy the Second Circuit's *Grinnell* Factors

In determining whether the substantive terms of a settlement are fair, reasonable, and adequate, courts in this Circuit look to the nine *Grinnell* factors. All nine factors need not be

satisfied; the court must look at the totality of these factors in light of the specific circumstances involved. *Global Crossing*, 225 F.R.D. at 456. As demonstrated below, the Settlement satisfies the *Grinnell* factors.

1. Continued Litigation Would Be Complex, Expensive, and Protracted

Courts consistently have recognized that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement, especially in a securities class action. *See, e.g.*, *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Hicks v. Stanley*, No. 01 Civ. 10071, 2005 WL 2757792, at *5-6 (S.D.N.Y. Oct. 24, 2005).

The parties resolved this action after the Lead Plaintiffs: (i) conducted an extensive pre-complaint investigation; (ii) drafted and filed an Amended Consolidated Complaint; (iii) successfully opposed Defendants' motions to dismiss briefing; (iv) engaged in class and merits discovery; and (v) retained the Mediator to assist them in exploring a potential negotiated resolution of the claims against the Defendants. During the mediation process, the parties submitted confidential mediation statements and participated in a full day face-to-face mediation session, which, with the assistance of the mediator, resulted in an agreement to settle and release all claims asserted against all Defendants for $3.8 million in cash. Reaching a settlement at this juncture avoided the uncertainties of protracted litigation.

Absent the Settlement, Lead Plaintiffs still would need to pursue contentious and expensive discovery proceedings, including expert discovery, additional motion practice, a complex and costly trial, and likely appeals. Throughout this process, Lead Plaintiffs would face numerous hurdles such as compelling challenges to scienter. Defendants consistently suggested that they acted in good faith and did not intend to defraud investors. In particular, Defendants observed that they relied upon experienced counsel's advice that Baker Hughes' purported repudiation was

invalid and that a disclosure duty did not arise until Hi-Crush filed its own lawsuit against Baker Hughes on November 12, 2012. Indeed, as this Court observed in its motion to dismiss opinion, notwithstanding Baker Hughes' September 19, 2012 repudiation of the Supply Agreement, "Hi-Crush did not actually breach its agreement with Baker Hughes and . . . Baker Hughes had no valid basis for terminating the agreement." *See Hi-Crush*, 2013 WL 6233561, at *16. In addition, Defendants have challenged Lead Plaintiffs' loss causation and damages theories.

By contrast, the Settlement offers the opportunity to provide definite recompense to the Class now – making the instant Settlement a particularly valuable "bird in the hand." *See In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("*Sony*"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *Hicks*, 2005 WL 2757792, at *6 ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

2. Reaction of the Class to the Settlement

The reaction of the Settlement Class to the Settlement is a significant factor in assessing its fairness and adequacy. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ. 400, 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010); *Veeco*, 2007 WL 4115809, at *7. The absence of valid objections or investors electing to exclude themselves from the Settlement provides evidence of Class Members' approval of the terms of the Settlement and desire to share in the proceeds thereof. *See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). Pursuant to the Preliminary Approval Order, Class Members were

notified that they had until November 28, 2014 to request exclusion from the Settlement Class or to object to the Settlement. On December 12, 2014, the Court was advised that no objections were received and no actual members of the Class had requested to be excluded from the Settlement Class. *See* Press Decl. at ¶11.[1] The overwhelmingly positive reaction of the Settlement Class evidences the Class' approval. *See City of Providence*, 2014 WL 1883494, at *6 ("That almost no Class Member objected to the Settlement or chose to exclude himself from it is indeed the strongest indication that the Settlement is fair and reasonable.").

3. Lead Plaintiffs Had Sufficient Information to Make Informed Decisions as To Settlement

In considering the third *Grinnell* factor, "the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Der., and ERISA Litig.*, 909 F.Supp.2d 259, 266 (S.D.N.Y. 2012) (citing *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) (internal citations, quotation markets and alterations omitted)). To satisfy this factor, parties need not have even engaged in formal or extensive discovery. *See Maley v. Del*

[1] On October 14, 2014, Harold Rowell ("Rowell") sent a letter to the Settlement Administrator requesting exclusion from the Settlement Class and acknowledging that he would "release all manner of future claims [that he] may have had." Fraga Decl. ¶13, Ex. D. As Rowell failed to provide any detail relating to his ownership of Hi-Crush common units, whether he even is a member of the Settlement Class cannot be ascertained. Likewise, on November 10, 2014, Herbert M. Seybold requested exclusion from the Settlement Class but did not provide any evidence of his Class Period ownership of Hi-Crush common units. *Id.* Neither individual appears to be a member of the plaintiff class.

Global Techs. Corp., 186 F. Supp. 2d 358, 363 (S.D.N.Y. 2002).[2]

Here, Lead Counsel conducted its own independent investigation without the benefit of any government investigation to formulate its theory of the case and develop sufficient detail to defeat Defendants' motions to dismiss. As detailed in the Press Declaration, the investigation included, *inter alia*, reviewing and analyzing publicly available information and data concerning Hi-Crush and its industry, and consulting with experts about accounting and causation issues. Press Decl. ¶¶57, 59.

After defeating Defendants' motion to dismiss, Lead Counsel embarked on simultaneous class and merits discovery. Review of thousands of pages of documents produced by Defendants allowed Lead Counsel to corroborate Lead Plaintiffs' factual allegations arising in connection with the seven week Class Period. *See* Press Decl. ¶27. The strength of the evidentiary support factored heavily in settlement negotiations with Defendants and their insurers, and allowed Lead Counsel to argue plausibly that victory at summary judgment or trial were likely outcomes. Thus, even though discovery had not yet concluded, Lead Plaintiffs and Lead Counsel "had more than enough information to make an informed and intelligent decision" to settle the claims at the current stage of the litigation. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013).

Lead Plaintiffs also filed their motion for class certification, arguing that the Action was particularly well-suited for class action treatment and that all requirements of Federal Rule Civil Procedure Rule 23 were satisfied. (Docket #81.) Accompanying Lead Plaintiffs' class certification motion was an expert declaration that demonstrated that the market for Hi-Crush common units was efficient during the Class Period. During Class Discovery, Defendants deposed Lead Plaintiffs' representative in addition to Lead Plaintiffs' damages expert. *See* Press Decl. ¶59.

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[2] Formal discovery may not commence in cases brought under the PSLRA, such as this Action, until the motion to dismiss is denied.

"Accordingly, Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial." *City of Providence*, 2014 WL 1883494, at *7; *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted).

4. Lead Plaintiffs Faced Significant Risks in Establishing Liability and Damages

In analyzing the risk to plaintiffs in establishing liability, the Court does not "need to decide the merits of the case or resolve unsettled legal questions." *Cinelli v. MCS Claim Servs., Inc.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006) (internal quotations and alterations omitted). Rather, the Court is only required to weigh the likelihood of success on the merits against the relief provided by the Settlement. *See id.* Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *See Global Crossing*, 225 F.R.D. at 459.

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463; *Vecco*, 2007 WL 4115809, at *8-9. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See AOL Time Warner,* 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy, Inc. Sec. Litig.*, No. 03 Civ. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in a securities action presented significant hurdles to proving liability).

As set forth in detail in the Press Declaration (¶¶38-46), Lead Plaintiffs faced numerous hurdles in establishing liability. In particular, Lead Plaintiffs would bear the burden of showing

that the evidence they elicited during discovery was sufficient to establish their claims despite any credible defenses. While Lead Plaintiffs believe that documentary and testimonial evidence would support their claims, there was no way to determine, without substantial additional litigation, whether such evidence would withstand a summary judgment motion, let alone convince a jury to accept Lead Plaintiffs' theory over Defendants' competing narrative. Among other factual defenses, Defendants have argued that Hi-Crush's senior management: (i) believed that Baker Hughes' repudiation of the Supply Agreement was invalid under the contractual provisions and therefore did not have to be disclosed to investors; and (ii) relied upon advice of counsel in connection with evaluating their duty to disclose. Even if Hi-Crush was legally obligated to disclose the repudiation, Defendants argued that their failure to do so was the result of a good faith error, rather than an intent to defraud investors.

Lead Plaintiffs also faced the risk that they would be unable to prove loss causation and damages. *See In re Milken and Assoc. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement of a small percentage of the total damages sought because the magnitude of damages often becomes a "battle of experts . . . with no guarantee of the outcome"); *see also PaineWebber*, 171 F.R.D. at 129. To prevail on those issues, Plaintiffs would be required to prove, with the assistance of an expert, that Defendants' misleading statements inflated the price of Hi-Crush common units, as well as the amount of the artificial inflation.

Defendants already have challenged through a *Daubert* motion the scientific validity of Lead Plaintiffs' expert's report in connection with class certification briefing. It is likely that Defendants would have submitted their own competing expert reports as the litigation proceeded. *See, e.g.*, *In re Omnicom Group, Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010). At the summary judgment stage, Defendants likely would continue to challenge Lead Plaintiffs' calculation of damages and argue that any decline in the price of Hi-Crush common units resulted from factors

other than disclosure of Baker Hughes' purported repudiation of the Supply Agreement. Even if the Action were permitted to go to trial, it is not possible to determine which expert the jury would find more credible.

Accordingly, absent this Settlement, the proposed class faces a very real risk of no recovery, possibly after years of additional proceedings. Conversely, the Settlement will provide tangible, certain and substantial relief to the proposed class now, "without subjecting them to the risks, complexity, duration, and expense of continuing litigation." *Global Crossing*, 225 F.R.D. at 456-57. Under these circumstances, the proposed settlement balances the risks, costs, and delay inherent in complex cases.

5. Risks of Maintaining Class Action Status Through Trial

Lead Plaintiffs had fully briefed a class certification motion at the time the Settlement was finalized. I do not know how I would have ruled, especially in the face of the Daubert cross motion. Even if Lead Plaintiffs had prevailed, Defendants could have raised additional challenges to class certification, and even moved to de-certify the Class before trial or on appeal at the conclusion of trial. *See* Fed. R. Civ. P. 23(c); *Chatelain*, 805 F. Supp. at 214 ("Even if certified, the class would face the risk of decertification. This factor indicates that settlement is advantageous to the class at this time."). "Given such risk, this factor weighs in favor of approval of the Settlement." *In re Advanced Battery Techs.*, 298 F.R.D. at 178.

6. Ability to Withstand Greater Judgment

The Court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement. *See Grinnell*, 495 F.2d at 463. Lead Counsel does not dispute the viability of Hi-Crush and has no reason to believe that Defendants could not withstand a greater judgment. Courts, however, generally do not find the ability to withstand a greater judgment to be an

impediment to settlement when the other factors favor the settlement. *See In re Sony*, 2008 WL 1956267, at *8 ("a defendant is not required to 'empty its coffers' before a settlement can be found adequate.").

7. The Settlement Amount Is in the Range of Reasonableness in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The size of the Settlement provides support for its reasonableness when viewed in light of the best possible recovery and all of the risks of litigation. *See Wal-Mart*, 396 F.3d at 119 ("There is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion . . . .") (internal citation omitted).

When compared to other securities class action settlements, the Settlement is clearly within the range of reasonableness. According to a 2014 report by NERA Economic Consulting entitled "Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review" ("NERA Report"), "the median settlement for cases with investor losses of less than $20 million has been 17.1% of the investor losses." *See* Press Decl. ¶48, Ex. 4 at 32. Accordingly, the $3.8 million settlement here, which represents over 36% of the estimated class-wide damages of $10.4 million, represents a fine result.[3] Accordingly, the Settlement represents a recovery well in excess of the median securities class action settlement for comparable cases. *See* Press Decl. ¶48.

The Settlement is therefore favorable in comparison to other securities class action settlements and represents a significant recovery in light of the risks that Lead Plaintiffs would not succeed on class certification and that, even if they prevailed at summary judgment or trial, they

[3] As this is not a claims-made settlement, in the event that fewer than 100% of the class members choose to submit claims to share in the settlement recovery (securities class action claims rates are generally below 100%), those class members who file timely conforming claims will receive more than 36% of their potential recovery damages; perhaps significantly more.

would recover only a fraction of the maximum recoverable damages, or none at all. As this Court previously has noted, "There is a high likelihood that the costs involved in shepherding a securities action like this one through the discovery process, pre-trial motions, trial, and appeals will far outweigh – and indeed subsume – any recovery that might be realized by the Settlement Class." *In re Advanced Battery Techs.*, 298 F.R.D. at 179.

The *Grinnell* factors, taken together, weigh in favor of Settlement.

D. The Plan of Allocation Is Fair, Reasonable, and Adequate

When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel. "When formulated by competent and experienced class counsel," a plan for allocation of net settlement proceeds "need have only a reasonable, rational basis." *Telik*, 576 F. Supp. 2d at 580 (quoting *Global Crossing*, 225 F.R.D. at 462 (quotation marks omitted)). "A reasonable plan may consider the relative strength and values of different categories of claims." *Id.*; *see also In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 595-96 (S.D.N.Y. 1992) (plan of allocation that distributes greater part of settlement proceeds to those most injured is reasonable). Because they tend to mirror the complaint's allegations, "plans that allocate money depending on the timing of purchases and sales of the securities at issue are common." *In re Datatec Sys., Inc. Sec. Litig.*, Master File No. 04 Civ.525, 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007).

Here, the proposed Plan of Allocation is rational and consistent with Plaintiffs' theory of the case; the plan reimburses claimants largely based on when they bought or sold Hi-Crush common units, taking into account the amount of artificial inflation present in the stock price at those times (and the amount by which the level of inflation was reduced by the alleged corrective disclosure). *See* Declaration of Jose C. Fraga, dated November 13, 2014 ("Fraga Decl."), at 5-6. More specifically, the Plan allocates Recognized Loss based on the Hi-Crush price decline

immediately following the November 13, 2012 disclosure. This Recognized Loss is applied to units that were purchased between the time of Defendants' allegedly misleading September 25, 2012 presentation and the November 13, 2012 disclosure, and were not sold prior to that disclosure.

It should be noted that not one objection to the Plan of Allocation has been filed, which also supports approval of the Plan of Allocation. *See Veeco*, 2007 WL 4115809, at *14; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002).

E. Notice to the Class Satisfies Due Process Requirements

The Notice program provides the "best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (citing Fed. R. Civ. P. 23(c)(2)). In accordance with the Preliminary Approval Order, the Settlement Administrator, Garden City Group ("GCG"), caused the Court-approved Notice and Proof of Claim forms to be mailed by first class mail, postage prepaid to 2,360 potential Class Members. Press Decl. Ex. 3 (Fraga Decl. at ¶3). As of November 13, 2014, GCG has disseminated a total of 7,546 Notice Packets to potential Settlement Class Members. Press Decl. ¶7, Ex. 3 (Fraga Decl. at ¶9). On October 14, 2014, the Court-approved Summary Notice was published in *Investor's Business Daily*, and issued electronically over *Business Wire*. Press Decl. ¶8, Ex. 3 (Fraga Decl. at ¶10). The Notice and Proof of Claim along with other important documents related to the Settlement were also posted on the Claims Administrator's website (http://www.hicrushsecuritiessettlement.com) (the "Website") for easy downloading by interested investors. Press Decl. ¶9, Ex. 3 (Fraga Decl. at ¶12). Additionally, the Website allows claimants to submit electronic claims. *Id.* GCG also established a toll-free telephone hotline with a recorded message and live operators to assist potential Settlement Class Members with questions about the Settlement. *See* Press Decl. Ex. 3 (Fraga Decl. at ¶11). GCG has received 53 calls. *Id.* All calls to the toll-free telephone hotline

have been responded to in a timely manner. *Id.*

Moreover, as is required in class actions, the Class has been given notice of the proposed Settlement and Plan of Allocation, as well as the rights of Class Members and the method and dates by which they can object to, or opt-out of, the Settlement. *See* Press Decl. at ¶¶10-11. Further, the Class has been advised of the date of the final fairness hearing at which time they will have an opportunity to be heard with respect to any objection raised. *See* Press Decl. ¶8.

F. The Fee Award Motion is Granted

1. The Percentage of the Fund Method is Appropriately Used In This Case

Where "an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class, as . . . in a securities class action litigation, the attorney is entitled to the reasonable value of the services performed in creating that class recovery, as set by the court." *In re Philip Servs. Corp. Sec. Litig.*, No. 98 Civ. 835, 2007 WL 959299, at *1 (S.D.N.Y. Mar. 28, 2007) (internal citations and quotations omitted). As the Second Circuit observed in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*:

> Courts may award attorneys' fees in common fund cases under either the "lodestar" method or the "percentage of the fund" method. The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys.

396 F.3d 96, 121 (2d Cir. 2005) (internal citation omitted).

Nonetheless, "[t]he trend among district courts in the Second Circuit is to award fees using the percentage method." *City of Providence*, 2014 WL 1883494, at *11 (citations omitted).[4] The

[4] *See also In re Beacon Assocs. Litig.*, No. 09 Civ. 3907, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) ("the trend in this Circuit has been toward the use of a percentage of recovery as the

text of the PSLRA also contemplates using the percentage method, as it provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a *reasonable percentage* of the amount" recovered for the class. 15 U.S.C. §78u-4(a)(6) (emphasis added); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (the PSLRA expressly contemplates that "the percentage method will be used to calculate attorneys' fees in securities fraud class actions"); *Maley*, 186 F. Supp. 2d at 370 (by using this language, Congress "indicated a preference for the use of the percentage method" rather than the lodestar method).

District courts' adoption of the percentage of recovery methodology is consistent with national precedent. *See, e.g.*, *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 & n.7 (S.D.N.Y. 2008) (citing *Maley*, 186 F. Supp. 2d at 370 ("[T]here is a strong consensus – both in this Circuit and across the country – in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) ("In recent years, a majority of the Circuit courts have approved the percentage-of-the-fund method.")).[5] It is also consistent with the PSLRA, which expressly provides that class

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preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.*, No. 06 Civ. 6128, 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (same); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194, 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) (same); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06 Civ. 1825, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (same); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 480 (S.D.N.Y. 2009) (same); *see also, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *14 (S.D.N.Y. Dec. 23, 2009) ("the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits"); *see also Veeco,* 2007 WL 4115808, at *3; *Hicks,* 2005 WL 2757792, at *8 (same).

[5] Percentage-based fee awards in common fund cases have been approved by every of Circuit Court that has addressed the issue. *See In re Thirteen Appeals Arising out of the San Jun Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.3d 451, 454-56 (10th Cir. 1988); *Camden I. Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991);

counsel are entitled to attorneys' fees that represent a "reasonable percentage" of the damages recovered by the class. *Telik*, 576 F. Supp. 2d at 586 (citing 15 U.S.C. § 78u-4(a)(6)). "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *Id.*

Consistent with the approach adopted by the *Goldberger* court, the practice of district courts in this Circuit and nationally, and the relevant portions of the federal securities laws, the percentage-of-recovery approach is the appropriate methodology for awarding attorneys' fees in this action.

2. The Requested Fee is Fair and Reasonable

Lead Counsel is seeking a fee award of 33 1/3% of the Settlement Amount.

"In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund." *Beacon*, 2013 WL 2450960, at *5. Courts in this District have approved percentage-based fee awards comparable to the amount requested here. *See City of Providence*, 2014 WL 1883494, at *20 (awarding 33% of $15 million settlement); *Fogarazzo v. Lehman Bros. Inc.*, No. 03 Civ. 5194, 2011 WL 671745, *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2001) (awarding 33% of $13 million settlement); *In Van Der Moolen Holding N.V. Sec. Litig.*, No. 03 Civ. 8284, slip. op. at 2 (S.D.N.Y. Dec. 7, 2006) (awarding 33 1/3% of $8 million settlement) (ECF No. 45) (Ex. 11); *Maley*, 186 F. Supp. 2d at 367-68 (awarding 33 1/3% of $11.5 million settlement and citing two cases which awarded 33 1/3% of the settlement amount: *In re Apac Teleservs., Inc. Sec. Litig.*, No. 97 Civ. 9145, slip op. at 2 (S.D.N.Y. June 29, 2001) (Docket #54), awarding 33 1/3% of $21 million settlement; and *Newman v. Caribiner Int'l*

Swedish Hosp. Corp. v. Shala, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits require the use of the percentage method in common fund cases. *Camden*, 946 F.2d at 774; *Swedish Hosp.*, 1 F.3d at 1271.

Inc., No. 99 Civ. 2271 (S.D.N.Y. Oct. 25, 2001) (Docket #31), awarding 33 1/3 of $15 million settlement); *see also Moloney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement).

Courts in other federal jurisdictions similarly have determined that a fee award of 33% or more is reasonable and should be awarded. *See, e.g.*, *Grant Barfuss v. DGSE Companies, Inc., et al.*, No. 12 Civ. 3664 (N.D. Tex. Oct. 21, 2013) (Docket #59) (awarding 33% of $1.7 million settlement); *In re Pilgrim's Pride Corp. Sec. Litig.*, No. 08 Civ. 419 (E.D. Tex. May 2, 2012) (Docket #85) (awarding 34% of $1.5 million settlement); *In re Heritage Bond Litig.*, No. 02 ML 1475, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005) (awarding 33 1/3% of $27.278 million settlement); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 498 (E.D. Pa. 2003) (awarding 33 1/3% of $7 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, No. 01 Civ. 258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33 1/3% of $20 million settlement); *In re Green Tree Fin. Corp. Stock Litig.*, Nos. 97-2666 and 97-2679, slip. op. at 9 (D. Minn. Dec. 18, 2003) (awarding 33 1/3% of $12.45 million settlement) (Docket #140).[6]

3. The Goldberger Factors Support the Requested Award of Attorneys' Fees

Under either the percentage-of-the-fund approach or the lodestar multiplier approach, the "*Goldberger* factors" ultimately determine the reasonableness of a common fund fee. *Goldberger*, 209 F.3d at 50. They include: "(1) the time and labor expended by counsel; (2) the magnitude and

[6] A recent analysis of securities class action settlements from 1996 through 2013 confirmed that the median fee award was 30% of the settlement amount for settlements between $5 and $10 million. *See* NERA Report at 34, Figure 34 (NERA Jan. 21, 2014).

complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.*; *see also McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417, 422-26 (2d Cir. 2010) (confirming the continued availability of both lodestar and percentage-of-the-fund methods and the applicability of the "*Goldberger* factors").

(i) Lead Counsel Has Devoted Significant Time and Labor to This Action

Lead Counsel devoted 1,594.75 hours to this matter (excluding time devoted to preparing this submission), yielding a "lodestar" amount of $900,705. The requested fee is a multiplier of 1.41 on that lodestar. *See* Press Decl. at ¶74.[7]

(ii) Lead Counsel's Hours and Hourly Rates are Reasonable

Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. Lead Counsel devoted substantial time devoted to this litigation over two years. Lead Counsel, among other things:

- Investigated, drafted, and filed the Consolidated Amended Complaint, which involved: (i) review and analysis of Hi-Crush's public filings, including its SEC filings; (ii) review and analysis of news articles, press releases, announcements, and analysts' reports by and relating to Hi-Crush; (iii) researched law applicable to the claims asserted in the Action and the defenses thereto; (iv) developed new claims not included in previously filed complaints (which were the *only* claims to survive Defendants' motion to dismiss) (Press Decl. at ¶57);
- Responded to and, with respect to the claims that gave rise to the settlement, defeated Defendants' complex motion to dismiss (*id.* at ¶58);
- Negotiated the exchange of class and merits discovery from Defendants and reviewed over 14,000 pages of documents (*id.* at ¶¶27, 58);

[7] All attorneys who submitted time in connection with this Action were full-time employees of Lead Counsel Kirby McInerney. No contract attorneys were employed by Lead Counsel on this matter.

- Researched and briefed class certification motions amid the changing legal landscape relating to class certification, in addition to responding to Defendants' document requests related to class certification and defending the depositions of Lead Plaintiffs' damages expert and representative (*id.* at ¶59);

- Conducted numerous settlement meetings and telephone calls, prepared a mediation statement, worked with a damages expert to prepare a classwide damages analysis and negotiated during one day of mediation in Los Angeles, California before the Mediator, which resulted in the parties reaching an agreement in principle to settle (*id.* at ¶60); and

- Vigorously pressed the Class' interest through the negotiation of beneficial terms for the Class in the Stipulation (*id.* at ¶61).

In addition, Lead Counsel directly supervised the day-to-day litigation work, to ensure efficiency and minimize unnecessary duplication of work.

Lead Counsel's hours are reasonable. The attorneys' fees requested will compensate counsel for work already performed in this case, and for work remaining to be performed, including making sure that the Settlement is fairly administered and implemented, preparing for and attending the final fairness hearing, and obtaining dismissal of the action. For these reasons and as further discussed below, Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses is granted.

In a lodestar analysis, the appropriate hourly rates are those rates that are "normally charged in the community where the counsel practices, *i.e.*, the 'market rate.'" *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *17 n.6 (S.D.N.Y. July 27, 2007); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted). Awards in comparable cases are an appropriate measure of the market value of counsel's time. *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 885 (2d Cir. 1983).

The rates billed by Lead Counsel (ranging from $425 to $825 per hour) for attorneys, are

comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. *See* Press Decl. at Exs. 11, 12.[8] Similar billing rates for law firms representing plaintiffs in securities class actions have been approved by other courts in this Circuit. *See, e.g.*, *City of Providence*, 2014 WL 1883494, at *13 (finding partner rates of $640 to $875 and non-partner attorney rates of $335 to $725 to be line with defense firms); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007).

Finally, the use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation.[9] Lead Counsel's calculated lodestar of $900,705.00 represents the appropriate amount on which to apply a multiplier to reflect the contingent nature of the fee and risk incurred by Lead Counsel.

(iv) The Complexity, Duration, and Magnitude of the Litigation Weigh in Favor of Approval

"The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel." *City of Providence*, 2014 WL 1883494, at *16 (citing *Chatelain v. Prudential-Bache Sec. Inc.*, 805 F. Supp. 209, 216

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[8] "[T]he best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that defend class actions on a regular basis." *Telik*, 576 F. Supp. 2d at 589 (emphasis omitted) (cited by *City of Providence*, 2014 WL 1883494, at *13). *See also* Jones, Leigh, *The best still charge the most: For high-end legal work, firms remain in the driver's seat over hourly rates.* The National Law Journal (Online) (Dec. 17. 2012) at *2 ("Not surprisingly, the biggest firms in the biggest markets generally had the highest rates. Several firms that have their largest offices in New York and Washington had median rates above $500, according the NLJ survey.")

[9] *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (rates "should be 'current rather than historic'") (citation and internal quotations omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment"); *Telik*, 576 F. Supp. 2d at 589 n.10 (same); *Veeco*, 2007 WL 4115808, at *9 (same).

(S.D.N.Y.1992)). Courts have recognized the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006). A securities fraud class action's magnitude and complexity must be evaluated in comparison to similarly complex cases. *See In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 234 (S.D.N.Y. 2005). As described in greater detail in the Press Declaration, this case was no exception. It involved complex and inextricably linked legal and factual issues relating to Hi-Crush's customer relationship with Baker Hughes, in addition to inherently complex Exchange Act issues regarding, *inter alia*, whether Defendants' omissions were materially misleading, whether Defendants' acted with scienter and if loss causation could be established.

In addition, Lead Counsel did not have the benefit of a "road map" established by a government investigation off which they could "piggy back", but instead independently developed factual allegations and legal theories sufficient to survive the PSLRA's heightened pleading standards. *City of Providence*, 2014 WL 1883494, at *16 (citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ.3400, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010); *In re Med. X–Ray Film Antitrust Litig.*, No. 93 Civ. 5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998)). Accordingly, the complexity of this case supports the requested fee award.

(v)The Risks of the Litigation Warrant Approval

Courts have frequently recognized that "[t]he risk of the litigation is often cited as the first, and most important, *Goldberger* factor." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 361 (E.D.N.Y. 2010) (internal citation and quotations omitted). As the Second Circuit has observed, "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *City of Detroit*

v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted).

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees].'" *In re Marsh*, 2009 WL 5178546, at *18 (quoting *Goldberger*, 209 F.3d at 54). Lead Counsel undertook the representation of Lead Plaintiffs and the Class in this Action on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation or of recovering out-of-pocket expenses. There is a real risk of no recovery in complex securities litigation cases such as this one. Over the last five years, nearly 48% of all securities class actions have been dismissed on motions prior to trial,[10] while plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions[11] or appeal.[12]

While Lead Counsel believes that the evidence obtained pursuant to discovery confirms Defendants' wrongful conduct, Defendants have steadfastly denied any wrongdoing. *See* Press Decl. ¶¶38-46. In particular, Defendants consistently have argued that they did not intend to

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[10] Ex. 4, NERA Report, at 21, 24.

[11] *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07 Civ. 61542, 2011 WL 1585605, at *6, *20 (S.D. Fla. Apr. 25, 2011) (although the jury found that certain statements violated section 10(b) of the Exchange Act, the court entered judgment as a matter of law in favor of the defendants as to all claims and statements, on the ground that plaintiffs had failed to present evidence from which the jury could reasonably find loss causation).

[12] *See, e.g.*, *Robbins v. Koger Props. Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing district court's denial of defendant's Federal Rule of Civil Procedure 50(a) motion after trial; reversing $81 million judgment in plaintiffs' favor and entering judgment in favor of defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation and remanding for new trial in light of intervening Supreme Court decision in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

defraud investors and that Baker Hughes' purported repudiation of its supply agreement was a meritless renegotiation ploy.[13] Defendants also claimed to have relied upon the advice of experienced counsel, who advised that Baker Hughes' repudiation was invalid, and that Hi-Crush only owed investors a disclosure duty when Hi-Crush filed its own lawsuit against Baker Hughes on November 12, 2012. This Court observed, in its opinion denying the motion to dismiss, that "Hi-Crush did not actually breach its agreement with Baker Hughes and . . . Baker Hughes had no valid basis for terminating the agreement." *See Hi-Crush*, 2013 WL 6233561, at *16.

While Lead Plaintiffs believe that they would be able to establish that Defendants acted with scienter in failing to disclose Baker Hughes' supply agreement repudiation, they still faced considerable risk that available evidence would not withstand a summary judgment motion, or that they would not be able to convince a jury to accept Lead Plaintiffs' theory over Defendants' competing narrative. Similarly, Defendants raised arguments in opposition to Lead Plaintiffs' loss causation and damages theories, which created additional risk that in the absence of a settlement, the Class's recovery would have been commensurately smaller, or nonexistent.

(vi)The Quality of Representation Favors Approval of Lead Counsel's Fees

Given the number and complexity of the factual and legal issues presented by this action, this case required the expertise and capacity that Lead Counsel brought to bear. Kirby McInerney has decades of experience in complex federal civil litigation, particularly the litigation of securities and other class actions. *See* Press Decl. Ex. 6. Kirby McInerney's experience translated into immediate benefits for the class. Whereas other plaintiffs and their counsel focused exclusively

[13] During the pendency of this Action, Hi-Crush filed an 8-K filed with the U.S. Securities and Exchange Commission on October 10, 2013 that announced Hi-Crush had resolved its contract dispute with Baker Hughes by negotiating a new 6-year supply agreement which required Baker Hughes to purchase a minimum amount of frac sand on a monthly basis.

on claims linked to Hi-Crush's IPO, Kirby McInerney also developed after-market claims under Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5. These new claims were the only ones to survive Defendant's motion to dismiss. Following the Court's motion to dismiss order, Kirby McInerney continued to actively prosecute these remaining claims and brokered a settlement for an amount that compares very favorable to cases with similar estimate total damages.

Another consideration for assessing the quality of services rendered by Lead Counsel is the quality of the opposing counsel in the case. *See Flag Telecom*, 2010 WL 4537550, at *28; *Teachers' Ret. Sys.*, 2004 WL 1087261, at *7; *Maley*, 186 F Supp. 2d at 373. The Defendants were represented by Vinson & Elkins LLP, a prominent international defense-oriented law firm, with more than 700 attorneys in 15 offices worldwide. Defendants' counsel zealously contested the merits of Lead Plaintiffs' claims at every stage of the litigation and engaged in a hard-fought settlement negotiation. In sum, Plaintiffs and all Defendants were well represented.

(vii) The Requested Fee in Relation to the Settlement Is Reasonable

Regardless of which method a court uses to award attorneys' fees, the award must be reasonable under the circumstances of the particular case. *See Goldberger*, 209 F.3d at 47. The Supreme Court has held that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Jenkins*, 491 U.S. at 285-86. As discussed above (*see supra* Section III.C), the 33 1/3% fee requested by Lead Counsel in this Action is consistent with percentage fees awarded in this Circuit and nationwide for comparable recoveries.

(viii) Public Policy Considerations

"'A strong public policy concern exists for rewarding firms for bringing successful securities litigation.'" *Telik*, 576 F. Supp. 2d at 593 (quoting *In re Ashanti Goldfields Sec. Litig.*, No. 00 Civ. 717, 2005 WL 3050284, at *5 (E.D.N.Y. Nov. 15, 2005)). The Supreme Court has

recently reaffirmed its longstanding recognition of the importance of private class actions to the enforcement of the securities laws. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007) (private securities fraud actions provide "'a most effective weapon in the enforcement' of securities laws and are 'a necessary supplement to Commission action'"); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985).

Courts in the Second Circuit have held that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation.'" *In re Merrill Lynch*, 2007 WL 313474, at *21.[14] This Court also recently recognized the importance of "private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis." *City of Providence*, 2014 WL 1883494, at *17 (citing *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331, 2014 WL 1224666, at *24 (S.D.N.Y. March 24, 2014)).[15] Under these circumstances, "provid[ing] appropriate financial incentives. . . in order to attract well qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so'" is entirely appropriate as "[l]awsuits such as this one can only be maintained if competent counsel" is retained. *Id.* at *17-18 (quoting *In re WorldCom*, 388 F.Supp.2d at 359).

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[14] *Telik*, 576 F. Supp. 2d at 593; *In re Priceline.com, Inc. Sec. Litig.*, No. 00 Civ. 1884, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (finding award percentage encourages enforcement of securities laws and supports "attorneys' decisions to take these types of cases on a contingent fee basis"); *In re Bristol-Myers Squibb*, 361 F. Supp. 2d at 236 ("[P]ublic policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC").

[15] *See also Telik*, 576 F. Supp. 2d at 585 ("Courts have also recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature.") (citing *Maley*, 186 F. Supp. 2d at 369).

4. The Class' Reaction to the Fee Request

In addition to the criteria set forth in *Goldberger*, courts in the Second Circuit consider the reaction of the Class to the fee request in deciding how large a fee to award. *See Veeco*, 2007 WL 4115808, at *10; *Maley*, 186 F. Supp. 2d at 374; *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("The class'[] reaction to the fee request supports approval of the requested fees").

Thus far, no Class Members have objected to the fee request.

5. The Lodestar Multiplier Requested by Lead Counsel is Fair and Reasonable, and the Cross-Check Supports Approval of Attorneys' Fees

The Second Circuit also permits courts to utilize a lodestar "cross-check" to further test the reasonableness of a percentage-based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *see also Flag Telecom*, 2010 WL 4537550, at *25-26. "Where the lodestar is 'used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *Veeco*, 2007 WL 4115808, at *8 (quoting *Goldberger*, 209 F.3d at 50).

Lead Counsel and its para-professionals have spent, in the aggregate, 1,594.75 hours in the prosecution of this case. *See* Press Decl. ¶63. The attorneys' fees requested by Lead Counsel, i.e. 33 1/3% of the Settlement Amount, or $1,266,666.67, plus interest, represented a 1.41 multiplier

to Lead Counsel's lodestar.[16] This multiplier is well within the range of multipliers that are typically approved in this Circuit.[17] The multiplier is also within the range of multipliers that have been recently awarded in securities class actions settling for less than $20 million. *See* Press Decl. ¶76 (showing a multiplier range from 1.60 to 3.11). Moreover, the multiplier here is well within the range approved in other circuits.[18]

G. LEAD COUNSEL SHOULD BE REIMBURSED FOR REASONABLY INCURRED LITIGATION EXPENSES

Lead Counsel also requests reimbursement in the amount of $106,451.20 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this Action. The Press Declaration attests to the accuracy of Lead Counsel's expenses, and it is well established that expenses are properly recovered by counsel. Press Decl. ¶¶77-81; *see, e.g.*, *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (citations

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[16] The Supreme Court and other courts have held that the use of current billing rates is proper since such rates compensate for inflation and the loss of use of funds. *See Jenkins*, 491 U.S. at 283-84; *supra* note 8.

[17] *See, e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 134 (2d Cir. 2008) (holding that a $34 million fee, representing a 2.04 multiplier was "toward the lower end of reasonable fee awards"); *Wal-Mart*, 396 F.3d at 123 (multiplier of 3.5 approved on appeal); *Telik*, 576 F. Supp. 2d at 590 (finding a multiplier of 1.6 "well within the range of fees approved by courts in this Circuit"); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier); *In re EVCI*, 2007 WL 2230177, at *17 (finding a multiplier of 2.48 in a lodestar cross-check to confirm the reasonableness of the requested attorneys' fees).

[18] *See, e.g.*, *In re Genta Sec. Litig.*, No. 04 Civ. 2123, 2008 WL 2229843, at *11 (D.N.J. May 28, 2008) (lodestar multiplier of 3.72); *In re Ravisent Techs. Sec. Litig.*, No. 00 Civ. 1014, 2005 WL 906361, at *12 (E.D. Pa. Apr. 18, 2005) (lodestar multiplier of 3.1); *In re Rite Aid Sec. Litig.*, 362 F. Supp. 2d 587, 588 (E.D. Pa. March 24, 2005) (finding multipliers of four fairly common); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 135 (D.N.J. 2002) (lodestar multiplier of 4.3); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (performing lodestar cross-check and stating, "[m]ost courts agree that the typical lodestar multiplier in a large post-PSLRA securities class action[] ranges from 1.3 to 4.5"); *Manners v. Am. Gen. Life Ins. Co.*, No. 98 Civ. 266, 1999 WL 33581944, at *31 (M.D. Tenn. Aug. 11, 1999) (observing that multipliers in similar litigations "have ranged from 1-4 and have reached as high as 10"); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991) (noting multipliers of 4 and 5 in other cases).

omitted).

Because the expenses here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. Lead Counsel made a concerted effort to avoid unnecessary expenditures and economized wherever possible. Most of the expenses arose out of professional services rendered by experts, along with the costs of document production, online legal research databases, and other expenses directly related to the prosecution of this Action. Press Decl. Ex. 8. The remaining expenses are attributable to such things as travel for mediation and other incidental expenses. *Id.* These expenses were all necessarily incurred in connection with this litigation and were reasonable. *See* Press Decl. ¶¶77-81, Ex. 8; *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred . . . are the type for which 'the paying arms' length market' reimburses attorneys . . . [and] for this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

CONCLUSION

For all of the foregoing reasons, the Court approves the proposed Settlement as fair, reasonable, and adequate; approves the Plan of Allocation as fair, reasonable, and adequate; and grants the accompanying motion for fees and expense reimbursement.

The Clerk of Court is directed to remove Docket ##105 and 107 from the Court's list of pending motions. Docket #88 is denied as moot; the Clerk of Court also should remove Docket #88 from the Court's list of pending motions, and close the file.

Dated: December 19, 2014

U.S.D.J.

BY ECF TO ALL COUNSEL