

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: § Chapter 11
§
HI-CRUSH, INC., *et al.*,¹ § Case No. 20-33495 (DRJ)
§
Debtors. § (Jointly Administered)
§

WISCONSIN TORT CLAIMANTS' PROTECTIVE MOTION FOR TEMPORARY
ALLOWANCE OF CLAIMS FOR VOTING PURPOSES PURSUANT TO
BANKRUPTCY RULE 3018

EMERGENCY RELIEF HAS NOT YET BEEN REQUESTED BECAUSE THE CLAIMS ARE NOT SUBJECT TO OBJECTION AND SHOULD BE DEEMED ALLOWED FOR VOTING. BUT IF THE DEBTORS WAIT TILL THE EVE OF CONFIRMATION TO OBJECT TO THE CLAIMS, EMERGENCY RELIEF MAY BE REQUIRED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 14 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Hi-Crush, Inc. (0530), OnCore Processing LLC, Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC, D&I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), PB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd., Suite 600, Houston, Texas 77056.



REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

ANY HEARING WILL BE CONDUCTED IN COURTROOM 400, 515 RUSK STREET, HOUSTON, TX 77002. YOU MAY PARTICIPATE IN THE HEARING EITHER IN PERSON OR BY AUDIO/VIDEO CONNECTION.

AUDIO COMMUNICATION WILL BE BY USE OF THE COURT'S DIAL-IN FACILITY. YOU MAY ACCESS THE FACILITY AT (832) 917-1510. YOU WILL BE RESPONSIBLE FOR YOUR OWN LONG-DISTANCE CHARGES. ONCE CONNECTED, YOU WILL BE ASKED TO ENTER THE CONFERENCE ROOM NUMBER. JUDGE JONES' CONFERENCE ROOM NUMBER IS 205691.

YOU MAY VIEW VIDEO VIA GOTOMEETING. TO USE GOTOMEETING, THE COURT RECOMMENDS THAT YOU DOWNLOAD THE FREE GOTOMEETING APPLICATION. TO CONNECT, YOU SHOULD ENTER THE MEETING CODE "JUDGEJONES" IN THE GOTOMEETING APP OR CLICK THE LINK ON JUDGE JONES' HOME PAGE ON THE SOUTHERN DISTRICT OF TEXAS WEBSITE. ONCE CONNECTED, CLICK THE SETTINGS ICON IN THE UPPER RIGHT CORNER AND ENTER YOUR NAME UNDER THE PERSONAL INFORMATION SETTING.

HEARING APPEARANCES MUST BE MADE ELECTRONICALLY IN ADVANCE OF THE HEARING. TO MAKE YOUR ELECTRONIC APPEARANCE, GO TO THE SOUTHERN DISTRICT OF TEXAS WEBSITE AND SELECT "BANKRUPTCY COURT" FROM THE TOP MENU. SELECT "JUDGES' PROCEDURES," THEN "VIEW HOME PAGE" FOR JUDGE JONES. UNDER "ELECTRONIC APPEARANCE" SELECT "CLICK HERE TO SUBMIT ELECTRONIC APPEARANCE." SELECT THE CASE NAME, COMPLETE THE REQUIRED FIELDS AND CLICK "SUBMIT" TO COMPLETE YOUR APPEARANCE.

RELIEF IS REQUESTED NOT LATER THAN SEPTEMBER 17, 2020.

The following persons (collectively, the "Wisconsin Tort Claimants") represented by Fitzpatrick, Skemp & Butler, LLC: (A) (i) Cory Berg, Julie Berg, and Danielle Holstad; (ii) Greg Bluem and Lorraine Bluem; (iii) Dianna Brown; (iv) Michael Johnson and Paula Knutson; (v) Patrick Mathson and Deborah Clare; (vi) Randy Rose and Cara Rose; (vii) James Syverson and Kimberly Syverson (collectively, the "Berg Claimants"); (B) (i) Darrell Bork, Mary Jo Bork, Dakotah Bork, and Colton Bork; (ii) Robert Guza, Lisa Guza, Emily Guza, and Kaitie Guza; (iii) Todd Lulig, Amy Kulig, and H.K. (a minor child by her natural parents and guardians Todd and

Amy Kulig); (iv) Broney Manka; (v) Jared Manka; and (vi) John Manka and Mary Manka (collectively, the “Bork Claimants”); (C) Leland Drangstveit and Mary Drangstveit (the “Drangstveit Claimants”); (D) (i) Michael J. Sylla, Stacy L. Sylla, Chase Sylla, and M.S. (a minor child by her natural parents and guardians Michael and Stacy Sylla); (ii) William J. Sylla, Angela Sylla, W.S. and Z.S. (minor children by their natural parents and guardians William and Angela Sylla); and (iii) Ann Sylla (collectively, the “Sylla Claimants”) and (E) together with the following additional claimants with as yet unfiled claims: Kate Connell, Scott Dykstra, Glenn Willers, Beth Willers, and S.S. (a minor child by her natural parents and guardian Cara Rose) (collectively referred to herein as the “Connell Claimants”); file this *Wisconsin Tort Claimants’ Protective Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Bankruptcy Rule 3018* (the “Motion”). Pursuant to the Motion, the Wisconsin Tort Claimants seek entry of an order, substantially in the form attached hereto (the “Proposed Order”), pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) temporarily allowing the claims of each of the Wisconsin Tort Claimants for plan voting purposes. In support of the Motion, the Wisconsin Tort Claimants respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The bases for the relief requested herein are section 105(a) of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Bankruptcy Rule 3018.

BACKGROUND

A. General Background of the Chapter 11 Cases Relevant to this Motion

i. Procedural Background

3. On July 12, 2020 (the “Petition Date”), Hi-Crush, Inc. and certain affiliates (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Cases commencing the above-captioned chapter 11 cases (the “Bankruptcy Cases”) in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the “Bankruptcy Court”).

4. On July 27, 2020, the Debtors filed: (i) the *Joint Plan of Reorganization for Hi-Crush Inc. and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Doc. Nos. 174, 289] (as may be amended, the “Plan”) and (ii) the *Disclosure Statement for the Joint Plan of Reorganization for Hi-Crush Inc. and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Doc. Nos. 175, 290] (as may be amended, the “Disclosure Statement”).

5. On July 27, 2020, the Debtors filed the *Debtors’ Emergency Motion for Entry of an Order (I) Approving Adequacy of Disclosure Statement, (II) Scheduling Hearing on Confirmation of Plan, (III) Establishing Deadline to Object to Plan and Form of Notice Thereof, (IV) Approving (A) Solicitation Procedures, (B) Forms of Ballots and Notices of Non-Voting and Limited Voting Status, and (C) Rights Offering Materials, (V) Approving Procedures for Assumption of Contracts and Leases and Form And Manner of Cure Notice, and (VI) Granting Related Relief* [Doc. No. 176] (the “Scheduling Motion”).

6. On August 14, 2020, the Bankruptcy Court entered an order approving the Scheduling Motion [Doc. No. 288] (the “Scheduling Order”). Pursuant to the Scheduling Order, among other things, the Bankruptcy Court established August 30, 2020 at 5:00 p.m. (CT) as the

deadline for any party to file and serve a motion requesting temporary allowance of a claim for purposes of voting under Bankruptcy Rule 3018(a). *See id.* at ¶ 14.² The Court also established September 18, 2020 as the voting deadline (the “Voting Deadline”) and September 23, 2020 as the confirmation hearing (the “Confirmation Hearing”).

ii. *The Proofs of Claim of the Wisconsin Tort Claimants*

7. On August 21, 2020,³ each of the Wisconsin Tort Claimants submitted proofs of claim against two of the Debtors’ operating subsidiaries to preserve any and all claims and rights arising from, related to, or in connection with the Tort Litigation Claims (as defined below). In total, the Wisconsin Tort Claimants submitted forty-five (45) proofs of claim (collectively, the “Wisconsin Tort POCs”). Each of the Wisconsin Tort POCs included an addendum describing the basis for the claims and where applicable a copy of the complaint for each applicable Tort Litigation Claim.

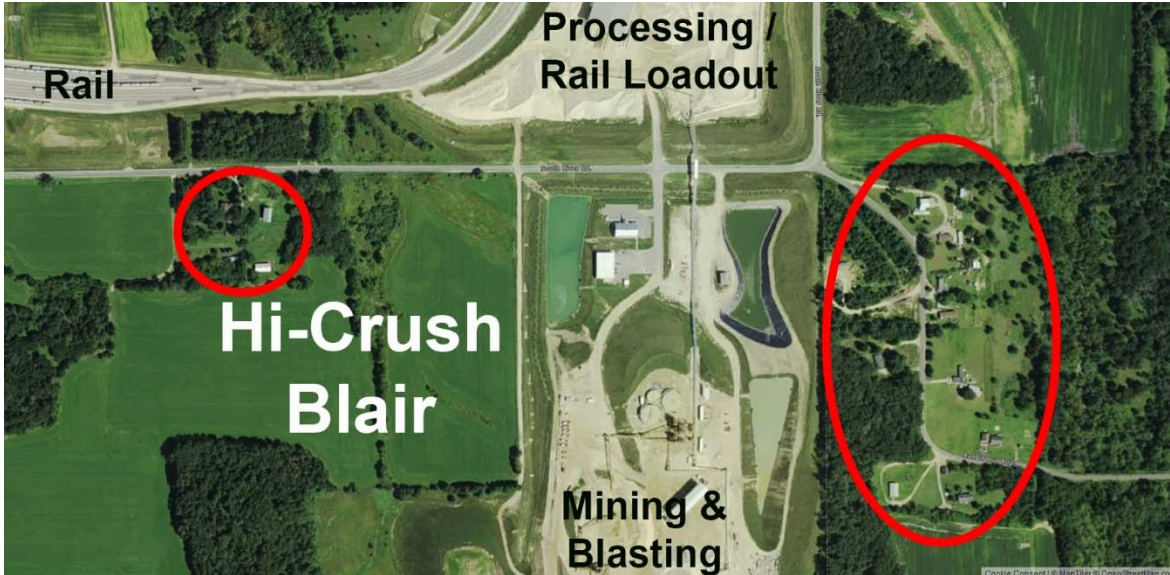
8. The amounts asserted in the Wisconsin Tort POCs are for approximately \$82 million. A table summarizing each of the Wisconsin Tort POCs is detailed below:

Claimant Group	Number of Claimants in the Group	Amount
Sylla Claimants	9	\$14 million
Bork Claimants	15	\$28 million
Berg Claimants	14	\$28 million
Drangstveit Claimants	2	\$6 million
Connell Claimants	5	\$6 million
Totals	45	\$82 million (approx.)

² By agreement of the Debtors, the Wisconsin Tort Claimants had an extension of this deadline to September 4, 2020 to file this 3018 Motion.

³ By agreement of the Debtors, the Wisconsin Tort Claimants had an extension of the original bar date (August 16, 2020) until August 24, 2020 to file their proofs of claim.

B. The Hi-Crush Defendants' Operations



Hi-Crush Blair operations with some Wisconsin Tort Claimants' homes circled in red.

9. The two operating Debtors subject to these claims are Hi-Crush Blair, LLC (“Hi-Crush Blair”) and Hi-Crush Whitehall, LLC (“Hi-Crush Whitehall,” and together, the “Hi-Crush Defendants”). Each of the Hi-Crush Defendants are engaged in the business of frac-sand mining and processing. The Hi-Crush Defendants developed and continued to operate their frac-sand mining sites in close proximity to the properties of the Wisconsin Tort Claimants.

10. Upon information and belief, Hi-Crush Blair operates a facility capable of producing 2,860,000 tons per year of 20/100 frac sand. The processing facility is located on about 1,285 acres with coarse-grade Northern White sand reserves. The facility is located on a mainline of the North American rail network of the Canadian National Railway, with an on-site rail yard that contains approximately 43,000 feet of track and has storage capacity for approximately 500 rail cars. Hi-Crush Blair conducts processing and loading of sand seven days per week, 24 hours per day. The extraction of non-metallic minerals and related hauling of extracted material within the mine property starts as early as 6:00 AM, running to 10:00 PM (CT), seven days per week.

11. Upon information and belief, the Hi-Crush Whitehall operates a facility capable of producing 2,860,000 tons per year of 20/100 frac sand. The processing facility is located on 1,447 acres with coarse-grade Northern White sand reserves. The facility is located on a mainline of the North American rail network of the Canadian National Railway, with an on-site rail yard that contains approximately 30,000 feet of track and has storage capacity for approximately 500 rail cars. During entire seasons of the year, Hi-Crush conducts processing of sand seven days per week, 24 hours per day. The extraction of non-metallic minerals and related hauling of extracted material within the mine property runs around the clock, seven days per week. Blasting operations occur between 10:00 AM and 3:00 PM (CT).



Example of blasting operations at a Wisconsin frac sand mine, with silica dust hurled into the air.

C. The Tort Litigation Actions

12. On April 22, 2019, most of the Wisconsin Tort Claimants asserted the following causes of action against the Hi-Crush Defendants, while a few of them remain subject to the stay yet also have similar claims that would be in these or similar suits (collectively, the “Tort Litigation Claims”):

- *Michael Sylla, et al. v. Hi-Crush Whitehall, LLC, et al.*, Trempealeau (Wis.) County Case No. 19-CV-63;
- *Darrell Bork, et al. v. Hi-Crush Whitehall, LLC, et al.*, Trempealeau (Wis.) County Case No. 19-CV-64;
- *Cory Berg, et al. v. Hi-Crush Blair, LLC, et al.*, Trempealeau (Wis.) County Case No. 19-CV-65; and
- *Leland and Mary Drangstveit v. Hi-Crush Blair, LLC, et al.*, Trempealeau (Wis.) County Case No. 19-CV-66.

True and correct copies of the relevant complaints filed in the Tort Litigation Claims were attached to the Wisconsin Tort POCs where applicable and have already been provided to the Debtor and will comprise exhibits in any hearing.

13. On August 17, 2020, the Wisconsin Tort Claimants filed their *Motion for Relief from the Automatic Stay to Continue State Court Litigation* [Doc. No. 293] (the “Lift Stay Motion”) to continue pursue the Tort Litigation Claims and permit the Connell Claimants to file their complaints.

14. No objection has been filed to the claims, though they are admittedly disputed in the state courts, and perhaps the Debtors may not dispute these claims if unsecured since they presumably will be getting virtually nothing, absent the availability of coverage or third parties who may have co-liability on these claims. This Motion is protective, and is timely given extensions of the Rule 3018 deadline before this date.

- The Hi-Crush Defendants’ Negligent Mining Operations Have Harmed the Wisconsin Tort Claimants on a Pre-Petition Date Basis*

15. The Tort Litigation Claims are each similar though the impacts and damages and harms each claimant has sustained varies. Generally, each of the Wisconsin Tort Claimants seek damages and other relief from the Hi-Crush Defendants for conducting the frac-sand mining operation in a negligent manner, which includes emanating noxious particulates and environmental

contamination. The Hi-Crush Defendants have violated mandatory state, local and federal laws, rules, ordinances, and regulations governing the safe methods of operation of the frac-sand mining operation, causing airborne pollution (both gaseous and solid), excessive noise, silica dust, excessive nighttime light, polluted surface and/or underground water, vibrations, destruction of landscape, and reduced property values.

16. Moreover, the Bork Claimants and the Sylla Claimants have suffered additional harm because on or about May 21, 2018, Hi-Crush Whitehall caused a spill of approximately 10 million gallons of liquid mine sludge to occur.



Contaminated mine sludge from Hi-Crush Whitehall 10-million-gallon spill, May 2018.

This mine sludge left Hi-Crush Whitehall's facility and ran across other parcels of property, including land owned by the Bork Claimants and the Sylla Claimants. For the Sylla Claimants, this spill and the negligent operations caused harm to the Sylla's farming business. Further, the

sludge caused the nearby Trempealeau River to turn orange for several days. Hi-Crush environmental compliance manager, Jeff Johnson, publicly stated the mine sludge could contain trace elements of polyacrylamide. Tests showed lead concentrations of more than 10 times allowable levels in water sampled near where the spill entered Poker Creek, and aluminum was measured at more than 1,000 times the limit. There also were high levels of beryllium, cadmium, chromium, copper, magnesium, nickel and other contaminants.



Miles downstream from Hi-Crush Whitehall, the Trempealeau River was orange from spilled mine sludge.

17. The Berg Claimants and Drangstveit Claimants have suffered additional harm because starting around November 2016, operations of the Hi-Crush Blair facility caused groundwater contamination. Specifically, groundwater contamination at the Hi-Crush facility reached a point of being as high as four times the acceptable limit of arsenic, without any notice to the Berg Claimants or the Drangstveit Claimants, and some of the Berg Claimants have suffered from sedimentation in their well water.

ii. *The Hi-Crush Defendants' Negligent Mining Operations Will Continue to Harm the Wisconsin Tort Claimants on a Post-Petition Date Basis*

18. The Wisconsin Tort Claimants are aware that the Hi-Crush Defendants have temporarily in their financial distress dramatically reduced operations. Nonetheless, the harms prior to the Petition Date have continued and result in continuing environmental degradation and harm and upon information and belief, the Hi-Crush Defendants continue to maintain employees at each of their facilities. Moreover, although there is no current active blasting or mining, the Hi-Crush Defendants may continue to process or ship some of the inventories large piles of frac sand, and once oil prices and drilling increase, mining operations will resume. Indeed, this is the inevitable outcome from what the Debtors are seeking to accomplish in these proceedings. Despite the decreased operations, the Wisconsin Tort Claimants suffer a continuing harm because the Hi-Crush Defendants maintain massive piles of frac sand, and silica dust / particulate matter pollution from those piles continues to cause harm to the Wisconsin Tort Claimants. Particulates and dust emanating from these unconstrained piles create noxious conditions that are harmful to health and property. The facilities themselves constitute a destruction of landscape scenic values and cause decreased values for neighboring properties.

19. In the Debtors' Surety Bond Motion, they acknowledge the importance of procuring and maintaining the Lexon Bonds because "[t]o continue their business operations, the Debtors must be able to provide financial assurance to federal and state governments, regulatory agencies, and other third parties." Doc. No. 11 at ¶ 22. Furthermore, the Debtors recognize that if the Lexon Bonds were terminated, it would "jeopardize the Debtors' operations and endanger the Debtors' efforts to reorganize and maximize the value of their assets through the Chapter 11 Cases." *Id.* at ¶ 35. Despite the Debtors referencing that certain of their facilities are either closed or idled and that the closure and/or idling of these facilities could involve significant reclamation

and environmental costs, the Debtors fail to discuss their environmental obligations and how those obligations will be met in their restructuring. *See* Disclosure Statement at p. 75-76, 79-80, 82. From these statements of the Debtors, it is unclear whether the Wisconsin Tort Claimants will be subjected to severe nuisances from active mining, blasting, and rail load-out operations in the future or whether they will be left with a hulking, unmonitored wasteland that continues to inundate them with dangerous fugitive dust that becomes worse due to the failure of idled facilities to engage in active fugitive dust suppression on massive sand piles covering dozens of acres of land near the Wisconsin Tort Claimants' homes. In either event, the Wisconsin Tort Claimants are, and will continue to be, subjected to significant ongoing damages post-petition.

iii. *The Wisconsin Tort Claimants' Damages*

20. In each of the Tort Litigation Actions, the Wisconsin Tort Claimants seek unliquidated damages from the Hi-Crush Defendants and their insurance company.⁴ The Wisconsin Tort Claimants have categorized their harms in the *Plaintiffs' Disclosures Per Modified Lone Pine Order*, which Debtors have and which can be provided in any hearing on this matter (the "Lone Pine Order"). The Lone Pine Order, named after a 1986 New Jersey case, required the Wisconsin Tort Claimants to specify the harms they have suffered, in general terms.

21. An exact amount of the claim for each Berg Tort Claimant is unable to be calculated and stated because the damages are unliquidated and were expected to be determined by a jury. Moreover, the tort is continuing in nature because the Hi-Crush Defendants continue to operate

⁴ At the time of filing each of the complaints, the Wisconsin Tort Claimants lacked information about the insurance coverage for their claims. Requests for all coverages since 2014 have been previously made, and notably ignored. More formal requests are therefore to be made, since informal efforts have failed. Pursuant to Wisconsin state law, the Wisconsin Tort Claimants named a fictitious insurance company, ABC Insurance Company, with the intent of learning the identity of the insurer(s) and substituting them into the cases. *See* Wis. Statute § 807.12.

their sites which continues to impact and cause damages to the Wisconsin Tort Claimants with each passing day.

22. Wisconsin Statute sec. 802.02(1m)(a) also states that, “[w]ith respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks.” This statute bars each of the Wisconsin Tort Claimants from demanding a specific dollar amount in the Tort Litigation Actions. It is believed that damages to the Wisconsin Tort Claimants collectively could exceed \$82 million.

iv. Status of the Tort Litigation Actions

23. The Wisconsin state court Tort Litigation Actions identified above have been pending since April 2019. The parties therein have litigated various motions, including motions to dismiss and motions for Lone Pine case management orders filed by the Debtors. A preliminary Scheduling Order was entered by the circuit court for Trempealeau County, Wisconsin on October 9, 2019. At a hearing in December 2019, the circuit court denied the Hi-Crush motions to dismiss and granted, in part, the motions for Lone Pine case management orders. Specifically, the circuit court ordered the Wisconsin Tort Claimants to disclose to Hi-Crush witnesses for the Wisconsin Tort Claimants and damages sustained by the Wisconsin Tort Claimants by January 31, 2020, which disclosures the Wisconsin Tort Claimants completed. Subsequently, the parties to the Tort Litigation Actions have been engaged in discovery and discovery disputes, including whether the Hi-Crush defendants exceeded the statutory maximum number of interrogatories. The Wisconsin Tort Claimants spent months compiling information to respond to Hi-Crush discovery requests, but the automatic stay went into effect before that information was produced. Additionally, the Wisconsin Tort Claimants served written discovery on the Hi-Crush defendants, including discovery about insurance coverage, which has not yet been responded to.

REQUESTED RELIEF

24. Pursuant to Bankruptcy Rule 3018(a), the Wisconsin Tort Claimants seek entry of the Proposed Order temporarily allowing their claims asserted in the Wisconsin Tort POCs for voting purposes only.

BASIS FOR RELIEF

A. Bankruptcy Rule 3018 Permits Temporary Allowance of Claims for Voting Purposes

25. Only holders of allowed claims or interests are permitted to vote to accept or reject a chapter 11 plan. 11 U.S.C. § 1126. A claim represented by a timely and properly filed proof of claim “is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C. § 502(a). But there is a deadline to seek 3018 relief in advance of the deadline the Debtors have to object, leaving the claimants in the potential situation of having missed a deadline. In effect, once a party in interest objects to a filed claim, the holder of that claim is not entitled to vote on a chapter 11 plan while the objection is pending. *See* 11 U.S.C. § 1126. Although the Debtors have not formally objected to the Wisconsin Tort POCs, they dispute the basis for the claims, as reflected in the description of the Tort Litigation Actions in the Disclosure Statement [Doc. No. 290, p. 135–36] and their scheduling of the same as disputed claims [*see* Doc. Nos. 245, p. 44; 237, p. 45].

26. Notwithstanding this prerequisite, when a claim is not yet allowed, “the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.” FED. R. BANKR. P. 3018(a). The policy behind temporarily allowing claims is “to prevent possible abuse by plan proponents” who attempt to ensure acceptance of a plan by gaming the system. *In re Armstrong*, 292 B.R. 678, 686 (10th Cir. B.A.P. 2003); *see also In re Harmony Holdings, LLC*, 395 B.R. 350, 353–54 (Bankr. D.S.C. 2008). Bankruptcy Rule 3018(a) “was designed to give all creditors, *even those holding disputed*

claims, the opportunity to vote.” *In re Century Glove, Inc.*, 88 B.R. 45, 46 (Bankr. D. Del. 1988) (emphasis added); *In re Amarex Inc.*, 61 B.R. 301, 303 (Bankr. W.D. Okla. 1985) (holding that “to allow [holders of disputed claims] to vote on plans, even though some may be eventually disallowed . . . for purposes of distribution, is more in keeping with the spirit of chapter 11 which encourages creditor vote and participation in the reorganization process”).

27. Temporary allowance is appropriate in various circumstances, including: (1) when the objection to the claim has been filed too late to be heard prior to the confirmation hearing; (2) when a full hearing on the objection would delay the chapter 11 case; or (3) when the objection is frivolous or questionable. *See, e.g., In re Armstrong*, 294 B.R. 344, 354 (10th Cir. B.A.P. 2003); *In re Frascella Enters., Inc.*, 360 B.R. 435, 457 (Bankr. E.D. Pa. 2007); 9 *Collier’s on Bankruptcy* ¶ 3018.01 [5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2020).

28. Bankruptcy Rule 3018(a) provides little guidance regarding the test to determine temporary allowance. Thus, the “determination of whether and how to determine the temporary allowance of a claim is left to the sound discretion of the bankruptcy judge.” *In re Frascella Enter., Inc.* 360 B.R. at 458; *see also In re TransAmerican Natural Gas Corp.*, 79 B.R. 663, 666 (Bankr. S.D. Tex. 1987). The only applicable language in Bankruptcy Rule 3018(a) states that the court can temporarily allow claims it “deems proper.” FED. R. BANKR. P. 3018(a). Thus, the bankruptcy court has great discretion to determine the method of estimation and should use whatever method is best suited to the circumstances to estimate the claim. *In re TransAmerican Nat. Gas Corp.*, 79 B.R. at 666; *In re Brints Cotton Mktg., Inc.*, 737 F.2d 1338, 1341 (5th Cir. 1984); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982). Moreover, the amount is not binding on the ultimate validity or amount of the claims. *See In re Quigley Co.*, 346 B.R. 647, 654 (Bankr. S.D.N.Y. 2006).

29. Courts are varied regarding what factors or methods to use in their estimation. Courts may use the estimation procedures of section 502(c)(1) of the Bankruptcy Code to temporarily allow a claim for voting purposes when to do otherwise would delay the case. *See In re TransAmerican Nat. Gas Corp.*, 79 B.R. at 665. At least one court utilized several factors when deciding whether to temporarily allow a claim and considered “(1) the manner in which the claim was initially scheduled by the debtor; (2) the proof of claim by the creditor; and (3) the objection [] of the debtor.” *In re Stone Hedge Props.*, 191 B.R. 59, 65 (Bankr M.D. Penn. 1995). Generally, “estimation should ensure that the voting power is commensurate with the creditor’s economic interests in the case.” *In re Quigley Co.*, 346 B.R. at 654.

B. The Wisconsin Tort POCs Should be Temporarily Allowed at Face Value for Voting Purposes

30. Under the circumstances here, the Wisconsin Tort Claimants request that the Bankruptcy Court temporarily allow the Wisconsin Tort POCs in the amount of \$82 million—the face value of the claims—for purposes of voting on the Plan under Bankruptcy Rule 3018. Each claim is supported by a duly and timely filed proof of claim attaching both (1) an addendum setting forth the basis for the claim and (2) a copy of the Complaints, which contain extensive and detailed allegations of the facts, circumstances, and misconduct of the Tort Litigation Actions that form the basis of the claims.

31. The circumstances warrant estimating the Wisconsin Tort POCs for purposes of voting on the Plan at face value because a full hearing on any objection to the Wisconsin Tort POCs would delay the administration of the Bankruptcy Cases and allowance is only for the limited purpose of voting. It is unlikely that a full hearing on the Wisconsin Tort POCs could proceed prior to the fast approaching Confirmation Hearing as such hearing would take multiple

days and require extensive discovery and witness preparation, thereby unduly delaying the administration of these Bankruptcy Cases.

32. As currently proposed, the Debtors estimate that the class of General Unsecured Claims (as defined in the Plan) as seemingly aggregated in a quasi substantive consolidation of all debtors whether operating or not comprises \$86.7 million. The class of General Unsecured Claims is one of the two classes permitted to vote on the Plan. *See* Doc. No. 289, p. 28. This amount does not apparently include the claims of the Wisconsin Tort Claimants which are approximately \$82 million.

33. Moreover, the Debtors scheduled the claims of the Wisconsin Tort Claimants as nonpriority unsecured claims that are contingent, unliquidated, and disputed, with an undetermined amount. *See* Doc. Nos. 245, p. 44; 237, p. 45. Thus, in the current Plan, the Wisconsin Tort Claimants would not be able to vote any amount of their claims, which is directly contradictory to one of the fundamental principles of chapter 11 to “encourage[] creditor vote and participation in the reorganization process.” *See Amarex*, 61 B.R. at 303.

34. As stated above, the estimation should ensure that the voting power of the claimant is “commensurate with the creditor’s economic interests in the case.” *In re Quigley Co.*, 346 B.R. at 653. As explained in the Lift Stay Motion, the claims held by the Wisconsin Tort Claimants will not be discharged through the Bankruptcy Cases because they are of the nature of a continuing tort. Doc. No. 293, p. 15 (collecting cases). Because their claims will not be discharged, the Wisconsin Tort Claimants should have a vote that is commensurate with the corresponding interest, which the Wisconsin Tort Claimants submit is \$82 million. If the Wisconsin Tort POCs are not estimated, the Wisconsin Tort Claimants will be completely disenfranchised in the

Bankruptcy Cases, having no opportunity to vote, despite being members of one of the only two voting classes.

REQUEST FOR EMERGENCY RELIEF IF LAST MINUTE OBJECTION TO CLAIM

35. Under the Scheduling Order, the deadline to file 3018 Motions is August 30, 2020. By agreement this was extended to September 1, 2020. Under the non-emergency return date procedures, the deadline to object to this Motion would be Sunday, September 20, 2020 (i.e., twenty-one days after August 30, 2020). The Scheduling Order, however, establishes the Voting Deadline as September 18, 2020. Accordingly, in order for the Wisconsin Tort Claimants to submit timely votes based the amounts requested herein, relief is requested prior to the Voting Deadline to better enable them to prepare for any objection to confirmation.

RESERVATION OF RIGHTS

36. The Wisconsin Tort Claimants reserve the right to amend, modify, or supplement this Motion. The Wisconsin Tort Claimants reserve the right to respond to any objections to this Motion and to make other arguments in connection with any adjudication of or related to Wisconsin Tort POCs.

NOTICE

37. Notice of this Motion will be given by ECF notice to: (i) the Debtors and their counsel; (ii) the United States Trustee for the Southern District of Texas; (iii) the parties included on the Debtors' consolidated list of the holders of the 30 largest unsecured claims against the Debtors; (iv) Simpson, Thacher & Bartlett LLP as counsel to the agent for the Debtors' prepetition and postpetition secured asset-based revolving credit facility; (v) U.S. Bank National Association, as indenture trustee for the Debtors' prepetition notes; (vi) counsel to that certain ad hoc group of holders of prepetition senior notes (the "Ad Hoc Group") (a) Paul, Weiss, Rifkind, Wharton &

Garrison LLP and (b) Porter Hedges LLP; (vii) Shipman & Goodwin LLP as counsel to the agent under the Debtors' postpetition term loan facility; (viii) the United States Attorney's Office for the Southern District of Texas; (xi) the Internal Revenue Service; (x) the Securities and Exchange Commission; (xi) the state attorneys general for states in which the Debtors conduct business; (xii) counsel to any statutory committees; and (xiii) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the movants submit that no other or further notice is required or needed under the circumstances.

38. A copy of this Motion will be available on (i) the Court's website: www.txs.uscourts.gov, and (ii) the website maintained by the Debtors' claims and noticing agent, Kurtzman Carson Consultants LLC, at www.kccllc.net/hicrush.

CONCLUSION

WHEREFORE, the Wisconsin Tort Claimants respectfully request that to the extent needed if any objection is filed, the Court enter the Proposed Order temporarily allowing the Wisconsin Tort POCs in the amount of \$82 million for purposes of voting on the Plan and granting such other further relief as is just and proper.

Respectfully submitted,

Dated: September 4, 2020

HAYNES AND BOONE, LLP

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-and-

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ATTORNEYS FOR WISCONSIN TORT CLAIMANTS

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, I caused a copy of the foregoing document to be served by electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case.

/s/ Patrick L. Hughes

Patrick L. Hughes

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re: HI-CRUSH, INC., et al.,¹ Debtors.	§ § § § § §	Chapter 11 Case No. 20-33495 (DRJ) (Jointly Administered)
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**ORDER GRANTING WISCONSIN TORT CLAIMANTS' PROTECTIVE MOTION FOR
TEMPORARY ALLOWANCE OF CLAIMS FOR VOTING PURPOSES PURSUANT TO
BANKRUPTCY RULE 3018**

Ref Doc. No. ____

The Court having considered the *Wisconsin Tort Claimants' Protective Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Bankruptcy Rule 3018* (the "Motion")² filed by the Wisconsin Tort Claimants, finds that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. § 1334; (ii) this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) proper and adequate notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary; (iv) the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and (v) after due deliberation thereon, good and sufficient cause exists for granting the relief as set forth herein. **IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED**.

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Hi-Crush, Inc. (0530), OnCore Processing LLC, Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC, D&I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), PB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd., Suite 600, Houston, Texas 77056.

² Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Motion.

2. Pursuant to Bankruptcy Rule 3018(a), the Wisconsin Tort POCs are temporarily allowed, solely for the purpose of voting on the Plan, in the amount of \$82 million.

3. The temporary allowance of the Wisconsin Tort POCs shall not be deemed, in any way, determinative of or preclusive upon the ultimate validity or amount of the Wisconsin Tort POCs in these Bankruptcy Cases or in the Tort Litigation Actions.

4. The relief granted in this Order is without prejudice to Wisconsin Tort Claimants' rights to seek additional relief. Nothing in this order shall be construed as a waiver of the Wisconsin Tort Claimants' rights under state law.

5. The Debtors and the Wisconsin Tort Claimants are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

6. This Court retains jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the interpretation or enforcement of this Order.

SO ORDERED this ____ day of ____ 2020.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE