UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Hi-Crush Partners L.P. Securities Litigation	No. 12-Civ-8557 (CM) **ECF Case**

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Plaintiffs' Lead Counsel[1] respectfully submits this memorandum of law in support of its motion pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure for an award of attorneys' fees and reimbursement of litigation expenses to be paid out of the Settlement Fund, including interest at the same rate as the Settlement Fund's rate.

The proposed Settlement recovers $3.8 million for the Class. The Settlement recovers approximately 36% of total estimated class-wide losses, which compares very favorably to the percentage of damages recovered in settlements of other securities class actions.[2] *See* Lead Plaintiffs' Memorandum in Support of Motion for Final Approval at 19 (citing Press Decl. ¶48 and Ex. 4 at 32).[3]

Lead Counsel respectfully seeks an award of attorneys' fees in the amount of 33 1/3% of the Settlement Amount, or $1,266,666.67, plus any accrued interest, which would represent a lodestar multiplier of 1.41. Additionally, Lead Counsel respectfully seeks reimbursement of $106,451.20in litigation expenses actually incurred.

As set forth below, this request is reasonable considering the factors identified by the Second Circuit in *Goldberger v. Integrated Res.*, 209 F.3d 43, 50 (2d Cir. 2000) to determine the

---

[1] Unless otherwise indicated, all capitalized terms herein have the same meaning as is ascribed in the Stipulation and Agreement of Settlement (the "Stipulation") filed with the Court on September 12, 2014 [ECF No. 102-1].

[2] 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" for cases that settled between January 1996 and December 2013. *See* Declaration of Ira M. Press in Support of Proposed Class Settlement, Plan of Allocation and Award of Attorneys' Fees and Expenses ("Press Decl.") ¶48, Ex. 4 at 32.

[3] References to "Ex." or "Exs." are references to exhibits annexed to the Press Decl., unless otherwise noted.

appropriateness of a fee award. The requested fee is consistent with fees awarded in similar actions in this Circuit and uses the appropriate method of compensating counsel. *See* Press Decl. at ¶¶75-76, and Exs. 9, 10. The amount requested is especially warranted in light of the substantial recovery obtained for the Class and the significant obstacles presented in the prosecution and settlement of this Action against Defendants.

II. STATEMENT OF THE FACTS

The relevant facts supporting the motion are set forth in detail in the memorandum of law submitted in support of Lead Plaintiffs' Motion for Final Approval of the Proposed Class Action Settlement and Plan of Allocation ("Settlement Brief") and the accompanying Press Declaration both filed concurrently herewith.

III. LEAD COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FROM THE COMMON FUND

A. Lead Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The court's authority to reimburse the parties stems from the fact that the class action [device] is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil 2d §1803, at 493-94 (2d ed. 1986). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL

1883494, at *10 (S.D.N.Y. May 9, 2014) (citing *Goldberger,* 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 0165 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007).

In addition, courts have recognized that awards of attorneys' fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore to discourage future alleged misconduct of a similar nature. *See City of Providence*, 2014 WL 1883494, at *11 (citing *Hicks v. Morgan Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005); *Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002)). As this Court has previously observed, "[c]ourts in this Circuit have consistently adhered to these teachings." *Id.* (citing *In re Top Tankers, Inc. Sec. Litig.,* No. 06 Civ. 13761(CM), 2008 WL 2944620, at *12 (S.D.N.Y. July 31, 2008) (McMahon, J.) ("It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to 'a reasonable fee-set by the court-to be taken from the fund.'") (citations omitted)).

B. The Court Should Award a Reasonable Percentage of the Common Fund to Lead Counsel

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] Moreover, the text of the PSLRA also supports 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).

The Second Circuit's 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

[4] *See also In re Beacon Assocs. Litig.*, No. 09 Civ. 3907 (CM), 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 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).

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 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. As detailed herein and in the accompanying Press Declaration filed herewith, Lead Counsel demonstrates that a "cross-check" with a lodestar analysis also supports the fee requested.

C. The Requested Fee is Fair and Reasonable

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

As this Court previously observed, "In this Circuit, courts routinely award attorneys' fees

[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); *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.

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 regularly approve 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) (ECF No. 54), awarding 33 1/3% of $21 million settlement; and *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 25, 2001) (ECF No. 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 have similarly determined that a fee awarded 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) (ECF No. 59) (Ex. 11) (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) (ECF No. 85) (Ex. 11) (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) (ECF No. 140) (Ex. 11).[6]

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

Under either the percentage common 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 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").

As shown below, the requested fee is reasonable on a percentage basis, and Lead Counsel respectfully submits should be approved in full.

[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* Ex. 4, NERA Report at 34, Figure 34 (NERA Jan. 21, 2014).

1. 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. Thus, the requested fee is a multiplier of 1.41 on that lodestar. *See* Press Decl. at ¶74, and Ex. 7.[7]

a. 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 submits that the substantial time devoted to this litigation over two years reflects the intensive effort they exerted to bring this case to a favorable resolution, and was reasonable. 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);

- 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);

[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.

- Conducted numerous settlement meetings and telephone calls, prepared a mediation statement, worked with a damages expert 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);

- Vigorously pressed the Class's 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. Accordingly, Lead Counsel's hours are reasonable. Moreover, 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 should be 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] Accordingly, Lead Counsel submits that its 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, discussed below at Sections III.D.3, 5 and 8.

2. 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

[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).

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 (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.

3. 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] Moreover, even plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions[11] or appeal.[12]

---

[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

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 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 the 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. Indeed, this Court observed in its motion to dismiss opinion 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.

As such prior to mediation, Lead Plaintiffs, the proposed class and Lead Counsel faced a

---

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)).

[13] Indeed, 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.

very real likelihood that they would be unable to obtain any recovery from Defendants. Only after retaining the assistance of a highly skilled mediator, were the parties able to settle this Action for $3.8 million on September 12, 2014. This Settlement is still subject to the Court's final approval. At this time, Lead Counsel remains uncompensated for the substantial investment of time put into this case. None of Lead Counsel's out-of-pocket expenses have been reimbursed. Uncompensated expenditures of time and money of this magnitude can severely impact negatively firms of the relatively small size involved here. Thus, this case clearly involved substantial risks that warrant the requested fee award.

4. The Quality of Representation Favors Approval of Lead Counsel's Fees

Lead Counsel also submits that the quality of its representation supports the reasonableness of the requested fee.

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 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. *See e.g.*, *In re Initial Public Offering*, 671 F. Supp. 2d at 510 (finding plaintiffs' counsel's prosecution against "such formidable opponents . . . an impressive feat"). Defendants' counsel zealously contested the merits of Lead Plaintiffs' claims at every stage of the litigation and engaged in a hard fought settlement negotiation, which further highlights the impressiveness of the result achieved here. Accordingly, Plaintiffs and all defendants were well represented.

5. 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.

6. 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).

Furthermore, 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 has 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(CM)(MHD), 2014 WL 1224666, at *24 (S.D.N.Y. March 24, 2014)).[15] Under these circumstances, "provid[ing] appropriate financial incentives" "'[i]n 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).

---

[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).

Accordingly, Lead Counsel respectfully submits that this Court should find that public policy favors granting the Fee and Expense Request in full.

7. The Class's 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's reaction to the fee request supports approval of the requested fees").

Thus far, no Class Members have objected to the fee request. If any objections are received prior to the deadline for such filings (November 28, 2014), Lead Counsel will submit a response. Such responses are due December 12, 2014.

8. 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, "[u]nder 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 amount of attorneys' fees requested by Lead Counsel, 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] Accordingly, Lead Counsel's request is well within

[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).

the range of reasonableness, particularly in light of the substantial risks associated with this Action.

IV. 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, Ex. 8; *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 omitted).

Because the expenses 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, we submit, are 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] [F]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

To date, not a single objection has been made in connection with the expense request. Accordingly, Lead Counsel respectfully request payment for these expenses.

V. CONCLUSION

For the reasons set forth above, Lead Counsel submits that this fee request is fair and reasonable. It satisfies the guidelines of *Goldberger*, especially in light of the complicated nature of the case, the time, effort, and skill required to litigate this Action and reach this Settlement. Accordingly, for the foregoing reasons, Lead Counsel respectfully requests that this Court enter the accompanying proposed Order and Final Judgment awarding: (1) attorneys' fees of 33 1/3% of the Settlement Amount of $3,800,000, or $1,266,666.67, plus any accrued interest; and (2) reimbursement of Lead Counsel's litigation expenses in the amount of $106,451.20, plus any accrued interest.

Dated: November 14, 2014

KIRBY McINERNEY LLP

/s/ Ira M. Press
Ira M. Press
Mark A. Strauss
Thomas W. Elrod
Beverly Tse Mirza
825 Third Avenue, 16th Floor
New York, NY 10022
Tel: (212) 371-6600
Fax: (212) 751-2540

Lead Counsel for Lead Plaintiffs