UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. WAL-MART STORES, INC., et al., Defendants.	No. 5:12-cv-05162-SOH CLASS ACTION

DECLARATION OF JASON A. FORGE IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AN AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

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I, JASON A. FORGE, declare as follows:

1. I am an attorney duly licensed to practice in the State of California and admitted *pro hac vice* in this action. I am a member of the law firm of Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Lead Counsel"), Court-appointed lead counsel for Lead Plaintiff City of Pontiac General Employees' Retirement System ("PGERS" or "Lead Plaintiff") and the Class, in the above-captioned action pending in this Court. My knowledge of the matters stated herein is based on my active participation in all material aspects of the prosecution and settlement of this action (hereinafter, the "Litigation"), as well as my discussions and communications with other members of Lead Counsel's prosecution team.

2. I submit this declaration in support of Lead Plaintiff's motion for approval of: (a) the $160 million cash settlement on behalf of the Class (the "settlement"); (b) the proposed Plan of Allocation; as well as (c) Lead Counsel's application for an award of attorneys' fees and expenses.

I. PRELIMINARY STATEMENT

3. This settlement, in the amount of $160,000,000, if approved, resolves a long-running litigation spanning more than six years. It marks Wal-Mart Stores, Inc.'s ("Walmart")[1] first-ever securities settlement, the largest confirmed settlement ever obtained in a single case against Walmart, and is the largest securities settlement ever achieved in any Arkansas federal court.

[1] Effective February 1, 2018, Walmart changed its legal entity name to Walmart Inc.

4. From its outset, this case posed questions of both law and fact that made any recovery a significant challenge. With the benefit of hindsight, the risk of the Class recovering nothing from this Litigation is undeniable. Despite their nearly limitless investigative tools and resources, as well as a significant head start in their investigations of the same suspected corruption underlying this case, neither the Department of Justice ("DOJ") nor the Securities and Exchange Commission ("SEC") has brought a single charge, let alone collected a single dollar in penalties. Likewise, Walmart has defeated every other private lawsuit – and there have been over a dozen – filed after *The New York Times*'s April 21, 2012 publication of Walmart's bribery scandal:

	CASE
1.	*Fogel, et al. v. Vega, et al.*, 1:13-CV-02282 (S.D.N.Y.), filed on April 5, 2013
2.	*Henrietta Klein v. S. Robson Walton, et al.*, C.A. No. 7455-CS (Del. Ch.), filed on April 25, 2012
3.	*Elsie Cohen v. Aida M. Alvarez, et al.*, C.A. No. 7470-CS (Del. Ch.), filed on April 27, 2012
4	*Paula Gerber v. Aida M. Alvarez, et al.*, C.A. No. 7477-CS (Del. Ch.), filed on May 1, 2012
5.	*Leon Brazin and Mitchell Pinsly v. S. Robson Walton, et al.*, C.A. No. 7489-CS (Del. Ch.), filed on May 3, 2012
6.	*California State Teachers' Retirement System v. Aida M. Alvarez, et al.*, C.A. No. 7490-CS (Del. Ch.), filed on May 3, 2012
7.	*New York City Employees' Retirement System, et al. v. Aida M. Alvarez, et al.*, C.A. No. 7612-CS (Del. Ch.), filed on June 11, 2012
8.	*Kimberly R. Knowles v. Aida M. Alvarez, et al.*, C.A. No. 7630-CS (Del. Ch.), filed on June 18, 2012
9.	*Emory v. Duke*, No. CV -2012- 235 (Ark. Cir. Ct.) (filed Apr. 26, 2012, and removed to federal court on July 2, 2012)
10.	*John Cottrell v. Duke, et al.*, Civil Action No. 4:12-cv-4041 SOH (W.D. Ark.), filed on April 25, 2012
11.	*Louisiana Municipal Police Employees' Retirement Fund v. Scott, et al.*, Civil Action No. 4:12-cv-4045 SOH (W.D. Ark.), filed on April 27, 2012

	CASE
12.	*Tuberville v. Duke, et al.*, Civil Action No. 4:12-cv-4046 SOH (W.D. Ark.), filed on April 30, 2012
13.	*Lomax v. Walton, et al.*, Civil Action No. 4:12-cv-4047 SOH (W.D. Ark.), filed on May 1, 2012
14.	*William Cottrell v. Duke, et al.*, Civil Action No. 4:12-cv-4049 SOH (W.D. Ark.), filed on May 4, 2012
15.	*Richman v. Alvarez, et al.*, 4:12-cv-4069 SOH (W.D. Ark.), filed on June 26, 2012

5. As the foregoing win streak demonstrates, PGERS faced a formidable adversary in Walmart. As the largest retailer in the world with hundreds of billions of dollars in annual revenues, Walmart has a proven track record of aggressively, and successfully, defending itself. It does not simply throw money at plaintiffs to make them go away. Nor does it simply throw money at defense firms to prolong litigation. Walmart forces both plaintiffs and defense firms to earn their recoveries and fees, respectively. Among the DOJ, the SEC, 15 different plaintiffs, over 15 different plaintiffs' firms, PGERS and class counsel Robbins Geller are the only plaintiff-plaintiffs' counsel to earn a recovery related to the Mexican bribery allegations. Similarly, Walmart changed lead defense firms during this Litigation, switching from one world-renowned firm to another, demonstrating that it expects results and is not afraid to shake things up to get them. Walmart is as tough an adversary and as demanding a client as can be found in this country. Its vigorous defense in this Litigation and its successful defense of the 15 other cases related to the same underlying corruption allegations are not anomalous. In *Dukes, et al. v. Wal-Mart Stores, Inc.*, 3:01-CV-02252 (N.D. Cal.), a case spanning more than 15 years and ultimately appealed to the United States Supreme Court, demonstrates Walmart's determination extends to all

litigation. The sheer number of filings, and law firms, in this case confirms that Walmart took a similarly aggressive approach in this Litigation. The settlement here had to be earned.

6. This settlement reflects the results of over six years of hard-fought litigation, the resolution of which required my firm to, among other things: (a) conduct an extensive factual investigation into PGERS's claims, which included the filing of a wholly independent lawsuit against the SEC pursuant to a FOIA request and litigating it through summary judgment; (b) develop a novel damages methodology with the assistance of multiple experts from across the country; (c) defeat multiple rounds of motions to dismiss and to strike allegations; (d) conduct extensive discovery, which included five miscellaneous cases throughout the country concerning third-party subpoenas; (e) obtain class certification and defeat a Rule 23(f) petition in the Eighth Circuit; and (f) litigate over 20 discovery disputes.

7. While Lead Counsel firmly believes the merits of PGERS' claims, we recognize that continued litigation presents substantial risks that could significantly reduce or eliminate any recovery by the Class. Some of these threats, for example, defendants' motion for interlocutory appeal to defeat PGERS' proposed damages methodology, were pending when this settlement was reached. Many other risks remained. A settlement avoids these many case-specific risks, as well as the inherent risks of trial and the uncertainty of a lengthy appeals process. The realization of any one of these risks could have prevented the Class from winning a recovery.

8. The settlement was reached with the assistance of the Honorable Layn Phillips (Ret.), a highly-respected former federal district court judge with substantial experience as a mediator. The parties participated in a full-day mediation session, which was preceded by

extensive briefing and evidentiary submissions. Negotiations continued for many days after this session, culminating in a mediator's proposal of $160,000,000, which both sides accepted. This result will provide Class Members anywhere from 80% to 100% of estimated statutory damages depending on the number of Claims submitted by Class Members – an astonishing recovery in a world where the vast majority of securities settlements settle for pennies on the dollar of estimated damages. *See Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* at 35, Fig. 27 ("NERA Study"), available at https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf and attached hereto as Exhibit 1.

9. The six-year prosecution of this case, which the Court acknowledged had a "lengthy and complicated history," required Robbins Geller and its professional support staff to expend thousands of hours of work and hundreds of thousands of dollars in expenses. This means Robbins Geller went years not only without pay and without any promise of payment, but also risked hundreds of thousands of dollars in out-of-pocket expenses – all to prosecute this Litigation, with only a potential to recover – a potential that never materialized for over 15 other firms. Against such daunting odds, attorneys' fees in the amount of 30% of the Settlement Fund are modest in terms of a risk-benefit analysis, but also from a net recovery perspective for Class Members. The average recovery for class members in 10b-5 actions with estimated damages of between $100 million and $199 million is 3.1% of damages. *Id.* Here, net of the 30% fees, Class Members will receive over 50% of their damages, which is exponentially higher than the average recovery, which means that the attorneys' fees will be money well spent for the Class. After all, 70% of a $160 million

settlement is far more valuable to the Class than even 100% of a $16 million settlement (which would still be an above-average settlement).

10. The decision to settle this case involved a careful assessment of the case's strengths and weaknesses, considered in light of the unavoidable risks that continued prosecution would bear on the Class's ability to obtain a recovery. Based on this assessment, I believe a settlement in the amount of $160 million represents an excellent recovery and is in the best interests of the Class as it provides for an immediate and certain award. Accordingly, I respectfully submit that the proposed settlement is fair, reasonable, and adequate.

11. PGERS at all times throughout the Litigation, supervised Robbins Geller, participated in all material aspects of the Litigation, remained informed throughout the settlement negotiations, and ultimately approved the settlement. PGERS's commitment to the Litigation and the Class is nothing short of extraordinary. Not only did PGERS file the initial complaint in this case, but it was also the ***sole*** movant seeking appointment as lead plaintiff and the ***sole*** class representative. Moreover, in order to increase the Class' prospects of getting discovery, it committed to pursue this Litigation regardless of whether or not the case was certified as a class action.

II. FACTUAL SUMMARY OF PGERS'S CLAIMS

12. PGERS asserted claims brought under §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 promulgated thereunder, against Walmart and its former Chief Executive Officer ("CEO") Michael T. Duke (collectively, "defendants"). The case was brought on behalf of all persons or entities who

purchased or otherwise acquired Walmart common stock between December 8, 2011 and April 20, 2012 (the "Class Period").

13. PGERS alleged that in 2005, Duke – the then-CEO of Walmart International – discovered through internal detailed reports that Walmart's rapid expansion into Mexico had been fueled by millions of dollars in bribes to Mexican foreign officials for building permits throughout the country (the "Suspected Corruption"). PGERS further alleged that Walmart and Duke covered up the Suspected Corruption by electing to forego an independent investigation of the bribery allegations, in direct defiance of their General Counsel's advice. Instead, Walmart assigned the investigation to the very same office accused of having facilitated the fraudulent bribery scheme: Walmart De Mexico's General Counsel's Office.

14. PGERS further alleged that in the fall of 2011, Walmart learned that *The New York Times* was actively investigating the Suspected Corruption. Disclosure of facts by a forthcoming publication showing that Walmart had been aware of the Suspected Corruption since 2005 would have: (a) increased the likelihood of civil and criminal charges; (b) created uncertainty concerning Walmart's senior executives and officers who had been involved in the Suspected Corruption; and (c) jeopardized Walmart's growth strategy.

15. As alleged, rather than face these consequences, on December 8, 2011, Walmart filed its Report on Form 10-Q with the SEC containing materially false and misleading statements indicating that (a) it had received information sometime after February 1, 2011 related to the Suspected Corruption; (b) it was so proactive in protecting against corruption that it uncovered the Suspected Corruption through its own voluntary internal review of its policies, procedures, and internal controls pertaining to its global anti-

corruption compliance program; (c) that upon learning of the Suspected Corruption it engaged outside counsel to conduct an internal investigation and implemented appropriate remedial measures; and (d) that upon learning of the Suspected Corruption it proactively disclosed its internal investigation to the DOJ and the SEC. Duke also signed the Form 10-Q, certifying that the report did not contain any untrue statements of material fact or material omissions.

16. On April 21, 2012, *The New York Times* published its article exposing many of the facts that defendants had allegedly concealed since 2005 and 2006. On this news, Walmart's stock price declined causing PGERS and the members of the Class to be damaged.

III. RELEVANT PROCEDURAL HISTORY

A. The Initial Complaint and Transfer of Venue to the Western District of Arkansas

17. On May 7, 2012, PGERS filed the initial complaint as a class action in the Middle District of Tennessee, alleging claims under the Exchange Act on behalf of all persons who purchased or otherwise acquired Walmart common stock during the Class Period. ECF No. 1.

18. On July 3, 2012, defendants filed a Motion to Transfer Venue to the Western District of Arkansas. ECF No. 27.

19. PGERS filed its Opposition on July 17, 2012, arguing that the Middle District of Tennessee was a more favorable forum in light of its geographical proximity to serviceable airports. ECF No. 39.

20. On July 23, 2012, defendants filed their Reply brief. ECF No. 45.

21. Judge Todd J. Campbell issued an order granting defendants' Motion to Transfer on July 25, 2012, finding that Arkansas had a much stronger connection to the underlying events in the action and that the interests of justice were best served by transferring the Litigation to this District. ECF Nos. 46, 47.

22. The Litigation was assigned to Judge Robert T. Dawson in the Western District of Arkansas, but was subsequently reassigned to the Honorable District Judge Susan O. Hickey on August 27, 2012.

B. The Lead Plaintiff Appointment Process

23. Before the Litigation was transferred to this District, Magistrate Judge E. Clifton Knowles entered the parties' Proposed Joint Initial Case Management Plan and Order on July 9, 2012, which extended deadlines for the parties to amend or file initial pleadings until after the appointment of Lead Plaintiff. *See* ECF Nos. 31, 33.

24. Also on July 9, 2012, PGERS filed a Proposed Order requesting the Court to enter an order appointing it as Lead Plaintiff and approving its selection of Robbins Geller as Lead Counsel pursuant to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). ECF No. 32. On July 10, 2012, Walmart opposed entry of the Proposed Order, requesting that the Court defer its decision on appointment until after it had ruled on the then-pending Motion to Transfer Venue. ECF No. 36.

25. On August 29, 2012, once the Litigation was transferred to this Court, PGERS immediately renewed its motion for appointment as lead plaintiff and approval of its selection of lead counsel. No other class members sought to be appointed as lead plaintiff, which suggests that no other investor – or law firm – was willing to undertake the risks and

responsibilities of prosecuting this case against Walmart. ECF No. 66. Thereafter, on August 30, 2012, defendants filed their Response, notifying the Court of its previous filing on July 10, 2012 (ECF No. 36), and reiterating their argument that PGERS did not suffer recoverable damages. ECF No. 67.

26. Thereafter on November 29, 2012 and December 6, 2012, PGERS submitted supplemental memoranda detailing the qualifications of Robbins Geller and Liaison Counsel, as well as PGERS's trading history, which demonstrated that PGERS suffered losses under a last-in-first-out ("LIFO") accounting methodology. ECF Nos. 70, 71.

27. The Court on December 10, 2012, held a hearing on PGERS's Lead Plaintiff Motion. Defendants notified the Court that they would not be further pressing their objections and elected to submit on the record. After hearing from the parties, the Court noted that "in this case it is presumed that [PGERS] is the most capable of adequately representing the interest of the class," that "[t]his presumption has not been rebutted," and accordingly that, PGERS "should be appointed lead plaintiff in this matter." Transcript at 8:4-10. The following day, the Court formally entered an Order appointing PGERS as Lead Plaintiff and Robbins Geller as Lead Counsel, Barrett Johnston, LLC as additional counsel, and Patton Tidwell & Schroeder, LLP as Liaison Counsel. ECF No. 74.

C. PGERS's Amended Complaint and Opposition to Defendants' Motion to Dismiss

28. On January 24, 2013, defendants filed a Motion to Dismiss the initial complaint based on Federal Rule of Civil Procedure 12(b)(6), raising various arguments that the initial complaint failed to state a claim under §10(b) and §20(a) of the Exchange Act and Rule 10b-5. ECF Nos. 82, 83.

29. In response to defendants' Motion to Dismiss, PGERS filed an Amended Complaint on February 14, 2013, supplementing its existing allegations with greater detail, documents, and newly uncovered information since the original filing of the Litigation. ECF No. 86.

30. On March 4, 2013, defendants again moved this Court to dismiss the Amended Complaint, updating the arguments made in their original Motion to Dismiss. ECF Nos. 89, 90. Additionally, defendants argued investors would be largely incapable of showing economic loss by operation of PSLRA's 90-day "bounce-back" rule. ECF No. 90.

31. PGERS filed its Opposition on March 21, 2013. ECF No. 94. PGERS argued, among other things, that the challenged misstatements were false and misleading based on United States Supreme Court and Eighth Circuit precedent and that defendants' arguments wrongly analyzed the statements in isolation and without regard to the false impression they created. *Id.* PGERS further stated that the Amended Complaint went beyond the particularity requirements of the PSLRA by highlighting allegations of two instances when Duke received official reports of the Suspected Corruption. *Id.*

32. On April 1, 2013, defendants filed their Reply Memorandum in support of their Motion to Dismiss the Amended Complaint. ECF No. 98.

33. On September 17, 2013, the Court issued an Order denying (as moot) defendants' original Motion to Dismiss (ECF No. 82) based upon PGERS filing of the Amended Complaint and defendants' filing of its Motion to Dismiss the Amended Complaint (ECF No. 89). ECF No. 108.

34. On April 30, 2014, defendants filed a Notice of Supplemental Authority in Support of their Motion to Dismiss, informing the Court of three newly decided district court cases from the Southern District of New York and the Northern District of California that they believed supported their arguments. ECF No. 129. On May 1, 2014, PGERS filed its Response to defendants' filing of supplemental authority, explaining why none of the out-of-circuit district court cases were proper authority to dismiss the Amended Complaint. ECF No. 130.

35. On May 8, 2014, Magistrate Judge Erin L. Setser issued a Report and Recommendation ("R&R") that defendants' Motion to Dismiss be denied. ECF No. 133. Judge Setser found that PGERS adequately pled an actionable misstatement based upon defendants' failure to disclose the 2005 discovery of the Suspected Corruption and the internal investigation that followed in 2005 and 2006. *Id.* Judge Setser explained that while defendants' statements "may have been technically true . . . without any reference to the 2005 and 2006 events, a reasonable investor could have certainly been left with the impression that [d]efendants only learned of the suspected corruption in fiscal year 2012." *Id.* at 10. Judge Setser further determined that PGERS had sufficiently alleged that defendants acted with scienter based upon, *inter alia*, "allegations that Duke, in an email from a top Walmart lawyer in October 2005, had been given a detailed description of the suspected corruption allegations." *Id.* at 12.

36. Thereafter on May 27, 2014, defendants' filed objections to Judge Setser's R&R. ECF No. 134. Defendants objected that Judge Setser erred in concluding that the December 2011 10-Q disclosure was actionably false or materially misleading because,

among other things, Judge Setser wrongly determined that defendants had a duty to disclose details of Walmart's ongoing internal investigation. *Id.* at 8. Defendants also objected that Judge Setser had wrongly concluded that the Amended Complaint had adequately pled scienter because, among other things, Judge Setser improperly relied on an unreasonable interpretation of the 2005 e-mail to Mr. Duke, which only reflected that Mr. Duke was apprised of unsubstantiated "alleged corruption." *Id.* at 9.

37. On June 13, 2014, PGERS filed its Response to defendants' Objections to Judge Setser's R&R, arguing that defendants' objections mischaracterized Judge Setser's sound and well-reasoned R&R. ECF No. 137. More specifically, PGERS clarified that the R&R did not hold that defendants had a duty to disclose the Suspected Corruption in 2005 and 2006, but rather, that defendants were obligated to disclose the truth about when and how they learned of the Suspected Corruption upon electing to speak about it in 2011 and 2012. *Id.* at 9. PGERS also corrected defendants' mischaracterizations of the R&R's findings on scienter by noting that the facts known by Mr. Duke in 2005-2006 were completely inconsistent with Walmart's statement in late 2011. *Id.* at 25.

38. On June 20, 2014, defendants filed their Reply in Support of their Objections to the R&R, doubling down on the argument that Magistrate Judge Setser improperly conflated the materiality and falsity elements of a section 10(b) claim and failed to properly apply the "strong inference" standard for scienter. ECF No. 138.

39. On September 26, 2014, Judge Hickey issued an Order overruling defendants' objections and adopting *in toto* Judge Setser's R&R to deny defendants' Motion to Dismiss the Amended Complaint. ECF No. 146. The Court explained that Judge Setser properly

applied the materiality standard and correctly noted that, "without any reference to the 2005 and 2006 events, a reasonable investor could have been left with the impression that defendants first learned of the [S]uspected [C]orruption in fiscal year 2012 . . . ." *Id.* at 3-4. The Court also agreed with Judge Setser's finding "that it is likely that the disclosure of the 2005-2006 events would have been viewed by a reasonable investor as having significantly altered the total mix of information available." *Id* at 4. Regarding scienter, the Court stated that based on the allegations made in the Amended Complaint, the inference that defendants acted with scienter was "***as strong, if not stronger, than any competing plausible inference***." *Id*. at 6.

D. PGERS's Opposition to Defendants' Motion to Strike the Amended Complaint

40. PGERS' Amended Complaint set forth very specific allegations based on information obtained by Robbins Geller during its factual investigation, including excerpts of critical email communications. ECF No. 86. On March 7, 2013, defendants filed a Motion to Strike the Amended Complaint. ECF Nos. 91, 92. Preliminarily, defendants requested that the Court strike the Amended Complaint in its entirety based upon, among other things, defendants' contention that PGERS had represented that it would "stand on" the initial complaint. ECF No. 92. Defendants also asked the Court to strike what they believed to be confidential documents that were improperly included in the Amended Complaint, arguing that the documents were protected by the attorney-client privilege and work product doctrine. *Id.*

41. On March 25, 2013, PGERS filed its Opposition to defendants' Motion to Strike. ECF No. 97. PGERS stated that it properly exercised its right to file the Amended

Complaint, explaining that Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading "as a matter of course" before its served with a responsive pleading. *Id.* PGERS also clarified that it had always unequivocally reserved its rights to file an amended complaint and that Walmart failed to object to these reservations at each turn. *Id.* Regarding the privilege issues, PGERS argued that defendants failed to submit the affidavit of a single attorney or witness, and in doing so, failed to satisfy the threshold requirement that a party asserting the privilege provide a factual basis in support of its claims. *Id.* PGERS further argued that even if defendants had provided such a factual basis, defendants waived their privilege when they made excerpts from the documents at issue publicly available by filing them on another court's docket, produced the documents to the DOJ and SEC, and when they failed to take any steps to prevent their publication by ***The New York Times*** and Congress. *Id.*

42. On April 1, 2013, defendants filed their Reply in support of their Motion to Strike. ECF No. 99.

43. The next day, on April 2, 2013, PGERS filed a Supplemental Memorandum in further support of its Opposition to defendants' Motion to Strike. ECF No. 100. PGERS provided specific details and examples of defendants' voluntary disclosure of the substance of all ten communications at issue, which waived any privileges and enabled PGERS to use them. *Id.* at 8.

44. Thereafter on May 20, 2013, PGERS filed a second Supplemental Memorandum in support of its Opposition to defendants' Motion to Strike, advising the Court that in the week prior, the Delaware Chancery Court held that Walmart had waived its

privilege to the documents that were at issue in defendants' opening motion. ECF No. 103. In particular, Chancellor Leo E. Strine held that defendants had waived the privilege as to any document published on *The New York Times*'s website or the Congressional website whose contents were quoted or referenced in the exhibits that Walmart filed in separate derivative cases. *Id*. In addition, PGERS noted that pursuant to the Full Faith and Credit Clause of the United States Constitution, Walmart was precluded from contesting waiver in the present case. *Id*.

45. On May 24, 2013, defendants filed a Response to PGERS's second Supplemental Memorandum advising the Court that the Delaware Chancery Court's decision was a bench ruling issued in advance of a proceeding on the merits and that a final adjudication on the merits was needed before the preclusive effect of the Full Faith and Credit Clause could apply. ECF No. 104.

46. Over the course of the next several months, the parties submitted a series of supplemental memoranda and correspondence updating the Court as to the status of the proceedings pending before the Delaware Chancery Court. *See* ECF Nos. 105, 106,107, 109, 110, 111, 112, 114, 115, 116, 117, 118, 119, 120. *See also* October 16, 2013, Judge Hickey Letter. Importantly, the parties informed the Court that: (1) the Delaware Chancery Court had entered its order and ruled against Walmart as to all emails posted to *The New York Times*'s or Congressional websites (October 16, 2013 Letter); (2) Walmart had appealed the order (ECF No. 115); and (3) the scope of the appeal did not encompass the documents at issue in defendants' Motion to Strike (ECF No. 116).

47. On February 24, 2014, the Court issued its ruling denying Walmart's Motion to Strike the Amended Complaint in its entirety finding that "pursuant to Rule 15, Plaintiff properly filed its amended complaint without leave of court." ECF No. 123 at 2. The Court also requested additional briefing from the parties on the collateral estoppel effect of the Delaware Chancery Court's ruling that Walmart waived the privilege over documents included on *The New York Times*'s or Congressional websites. *Id*.

48. In accordance with the Court's Order, the parties filed supplemental briefs on March 3, 2014. ECF Nos. 124, 125. For its part, Walmart informed the Court that it had discretionary authority to afford collateral estoppel effect to the Delaware Chancery Court's Order, or that it could adopt it simply as a matter of comity. ECF No. 124. More to the point, Walmart requested that the Court adopt the Order in full and hold that the privilege was waived as to published documents but retained with regard to all other documents. *Id*. PGERS argued that Walmart was collaterally estopped from contesting waiver of the published documents under Delaware case law and by application of the Full Faith and Credit Clause. ECF No. 125. As to the two remaining emails that remained publicly available on the docket as well as other documents in the possession of Lead Counsel, for the sake of expediency, PGERS agreed to not contest Walmart's request to strike those emails and to return to Walmart all unfiled copies of the documents at issue. *Id*.

49. In accordance with the parties' concessions, on March 10, 2014, the Court recognized that Walmart had withdrawn its motion with respect to the published documents and ordered the two remaining emails stricken from the record. ECF No. 127. In addition,

the Court explained that it would postpone its ruling on the return of documents in light of a pending appeal that the Delaware plaintiffs were then pursuing. *Id*.

E. PGERS's Opposition to Defendants' Motion to Strike PGERS's Damages Methodology

50. In August 2015, the parties held their Rule 26(f) conference and exchanged their Initial Disclosures. During the Rule 26(f) conference and in its Initial Disclosures, PGERS advised defendants that, consistent with the allegations in its Amended Complaint, PGERS did not intend to limit itself to a market-price methodology to measure damages, a position it had originally taken in its Response to defendants' Motion to Dismiss. *See* ECF No. 94. More specifically, PGERS advised defendants it would seek damages equaling Class Members' proportional shares of the value-diminishing consequences of the information that defendants misrepresented and misleadingly omitted.

51. On August 28, 2015, defendants filed a Motion to Strike seeking to strike paragraph 49(e) from the Amended Complaint, which alleged as a common question of law for the then-putative Class whether the perceived value of the Walmart common stock was artificially inflated. ECF Nos. 167, 168. As they stated, the purpose of defendants' motion was to strike PGERS's damages theory, arguing that because PGERS had filed a class action invoking the fraud-on-the-market presumption of reliance, it was bound by controlling Supreme Court precedent supposedly requiring PGERS to prove damages by reference to market price. ECF No. 168.

52. On September 9, 2015, defendants filed an Amended Motion to Strike, adding a request to strike footnote 3 from the Amended Complaint, which noted that although Walmart's stock increased due to a quarterly performance surprise in the weeks following

the corrective disclosure, investors never recovered what they had overpaid for Walmart's stock. ECF No. 176. In their brief, defendants urged the Court to strike footnote 3 because, like paragraph 49(e) of the Amended Complaint, it supposedly argued that shareholders suffered recoverable damages regardless of future stock performance or whether the shareholder sold securities at or above the mean trading price during the 90-day bounce back period. ECF No. 177.

53. PGERS filed its Response to defendants' Amended Motion to Strike on September 28, 2015. ECF No. 192. PGERS argued that defendants' Amended Motion to Strike was untimely under Federal Rule of Civil Procedure 12(f), as defendants had filed their Answer to the Amended Complaint nearly one year prior on October 10, 2014. *Id.* On more substantive grounds, PGERS argued, *inter alia*, that the limitation on damages under the PSLRA did not apply to all damage methodologies, but rather that by the express terms of the statute, the 90-day "bounce-back" rule applied only to cases where the plaintiff sought to establish damages by reference to the market price of a security. *Id*. at 13.

54. On October 5, 2015, defendants filed their Reply Memorandum in support of their Amended Motion to Strike, arguing that the PSLRA's bounce back rule unambiguously applies to all cases where the class purchased stock in an allegedly efficient market. ECF No. 194.

55. On May 20, 2016, defendants filed a Notice of Withdrawal of Amended Motion to Strike, pursuant to a compromise they had presented to the Court, wherein they had agreed to withdraw their motion if the Court granted them leave to file an amended sur-reply in connection with briefing on Class Certification (ECF No. 257). ECF No. 273.

F. PGERS's Motion for Class Certification

56. In accordance with the then-operative Scheduling Order (ECF No. 172), PGERS filed its Motion for Class Certification on November 3, 2015, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3). ECF Nos. 229, 230. PGERS moved to certify a class consisting of all entities that acquired the publicly traded common stock of Walmart during the Class Period and requested that the Court appoint it and Robbins Geller to serve as Class Representative and Class Counsel, respectively. PGERS argued that the proposed class satisfied the requirements of Rule 23, including numerosity, commonality, typicality, and adequacy. In support of its motion, PGERS submitted the declarations of experts Bjorn I. Steinholt and Jonathan M. Karpoff, which offered two alternative methodologies for the calculation of class wide damages: (1) the stock-price method, and (2) the build-up method. ECF Nos. 232, 234.

57. PGERS's development of the build-up method and its significance to the Class as a method by which to measure class-wide damages cannot be overstated. It allowed the Class to assess damages without consideration of the PSLRA's limitation on damages, which dramatically increased the Class's potential recovery. During the class-certification process, Lead Counsel undertook considerable efforts to prepare for and defend the depositions of PGERS's Executive Director and the two above-mentioned experts.

58. On November 16, 2015, the parties filed a Joint Motion for entry of a stipulation to extend the class certification briefing schedule. ECF No. 238.

59. Thereafter, defendants filed their Opposition to Plaintiff's Motion for Class Certification on November 24, 2015. ECF No. 244. First, defendants argued that PGERS

lacked standing and could not satisfy Rule 23(a)(3)'s typicality requirement because PGERS did not sustain any losses for trades it made in Walmart stock. Secondly, defendants argued that PGERS could not satisfy Rule 23(b)(3)'s predominance requirement with its build-up method as it was inconsistent with its theory of liability and because it could not be used to measure damages on a class-wide basis. *Id.*

60. In its Reply Memorandum filed on December 18, 2015, PGERS noted that defendants' Opposition was based on arguments more properly suited for a motion to dismiss and failed to provide the Court with a valid reason for denying class certification. ECF No. 252. Nevertheless, PGERS replied to defendants' arguments, explaining that it suffered losses under the LIFO methodology – a method previously unopposed by defendants and implicitly approved by the Court during the Lead Plaintiff appointment process as a method typically used in Section 10(b) cases. *Id.* Moreover, PGERS argued that defendants' attack on the build-up method was premature at this stage and irrelevant to whether the class should be certified given their concession that class-wide damages were measureable under the share-price method. *Id.*

61. Subsequently on December 29, 2015, defendants moved for leave to file a Sur-Reply based on an assertion that PGERS raised two novel arguments for the first time in its Reply Memorandum. ECF No. 255. PGERS then filed an Opposition in Response to defendants' motion on January 15, 2016 stating its arguments were merely responses to arguments made in defendants' Opposition. ECF No. 256. Thereafter, on January 28, 2016, defendants withdrew their prior motion for leave (ECF No. 255) and filed a new motion for leave to file an Amended Sur-Reply, attacking for the first time PGERS's class definition.

ECF No. 257. In it, defendants stated that PGERS's class definition was fundamentally flawed in that it purported to certify an unascertainable "fail safe" class that would require individual determinations to ascertain class membership. *Id.* at 3. PGERS responded on February 16, 2016, stating that Walmart's challenge to the class definition was inexcusably late and that the purportedly objectionable language in the class definition was routinely used in Section 10(b) class definitions. ECF No. 258. Defendants then filed a Reply on February 22, 2016, arguing that they were entitled to file their Amended Sur-Reply because PGERS included a new articulation of the build-up method in its Reply. ECF No. 259.

62. On May 20, 2016, the Court granted defendants' motion for leave. ECF No. 270. In its Order, the Court also granted PGERS the opportunity to file an additional response. *Id.*

63. Defendants filed their Amended Sur-Reply on May 20, 2016, advancing similar arguments regarding the purportedly improper class definition as well as lodging various attacks on PGERS's build-up method. ECF No. 274. PGERS then filed its response to defendants' Amended Sur-Reply, wherein PGERS established that there was nothing objectionable about the class definition language. ECF No. 277.

64. On September 20, 2016, the Court granted PGERS's Motion for Class Certification, holding that all requirements of Rule 23(a) were satisfied, including the only disputed requirement of typicality. ECF No. 284. The Court agreed with PGERS and explained that "courts routinely accept calculations of harm under the LIFO methodology, and the Court finds no reason to reject Plaintiff's calculation of its losses under this methodology." *Id.* at 9. The Court also held that PGERS satisfied the requirements of Rule

23(b)(3), finding defendants' challenges to the build-up method were misplaced at the class certification stage and stating that "***it is not necessary or appropriate for the Court to consider at this time whether to preclude the build-up methodology***." *Id*. at 12.

65. On October 6, 2016, defendants filed a Notice informing the Court that they had filed a Rule 23(f) petition seeking permission to receive interlocutory review of the Class Certification Order. ECF No. 290. Defendants' petition, which enlisted an additional law firm (Kirkland & Ellis) and additional lawyers, lodged various challenges to the use of PGERS's build-up method for purposes of class certification. *Id*.

66. On October 17, 2016, PGERS filed its answer to defendants' 23(f) petition, explaining that Rule 23(f) did not apply to what was just an objection to this Court's discretionary decision to defer resolution of defendants' challenge to the build-up method.

67. On October 24, 2016, defendants filed a reply brief in support of their 23(f) petition.

68. On November 7, 2016, the Eighth Circuit denied defendants' 23(f) petition. ECF No. 296-1.

G. PGERS's Opposition to Defendants' Motion to Dismiss PGERS's Damages Methodology

69. On January 4, 2017, defendants filed a third Motion to Dismiss, seeking dismissal pursuant to Rules 12(b)(1) and 12(h)(3), or alternatively for judgment on the pleadings pursuant Rule 12(c). ECF Nos. 303, 304. Defendants argued that because PGERS sought recovery for damages based on injuries that the Company suffered, its claims were actually derivative claims asserted under the guise of direct 10b-5 claims. ECF No. 304. Accordingly, defendants argued PGERS lacked standing as a shareholder to assert

"derivative" claims. *Id.* In the alternative, defendants argued that because PGERS had expressly filed its claims under Rule 10b-5, the action was subject to all provisions within the PSLRA, including the 90-day "bounce-back" rule, which defendants further argued constituted a mandatory limitation on damages. *Id.*

70. In its Opposition filed on January 18, 2017, PGERS explained that the PSLRA did not restrict the methods for measuring damages in a private action, and that the PSLRA expressly confined the "bounce-back" rule to cases where damages were measured by reference to market price. ECF No. 305. Moreover, PGERS stated that because defendants' alleged fraud caused class members to overpay for Walmart stock, the injury they suffered was plainly direct, and therefore, PGERS had standing to pursue its claims. *Id.*

71. Then on June 13, 2017, defendants filed a Notice of Supplemental Authority in support of their third Motion to Dismiss, notifying the Court of a then-recently decided Supreme Court decision in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 198 L. Ed. 2d 64 (2017) was relevant to issues of standing. ECF No. 399.

72. On September 29, 2017, the Court issued an Order denying defendants' third Motion to Dismiss. ECF No. 404. The Court held that PGERS had standing, reasoning that only class members suffered the harm of overpayment for Walmart stock, and that only class members would receive proceeds in the event that a judgment was entered against defendants. *Id.* The Court explained that "because PGERS alleges that [d]efendant's fraud caused class members to overpay for shares of Walmart's stock, the alleged injury to the class members is a direct injury that they have standing to pursue." *Id.* at 4. The Court further found that the PSLRA's damages limitation provision did not limit PGERS to a

market-price methodology, agreeing with PGERS that a "***plain reading of this provision reveals that it does not mandate the establishment of damages by reference to market price***." *Id*. The Court deferred any further ruling on PGERS's damage methodologies and "decline[d], at th[at] stage of the litigation, to force PGERS to elect one of its two alternative damages methodologies . . . ." *Id*.

73. On October 20, 2017, defendants' moved the Court to certify its order denying their Motion to Dismiss for interlocutory review pursuant to 28 U.S.C. §1292(b). ECF No. 405. Specifically, defendants sought the certification of two questions: (1) "Can a plaintiff in a Rule 10b-5 class action assert a claim for damages based on costs paid and other losses sustained by the defendant company?"; and (2) "Can a plaintiff in a Rule 10b-5 class action involving a publicly traded security avoid the limitation on damages in the [PSLRA] by claiming to calculate damages without reference to the security's market price?" *Id*. at 1. In their supporting memorandum, defendants argued that on both questions, this Court's order was contrary to the decisions of other courts. ECF No. 406. Defendants also argued that each question also satisfied the requirements of 28 U.S.C. §1292(b), including that the issues constituted controlling issues of law, there was substantial grounds for difference of opinion, and certification would materially advance termination of the Litigation. *Id*.

74. PGERS opposed this motion on November 3, 2017, explaining, *inter alia*, that this was a direct case as it sought to recover on behalf of a narrow class of shareholders who overpaid for Walmart's shares due to its alleged fraud. ECF No. 407. Defendants filed their Reply on November 10, 2017, insisting that PGERS's build-up method was an "unprecedented claim to 'recover' costs, losses, and expenses incurred . . . by Wal-Mart" and

was one that "ha[d] never been pursued nor accepted in connection with a securities class action." ECF No. 408 at 1.

75. At the time of settlement, defendants' motion remained pending.

IV. PREPARING THE CASE FOR TRIAL

76. Lead Counsel aggressively explored all available sources of discovery and fought to gather every piece of evidence it obtained in the prosecution of this Litigation. While discovery can be arduous in any case, it is even more so when facing an aggressive adversary that sought every opportunity to limit PGERS's fact gathering efforts. PGERS at all times pushed forward and litigated every issue necessary to obtain the evidence to which the Class was entitled.

77. Defendants' resistance to discovery was so pronounced, they started before the PSLRA's automatic stay of discovery lifted following the Court's denial of defendants' Motion to Dismiss (ECF No. 146). On October 10, 2014, defendants moved the Court to sequence class certification and merits discovery, requesting that the Court maintain the stay on merits discovery until after resolution of class certification. ECF No. 150. In essence, after more than two years of litigation and after overcoming defendants' motion to dismiss and motion to strike, PGERS had to yet again earn the right to engage in discovery. Once again, PGERS did not shrink from a fight. On October 27, 2014, PGERS opposed the motion and committed to "pursue this case whether or not it [was] certified as a class action," thereby making merits discovery inevitable for itself and more likely for the Class. ECF No. 153 at 2. In addition to its commitment, PGERS argued that the motion represented yet another attempt by defendants to conceal evidence of their wrongdoing and

that bifurcating discovery would only lead to additional delays by requiring the Court to decide what evidence qualified as "class certification" and "merit" discovery. ECF No. 153.

A. Obtaining Evidence from Defendants and Third Parties

1. Document Discovery

78. While PGERS obtained documentary evidence even prior to the commencement of discovery, evidence obtained through formal discovery procedures relating to Walmart's awareness of the Suspected Corruption was critical to the final resolution of this Litigation.

79. Upon the Court's denial of defendants' motion to sequence discovery, Lead Counsel promptly commenced discovery. On August 5, 2015, the parties conferred telephonically to discuss and agree upon a discovery plan pursuant to Fed. R. Civ. P. 26(f) and Local Rule 26.1. The parties filed their Joint Report on their Rule 26 conference on August 31, 2015, informing the Court of their various agreements and that negotiations regarding a protocol for the production of electronic discovery were ongoing. ECF No. 171.

80. During the course of discovery, PGERS served four separate sets of Requests for Production, beginning with service of its initial set of requests on September 25, 2015. In total, PGERS sought the production of 40 categories of documents from defendants including, *inter alia*, documents concerning any investigation of the Suspected Corruption by Walmart and actions taken in response to the findings of any such investigation.

81. On October 14, 2015, PGERS filed a motion seeking entry of an order establishing a protocol for the production of documents. ECF Nos. 202, 203. PGERS advised the Court that efforts by the parties to reach an agreement and enter a stipulated

protocol were unsuccessful because defendants had repeatedly failed to respond to PGERS's proposals.

82. On November 2, 2015, defendants filed a motion notifying the Court that the parties had resumed negotiations and requested a one-week time extension to file their response. ECF No. 223.

83. Defendants filed their Response on November 9, 2015, submitting their own proposed protocol and requesting that the Court enter an order adopting their protocol. ECF No. 235. Then, on November 17, 2015, the parties filed a joint motion for an order adopting a stipulated protocol (ECF No. 239), which the Court entered on May 19, 2016. ECF No. 266. The stipulated protocol allowed the parties to reduce costs and benefit the Class by facilitating the orderly production of documents over the discovery period and avoiding disputes that would have otherwise arose.

84. The parties also jointly submitted a motion for entry of a stipulated protective order containing agreed-upon procedures for the treatment of confidential information, including protocols for designating protected material, challenging designated material, and seeking judicial relief where necessary. ECF No. 239. The Court entered the Stipulated Protective Order on May 19, 2016. ECF No. 267.

85. In addition to the parties' stipulated protocol, Lead Counsel also carefully developed a narrowly tailored set of search parameters (***i.e.***, search terms, custodians, date ranges, etc.) to be used in connection with the searching and ultimate production of defendants' ESI. This required Lead Counsel to review, assess, and identify technical and proprietary terminology used by Walmart to develop a workable list of search parameters

that targeted all relevant documents. Moreover, Lead Counsel also expended significant time to meet and confer with defendants regarding proposed search terms.

86. Ultimately, defendants produced over 2.7 million pages in documents, including documents of various types, formats, styles, and languages. Given the sheer size of the production, Robbins Geller employed state of the art Relativity software to house and store the production. Use of this software streamlined the review process through use of predictive coding features which brought documents of perceived probative value to the forefront of review efforts based on a continuous assessment of previously identified documents.

2. Depositions

87. In total, PGERS took the depositions of five fact witnesses, including:

DEPONENT	DATE	LOCATION
Charles Holley, Chief Financial Officer (deposed twice)	June 29, 2018 January 10, 2017	Austin, TX Austin, TX
Joseph Lewis, Director of Corporate Investigations	June 20, 2018	Washington, D.C.
David Tovar, Vice President of Corporate Communications	November 18, 2016	Kansas City, MO
Ronald Halter, Special Investigator	October 13, 2016	Columbia, MO
Raymond Bracy, Vice President of Corporate Affairs	September 27, 2016	Washington, D.C.

88. At the time this settlement was reached, PGERS had noticed and was actively preparing to take three additional fact witness depositions. Lead Counsel was also engaged in extensive meet-and-confer efforts with opposing counsel regarding the scheduling of several other depositions and a variety of defendants' objections, including PGERS's

intended scope of examination and its decision to depose certain individuals within the Walmart organization. As discussed in greater detail below, PGERS was forced to litigate (and win) the right to reopen Mr. Halter's and Mr. Holley's depositions (*see* §§IV.A.3.d., IV.B.3.c.), as well as the right to depose Douglas McMillon, Walmart's current CEO (*see* §§IV.C.1.e., IV.C.3.b.).

3. Third-Party Discovery

89. PGERS's factual investigation in this case was extensive. In total, PGERS served 15 third-party subpoenas on the following parties:

- The United States Securities & Exchange Commission
- Indiana Electrical Workers Pension Trust Fund IBEW
- Grant & Eisenhofer, P.A.
- Maritza Munich
- Charles Holley
- Ernst & Young LLP
- David Tovar
- Leslie Dach
- William Henderson
- Raymond Bracy
- Ronald Halter
- Joseph Lewis
- Douglas McMillon
- Thomas Mars
- Lee Stucky

90. Enforcing these third-party subpoenas often required PGERS to litigate in venues throughout the country, often against ***both*** Walmart and third-party counsel (paid by Walmart).

a. *Wal-Mart Stores, Inc., et al. v. City of Pontiac General Employees' Retirement System*, Misc. No. 1:15-mc-00242

91. Walmart made substantial document productions to Indiana Electrical Workers Pension Trust Fund IBEW ("IBEW") and its counsel, Grant & Eisenhofer, P.A., in connection with the litigation captioned *Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores Inc.*, CA No. 7779-CS – a §220 books and records action based on Walmart's 2005-2006 bribery scandal. Robbins Geller diligently pursued these documents and served IBEW and Grant & Eisenhofer, P.A. each with identical third-party subpoenas on September 3, 2015.

92. On September 17, 2015, Walmart moved the United States District Court for the District of Delaware in *Wal-Mart Stores, Inc., et al. v. City of Pontiac General Employees' Retirement System*, Misc. No. 1:15-mc-00242, to quash the subpoenas, or alternatively, to transfer the motion to the Western District of Arkansas or to stay proceedings on the subpoenas. ECF No. 1.[2] Walmart urged the Court to quash the subpoenas because they sought production of privileged materials, noting that court-compelled disclosure did not result in a waiver of applicable privileges. ECF No. 2.

[2] All references to court filings in this section refer to filings made in *Wal-Mart Stores, Inc., et al. v. City of Pontiac General Employees' Retirement System*, Misc. No. 1:15-mc-00242.

93. PGERS filed its Opposition on October 5, 2015, stating that Walmart waived any privilege it had over the materials when it failed to establish a factual basis for its privilege assertions through the production of a privilege log. ECF No. 5.

94. The Court issued a ruling denying in part and granting in part Walmart's motion to quash on February 24, 2016. ECF No. 13. It stated that Walmart's prior production of the documents did not amount to a waiver because, *inter alia*, the Court of Chancery expressly preserved Walmart's ability to assert the privilege, and therefore, it retained the ability to assert any applicable privilege in the present proceedings. ECF No. 12. However, the Court agreed with PGERS, noting that Rule 45 requires a party to expressly make a claim of privilege and that "Wal-Mart ha[d] failed to assert a valid claim of privilege" in that it failed "to describe the nature of the withheld documents . . . in a manner that . . . [would] enable the parties to assess the claim." *Id.* at 5. Accordingly, the Court denied this aspect of Walmart's motion and ordered it to produce a privilege log. *Id.* at 6.

b. *Munich, et al. v. City of Pontiac General Employees' Retirement System, et al.*, Misc. No. 3:15-mc-00501

95. Maritza Munich, Walmart's former Vice President and General Counsel of its International Division, had unique personal knowledge of critical 2005 and 2006 events, including Walmart's internal investigation of the Mexican bribery allegations. Accordingly, on October 2, 2015, PGERS served two subpoenas on Munich, for the production of documents and deposition testimony.

96. Thereafter, on October 16, 2015, Munich moved the United States District Court for the District Court of Puerto Rico in *Munich, et al. v. City of Pontiac General*

Employees' Retirement System, et al., Misc. No. 3:15-mc-00501, to quash the subpoenas, or alternatively, to stay the proceedings. ECF No. 1.[3] Munich explained that the two subpoenas should be quashed because her compliance would necessarily require her to disclose privileged information and violate her ethical obligations. *Id*.

97. On the same day, Walmart filed a Motion to Intervene for the purpose of preventing the disclosure of material protected by the attorney-client privilege and the work product doctrine. ECF No. 2. Concurrently, Walmart filed a motion to quash or to transfer the motion to the Western District of Arkansas. ECF No. 3. In support of its motion to transfer, Walmart explained that Ms. Munich consented to the transfer and that the particular circumstances warranted transfer, including the fact that the subpoenas implicated broad privilege issues and that such issues should be determined by one judge to ensure consistency. *Id.*

98. Thereafter on November 2, 2015, PGERS filed its Opposition to Munich's motion, explaining that Munich was a percipient fact witness to Walmart's misconduct and therefore had personal knowledge of relevant matters which she gained independently of any legal counsel she may have provided in her role as General Counsel. ECF No. 12. PGERS also stated that Munich's blanket assertions of privilege over all documents and testimony should be rejected because, among other things, First Circuit case law and the Federal Rules of Civil Procedure do not permit such blanket assertions of privilege. *Id*.

[3] Unless otherwise specified, all references to court filings in this section refer to filings made in *Munich, et al. v. City of Pontiac General Employees' Retirement System, et al.*, Misc. No. 3:15-mc-00501.

99. On the same day, PGERS filed its Opposition to Walmart's motion, stating that while Munich may have consented to a transfer, she did not consent to be deposed in the Western District of Arkansas, and accordingly, the enforcement of any ruling on the pending motion to quash or to transfer the motion would have to be enforced in the District of Puerto Rico – creating serious inefficiencies and unnecessary delays. ECF No. 13.

100. On November 3, 2015, the Court granted Walmart's Motion to Intervene and to transfer the case to the Western District of Arkansas. ECF No. 14.

101. After the transfer, on September 29, 2016, this Court denied Walmart's Motion for a Protective Order (ECF No. 205), stating that defendants did not establish good cause because their requests were based on wholesale and vague assertions of privilege that did not provide the Court with sufficient information to grant a narrow order. ECF No. 288.

102. Following the Court's denial of defendants' request for a protective order, PGERS served Munich with an amended deposition subpoena and a second amended deposition subpoena on November 15, 2016 and March 23, 2017, respectively.

c. *Mars v. City of Pontiac General Employees' Retirement System*, Misc. No. 4:16-mc-00015-KGB

103. As Walmart's former General Counsel, Thomas Mars was actively involved in several critical events relevant to this Litigation, including Walmart's 2005-2006 internal investigation and in communications thereof to defendant Duke. Accordingly, on October 28, 2016, PGERS served Mars with subpoenas seeking deposition testimony and the production of documents.

104. On November 14, 2016, Mars petitioned the United States District Court for the Eastern District of Arkansas in *Mars v. City of Pontiac General Employees' Retirement System*, Misc. No. 4:16-mc-00015-KGB, for an order to quash the two subpoenas. ECF No. 1.[4] Mars argued that compliance with the subpoenas would require him to violate his ethical obligations and to disclose privileged information. ECF No. 2.

105. On November 17, 2016, Walmart filed a Motion to Intervene, again seeking to prevent the disclosure of information protected by the attorney-client privilege and the work product doctrine. ECF No. 4. In support of its request, Walmart stated that it was entitled as a matter of right to intervene because, among other things, it had a protected interest in preventing the disclosure of privileged information. ECF No. 5.

106. On the same day, Walmart also moved to quash the subpoenas, stating that the subpoenas should be quashed pursuant to Fed. R. Civ. P. 45 because, on their face, they sought privileged material. ECF Nos. 8, 9. In addition, Walmart argued that the subpoenas should be quashed because under the Eighth Circuit's *Shelton* Doctrine set forth in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), discovery of a party's former in-house counsel is only permitted under very limited circumstances, which were not present here. ECF No. 9. Walmart also concurrently filed a Motion to Transfer its Motion to Quash to the Western District of Arkansas, arguing that a transfer would avoid the risk of inconsistent rulings. ECF Nos. 10, 11.

[4] Unless otherwise specified, all references to court filings in this section refer to filings made in *Mars v. City of Pontiac General Employees' Retirement System*, Misc. No. 4:16-mc-00015-KGB.

107. On November 18, 2016, PGERS, Mars, and Walmart jointly moved the Court to enter a stipulated order permitting PGERS to file consolidated briefing in response to their motions to quash and allowing Mars and Walmart to file separate replies. ECF No. 14. The Court entered the stipulated Order on November 21, 2016. ECF No. 16.

108. On December 1, 2016, PGERS filed its consolidated response to Mars's and Walmart's respective motions to quash. ECF No. 24. PGERS informed the Court that Judge Hickey had previously permitted discovery in similar contexts where Walmart had failed to offer a factual basis in support of blanket assertions of attorney-client privilege and work product claims. *Id.* PGERS argued that their identical failing here warranted the same result. *Id.* Relatedly, PGERS informed the Court that it consented to Walmart's Motion to Transfer the motions to the Western District of Arkansas. *Id.*

109. On December 2, 2016, the Court granted Walmart's Motion to Intervene and its Motion to Transfer the motions to the Western District of Arkansas. ECF No. 25.

110. Then on December 13, 2016, Walmart and Mars filed reply briefs in connection with their respective motions to quash. ECF Nos. 27, 28. Each made similar arguments that their motions should be granted because PGERS failed to satisfy the *Shelton* test. *Id.*

111. On March 10, 2017, PGERS issued an amended deposition subpoena on Mars.

d. *City of Pontiac General Employees' Retirement System v. Charles Murphy Holley, Jr., et al.*, Case No. A-17-MC-207-LY

112. Charles Holley, Walmart's former Chief Financial Officer, was a critical fact witness, having held the position during all relevant times in 2011-2012 and having certified

the statements PGERS alleged were materially false and misleading. Accordingly, on October 2, 2015, PGERS issued Holley subpoenas seeking deposition testimony and the production of documents to. On November 17, 2016, PGERS issued an amended deposition subpoena. Pursuant to the amended subpoena, Holley sat for a deposition on January 10, 2017, in Austin, Texas. However, during the course of his examination, Walmart's counsel repeatedly instructed Holley not to testify regarding any information concerning the alleged misstatements Walmart made in this case – statements that Holley had certified as truthful, complete, and not misleading. Holley and Walmart's counsel explained that Holley's certifications were all based on information he learned from counsel, and was therefore, protected from disclosure by the attorney-client privilege.

113. Consequently, on March 6, 2017, PGERS petitioned the Court in the Western District of Texas in *City of Pontiac General Employees' Retirement System v. Charles Murphy Holley, Jr., et al.*, Case No. A-17-MC-207-LY, for an order compelling Holley to testify regarding all facts and communications concerning the Suspected Corruption and his certified statements. ECF No. 1.[5] PGERS asked that the Court grant its motion because Walmart's objections were improper in that they sought to prevent disclosure of underlying facts and not of communications. *Id.*

114. Then on March 13, 2017, Holley submitted his response stating PGERS's motion was wrongly directed at him because he had no authority to waive Walmart's

[5] All references to court filings in this section refer to filings made in *City of Pontiac General Employees' Retirement System v. Charles Murphy Holley, Jr., et al.*, Case No. A-17-MC-207-LY.

attorney-client privilege. ECF No. 7. Holley also informed the Court that he did not object to transfer of the motion to the Western District of Arkansas. *Id.*

115. On the same day, Walmart filed a Motion to Intervene (ECF No. 8) and a Proposed Intervenor Motion to Dismiss or in the Alternative to Transfer to the Western District of Arkansas. (ECF No. 9.) Walmart similarly argued that dismissal was proper because PGERS's motion contemplated Walmart's rights regarding its privilege. *Id.*

116. Walmart also filed a proposed intervenor's response to PGERS's Motion to Compel on March 13, 2017. ECF No. 10. Walmart opposed the motion stating that the underlying facts at issue were protected work product because their disclosure would reveal the fruits of an internal investigation, counsel's mental impressions, or conclusions. *Id.*

117. Thereafter, on March 20, 2017, PGERS filed an Omnibus Reply in support of its Motion to Compel, arguing that facts are not protected simply because they are uncovered during an investigation. ECF No. 23. On the same day, PGERS filed its Opposition to Walmart's Motion to Dismiss or in the Alternative to Transfer, arguing that PGERS's motion was properly directed at Holley because it sought additional testimony from him, not Walmart. ECF No. 24.

118. On March 21, 2017, the Court transferred the pending motions to the Western District of Arkansas citing fairness, consistency, judicial economy, and speed of resolution as the basis of its decision. ECF No. 27.

119. On March 9, 2018, the Court in a series of orders denied Walmart's Motion to Dismiss, or in the Alternative to Transfer as moot (ECF No. 34) and granted Walmart's Motion to Intervene (ECF No. 35).

120. On March 29, 2018, the Court granted in part and denied in part PGERS's Motion to Compel. ECF No. 40. The Court rejected PGERS's waiver arguments and its request that the Court review *in camera* the purportedly privileged testimony pursuant to the crime-fraud exception. *Id.* However, the Court agreed with PGERS that defendants were attempting to prevent disclosure of underlying facts, finding that "Holley asserted privilege as to issues that are not covered by the attorney-client privilege" and that "Wal-Mart applied a more expansive view of attorney-client privilege than the law permits." *Id.* at 5-6. Accordingly, the Court ordered Holley to sit for an additional deposition and to testify as to all non-privileged factual information irrespective of whether he learned the information from counsel. *Id*. at 6.

B. Working Around *Diversified Industries*

121. PGERS and Robbins Geller resolutely explored all manners of discovery, both formal and informal alike, in their effort to obtain relevant evidence necessary to support the Class's claims. Despite the Eighth Circuit's decision in *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), which held that the voluntary disclosure of privileged information to governmental entities does not waive the privilege to all parties (also known as the "Selective Waiver Doctrine"), Lead Counsel did not shy away from attempting to obtain evidence that Walmart produced to the SEC.

122. In contrast to the Eighth Circuit's approach, most other circuits have rejected the Selective Waiver Doctrine and ruled that the disclosure of the privileged information to governmental entities waives the privilege with respect to all parties. Thus, in recognition of *Diversified's* outlier status, Robbins Geller vigorously pursued such evidence by: (1) filing a

wholly independent lawsuit in the Middle District of Tennessee pursuant to the Freedom of Information Act; (2) filing a miscellaneous case in the District of Columbia to enforce a third-party subpoena; and (3) challenging the same doctrine in this Court.

1. Robbins Geller Sues the SEC in the Middle District of Tennessee Pursuant to the Freedom of Information Act in *Robbins Geller Rudman & Dowd LLP vs. United States Securities and Exchange Commission*, Case No. 3:14-cv-02197

123. In addition to pursuing discovery through the formalized procedures set forth in the Federal Rules of Civil Procedure, Lead Counsel also attempted to obtain relevant evidence through document requests made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552.

124. On April 3, 2013, Robbins Geller submitted a FOIA request to the SEC seeking the "extensive documentation" that Walmart had publicly admitted it had produced to the SEC as part of the SEC's investigation into Walmart's suspected violations of the FCPA in Mexico (the "Walmart Documents").

125. On May 8, 2013, the SEC responded stating that it was withholding documents responsive to the FOIA request under 5 U.S.C. §552(b)(7)(A), 17 C.F.R. §200.80(7)(i) ("Exemption 7(A)").

126. On May 22, 2013, Robbins Geller appealed the SEC's decision to withhold responsive documents. The SEC denied Robbins Geller's appeal based upon Exemption 7(A) on June 12, 2013.

127. On November 7, 2014, Robbins Geller contacted the SEC's FOIA office to inquire about the status of the enforcement action against Walmart. The SEC declined to provide any information and advised Robbins Geller to submit a second FOIA request.

128. Having exhausted its administrative remedies, Robbins Geller filed an action against the SEC for injunctive relief in the Middle District of Tennessee on November 13, 2014. ECF No. 1.[6] In *Robbins Geller Rudman & Dowd LLP v. United States Securities and Exchange Commission*, Case No. 3:14-cv-02197, Lead Counsel alleged that Robbins Geller had a right of access to the Walmart Documents and that the SEC had no legal basis under FOIA or otherwise to withhold the Walmart Documents. *Id.* Robbins Geller requested, *inter alia*, that it enjoin the SEC from withholding the Walmart Documents. *Id*.

129. The SEC filed its Answer on December 15, 2014, admitting various allegations but ultimately denying that Robbins Geller was entitled to any relief. ECF No. 13.

130. On April 28, 2015, the SEC filed its Motion for Summary Judgment on FOIA Exemption 7(A). ECF No. 30. In its accompanying memorandum, the SEC explained that its attorneys and staff members were actively conducting a criminal investigation to determine whether any person violated the federal securities laws. *Id.* Accordingly, the SEC stated that its assertion of Exemption 7(A) was proper because production of the Walmart Documents "could reasonably be expected to interfere with [its] enforcement proceedings." *Id*.

131. On May 1, 2015, Lead Counsel filed a motion requesting that the Court enter an order deferring any deadlines for a response to the SEC's Motion for Summary Judgment until after resolution of its upcoming Rule 56(d) motion. ECF No. 31. Consistent with its prior representations to the Court, Lead Counsel explained that it needed to conduct a limited

[6] All references to court filings in this section refer to filings made in *Robbins Geller Rudman & Dowd LLP v. United States Securities and Exchange Commission*, Case No. 3:14-cv-02197.

amount of discovery to respond to the SEC's motion, and that filing a substantive opposition while its Rule 56(d) motion was pending would create unnecessary inefficiencies. *Id.*

132. The SEC opposed the motion on May 6, 2015, stating that Robbins Geller's Rule 56(d) motion should be combined with and litigated alongside its response to the SEC's Motion for Summary Judgment. ECF No. 33.

133. The Court issued its order on May 8, 2015, granting Robbins Geller leave to file its Rule 56(d) motion but denying its request to extend briefing deadlines. ECF No. 35.

134. Then on May 19, 2015, Robbins Geller filed its Rule 56(d) motion seeking to take the depositions of the two declarants whom the SEC had used to support its motion. ECF Nos. 37, 38. Lead Counsel argued that this discovery was necessary to determine what possible basis the SEC had for its assertions that the disclosure of any documents would interfere with their ongoing investigations considering that many documents were already in the public domain. ECF No. 38.

135. On June 12, 2015, the SEC responded that it did not contest the fact that a certain subset of the Walmart Documents were already in the public domain. ECF No. 43. However, the SEC argued, that precisely because a subset of the Walmart Documents were already in the public domain, discovery on such matters was unnecessary. *Id.*

136. On October 28, 2015, the Court issued its order denying Robbins Geller's request to conduct discovery. ECF No. 44. However, the Court found that the SEC's supporting declarations were facially deficient and ordered the SEC to file supplemental declarations providing additional details and information. *Id.*

137. Thereafter on November 16, 2015, Robbins Geller moved the Court to reconsider its ruling on the Rule 56(d) motion. ECF Nos. 46, 47. The SEC opposed the motion on December 3, 2015 (ECF No. 49), to which Robbins Geller replied on December 22, 2015. ECF No. 52. On January 4, 2016, the Court denied Robbins Geller's renewed request for limited discovery. ECF No. 53.

138. On January 25, 2016, Robbins Geller responded to the SEC's Motion for Summary Judgment. ECF No. 54. In opposition, Robbins Geller stated the SEC failed to sufficiently explain the harms that could arise from disclosure of the Walmart Documents by listing every conceivable harm that could result without any meaningful connection between specific categories of documents and specific harms. *Id.*

139. In its Reply filed on February 8, 2016, the SEC noted that its supporting declaration specified a number of harms that would result from disclosure, including that "disclosure of each category could reveal what leads the SEC is pursuing." ECF No. 57.

140. Thereafter on March 12, 2016, the Court issued its Memorandum Opinion granting the SEC's Motion for Summary Judgment. ECF No. 58. The Court found that the SEC properly withheld the Walmart Documents under Exemption 7(A) because the records were compiled for a law enforcement purpose and because disclosure could reasonably be expected to interfere with enforcement proceedings. *Id.* In particular, the Court noted that the SEC's declaration sufficiently explained the harm that could result from disclosure when, for example, it described that only a select number of people within the Walmart organization had knowledge of the documents given to the SEC and that their release could shape the testimony of potential witnesses and defendants. *Id.* Three years later, the SEC's

purportedly "active" investigation still has not generated a single claim against a single individual or entity, let alone any actual penalties or relief for shareholders.

2. PGERS Seeks to Enforce Subpoenas in the District of Columbia in *City of Pontiac General Employees' Retirement System vs. United States Securities and Exchange Commission*, Case No. 1:15-mc-01267-RBW

141. On September 18, 2015, PGERS petitioned the United States District Court for the District of Columbia in *City of Pontiac General Employees' Retirement System v. United States Securities and Exchange Commission*, Case No. 1:15-mc-01267-RBW, for an order compelling the SEC to comply with its subpoena which sought, among other things, the production of all documents provided to the SEC by Walmart concerning possible violations of the FCPA. ECF No. 1.[7] PGERS informed the Court that it had offered to enter into a stipulated protective order that would provide attorneys-eyes-only protection to the documents sought but the SEC rejected the offer and refused to produce any documents under an assertion of the law enforcement privilege. *Id*. PGERS argued that the law enforcement privilege was inapplicable because the documents sought were primarily Walmart originated documents, and as such, production of them would not reveal any proprietary investigative techniques, findings, or the identities of confidential sources. *Id*.

142. On September 28, 2015, Walmart moved to intervene in PGERS's motion to compel for the purpose of protecting its attorney-client privilege and work product protections. ECF No. 5. Notably, Walmart informed the Court that it would file a motion to transfer the petition to the Western District of Arkansas, or alternatively, to request a stay of

[7] Unless otherwise specified, all references to court filings in this section refer to filings made in *City of Pontiac General Employees' Retirement System v. United States Securities and Exchange Commission*, Case No. 1:15-mc-01267-RBW.

the Court's consideration of the motion pending the resolution of its motion for a protective order pending in the Western District of Arkansas over the same materials. *Id.*

143. On October 5, 2015, the SEC filed its Opposition to PGERS's motion to compel, arguing that the Court should deny the motion because production of the materials would have an adverse impact upon the SEC's active investigation. ECF No. 9.

144. Thereafter, on October 15, 2015, PGERS filed its Response to Walmart's motion to intervene, informing the Court that it did not oppose Walmart's request to intervene but that it would oppose its requests for a transfer or stay. ECF No. 12.

145. On the same day, PGERS filed its Reply in connection with its motion to compel, noting that the SEC offered nothing more than speculative and unsubstantiated harms that would result from the production of the materials sought, and further, that such harms could be readily addressed by a protective order. ECF No. 11.

146. Thereafter, on November 3, 2015, the Court ordered the transfer of PGERS's motion to compel to the Western District of Arkansas pursuant to Federal Rule of Civil Procedure 45(f).

147. On January 31, 2017, the SEC submitted a Notice of Supplemental Authority, notifying the Court of the outcome in ***Robbins Geller Rudman & Dowd LLP v. SEC***, No. 3:14-cv-2197 (M.D. Tenn. 2014) (discussed above). ECF No. 18.

148. On March 27, 2017, this Court denied PGERS's Motion to Compel because, by this time, the Court had already issued an order in the Western District of Arkansas (ECF No. 287) requiring Walmart to produce all relevant non-privileged documents it had

submitted to the SEC and DOJ. ECF No. 19. The Court, therefore, declined to order the SEC to produce documents that Walmart was already required to produce. *Id*.

3. PGERS's Challenge to *Diversified Industries*

a. PGERS's Opposition to Walmart's Request for Protective Order in Connection with Its SEC Subpoena

149. On September 3, 2015, defendants moved the Court for a protective order requesting that the Court preclude PGERS from pursuing the discovery of documents in the SEC's possession. ECF No. 173. Specifically, PGERS sought the production of highly relevant and critical documents that Walmart had produced to the SEC as part of the SEC's investigation into the Walmart bribery allegations. Defendants argued that the underlying third-party subpoena was overly broad in that it sought the production of every FCPA-related document that Walmart produced to the SEC. ECF No. 174. Walmart also argued that the documents were protected from disclosure by the work product doctrine and attorney-client privilege. *Id*.

150. On September 17, 2015, defendants filed a motion requesting that the Court issue expedited rulings regarding their motions for a protective order concerning third-party subpoenas issued to the SEC and to Indiana Electrical Workers Pension Trust Fund IBEW and Grant & Eisenhofer, P.A. (discussed above). ECF Nos. 182, 183. Defendants argued that an expedited ruling was necessary to protect the attorney-client and work product that Walmart claimed over the documents. *Id.* On October 15, 2015, PGERS filed its response and joined in the request for an expedited hearing, stating that an expedited denial of defendants' requested protective orders would avoid unnecessary delays in the courts where disputes over the same subpoenas were pending. ECF No. 197.

151. On September 21, 2015, PGERS filed its Opposition, arguing that the power to modify or quash the subpoena was held by the district court where compliance of the subpoena was sought and that defendants' blanket privilege claims were futile because they failed to identify which documents were purportedly privileged. ECF No. 184.

152. On September 28, 2015, defendants submitted their Reply brief, stating that this Court retained jurisdiction under Rule 26 to issue protective relief. ECF No. 190.

153. On September 28, 2016, the Court denied in part and granted in part defendants' Motion for a Protective Order regarding the SEC subpoena. ECF No. 287. The Court explained that PGERS was not entitled to documents concerning possible violations of the FCPA in other countries. *Id.* However, the Court denied defendants' motion based on privilege, stating that "it [would] not issue a protective order based on a blanket assertion of privilege." *Id.* at 6.

b. PGERS's Motion to Compel Documents Produced to the SEC and DOJ

154. On November 25, 2015, PGERS filed a Motion to Compel the production of all documents that defendants provided to the SEC and DOJ (together, the "Government Productions") as part of their investigation into the Suspected Corruption; in the alternative, PGERS sought to compel the production of all relevant and non-privileged documents within the Government Productions. ECF No. 246. PGERS requested that the Court order Walmart to produce the Government Productions in their entirety because they were relevant, any claim of privilege had been waived by virtue of their failure to provide supporting factual information underlying their privilege assertions, and because defendants had prejudiced PGERS with unreasonable delay. ECF No. 247.

155. Walmart filed its Opposition on December 14, 2015, arguing that PGERS's motion should be denied because the mere act of producing documents to the government did not make all documents relevant or responsive for purposes of this Litigation, nor did it amount to a waiver of the attorney-client privilege or work product. ECF No. 250.

156. As part of its order ruling on Walmart's motion for a protective order (ECF No. 173) issued on September 28, 2016, the Court granted in part and denied in part PGERS's Motion to Compel the Government Productions. ECF No. 287. In particular, the Court ordered Walmart to produce all relevant, non-privileged documents produced to the SEC and DOJ as part of their investigation into the Suspected Corruption and to produce an affidavit and privilege log, based upon defendants' blanket assertion of privilege and their failure to "describe the nature of otherwise discoverable documents or communications being withheld . . . in a manner that will enable other parties to assess the claim." *Id*. at 6.

c. PGERS's Motion to Compel Testimony and Documents Regarding Ronald Halter

157. On October 26, 2016, PGERS filed a Motion to Compel Testimony and Documents, requesting that the Court order defendants' counsel to permit former Walmart investigator, Ronald Halter, to testify regarding: (1) documents published by *The New York Times* and posted to congressional websites; (2) facts that Halter learned during the course of his 2005 and 2006 internal investigation; and (3) information he disclosed during interviews with the FBI, SEC, and DOJ. ECF No. 292. PGERS also requested that the Court order defense counsel to order the production of factual reports Halter prepared and provided to his superiors. *Id*.

158. Walmart opposed the motion on November 14, 2016, maintaining that the attorney-client privilege and work product protections still applied to the underlying subject matter of the published documents and to the 2005 and 2006 internal investigation. ECF No. 298. Walmart also argued that disclosure of confidential information to any governmental entity did not waive any applicable privileges under *Diversified*. *Id.*

159. PGERS filed its Reply on December 1, 2016, requesting that the Court reject defendants' blanket assertions of privilege because they failed to provide any factual support for their assertions, either by declaration or otherwise. ECF No. 300.

160. On May 5, 2017, the Court granted PGERS's motion and ordered defendants to make witnesses available to testify regarding: (1) non-privileged published documents; (2) facts underlying the 2005 and 2006 internal investigation into the Mexican bribery allegations; and (3) information disclosed to governmental entities. ECF No. 364. The Court also ordered defendants to produce a variety of Halter's investigative reports. *Id.*

161. Thereafter on May 19, 2017, defendants filed an Expedited Motion for Reconsideration and Stay of the Court's May 5, 2017 Order. ECF No. 384. In their supporting Memorandum, defendants argued that because disclosure of the published documents was unauthorized and inadvertent, waiver of the privilege was limited to the information disclosed and not to the underlying subject-matter generally. ECF No. 385. Defendants further argued that because the factual record indicated that Halter's investigation was conducted at the direction of counsel and in anticipation of litigation, his communications and documents prepared in conjunction with the investigation were protected by the attorney-client privilege and work product. *Id.*

162. On May 23, 2017, PGERS filed its Opposition to defendants' Motion for Reconsideration, stating that defendants' motion should be denied because motions for reconsideration should be granted in only extraordinary circumstances and a simple adverse privilege ruling did not qualify. ECF No. 388.

163. On May 26, 2017, defendants filed their Reply, stating that exceptional circumstances were present where, as here, the Court issued a clearly erroneous ruling. ECF No. 393.

164. While the Court considered defendants' Motion for Reconsideration, it issued an Order on June 1, 2017, staying its May 5, 2017 Order. ECF No. 396.

165. Thereafter on March 28, 2018, the Court granted defendants' Motion for Reconsideration, vacated its prior May 5, 2017 Order (ECF No. 364), and granted in part and denied in part PGERS's Motion to Compel. ECF No. 424. The Court denied PGERS's motion as to the published documents, explaining that the waiver of the attorney-client privilege was limited to the "specific information disclosed in the portions of the documents that were published" and not to underlying subject-matter generally. *Id.* The Court also denied PGERS's motion as to information disclosed to governmental entities, citing *Diversified Industries*. *Id.* However, the Court granted PGERS's motion as to testimony regarding facts underlying the 2005 and 2006 internal investigation, agreeing with PGERS that the privilege "does not protect the disclosure of the underlying facts by those who communicated with the attorney." *Id.* The Court also denied PGERS's motion for the production of Halter's investigative reports. *Id.* Finally, the Court's Order stated that it "will allow Plaintiff to depose Ronald Halter a second time." *Id.*

C. Resolution of Discovery Disputes

166. Lead Counsel at all times engaged in good-faith negotiations and offered reasonable compromises in an effort to reach amicable resolutions to various discovery disputes. However, as shown above and below, Robbins Geller zealously litigated discovery issues where the parties could not agree.

1. Defendants' Relentless Pursuit of Protective Orders

167. Following the lifting of the PSLRA's stay on discovery, Robbins Geller pursued discovery against defendants and relevant third-parties. These necessary actions prompted defendants to seek several protective orders in attempt to limit PGERS's ability to obtain evidence from entities in possession of highly relevant documents and from witnesses with personal knowledge of matters relevant to PGERS's allegations.

a. IBEW

168. On September 17, 2015, defendants filed a Motion for a Protective Order, seeking to preclude PGERS from obtaining documents that Walmart had produced to IBEW and its counsel, Grant & Eisenhofer, P.A., in *Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores Inc.*, CA No. 7779-CS, Delaware Chancery Court (Wilmington) (the "*IBEW Action*"). ECF No. 179. In their brief, defendants argued that the Court should grant their protective order because the materials sought were covered by the attorney-client privilege, qualified as protected work product, and were beyond the scope of the allegations in this case. ECF No. 180.

169. On October 5, 2015, PGERS filed its Opposition, arguing that the power to modify or quash the subpoena was held by the district court where compliance of the

subpoena was sought and that defendants' motion was facially deficient in that it failed to identify which documents should be protected. ECF No. 195.

170. Thereafter on October 13, 2015, defendants filed a Reply brief, stating that PGERS sought privileged and irrelevant documents and that it was not required to identify individual documents as the Court had authority under Rule 26 to provide broad protective relief. ECF No. 198.

171. On September 28, 2016, the Court issued its ruling denying defendants' Motion for a Protective Order on multiple grounds. ECF No. 286. First, the Court stated that "Defendants cannot make a blanket privilege assertion and move the Court to prohibit any discovery related to this blanket assertion." *Id.* at 4. Accordingly, the Court denied defendants' motion on privilege and work product grounds and ordered them, pursuant to their own motion, to provide PGERS with a privilege log regarding documents it produced to IBEW and its counsel. *Id.* Secondly, the Court denied defendants' motion on the basis that the subpoena was overbroad, finding that the "Plaintiffs' allegations regarding multiple misleading aspects of the Form 10–Q disclosure expressly and directly correspond to the three categories in the IBEW Subpoena that Defendants argue are overbroad or not relevant." *Id.* at 6.

b. Maritza Munich

172. On October 16, 2015, defendants moved for a protective order seeking to prevent the deposition and document discovery from Walmart's former International Division General Counsel, Maritza Munich. ECF No. 205. In their supporting brief, defendants argued that PGERS failed to satisfy the three prong *Shelton* test by demonstrating

that (1) no other means existed to obtain the information; (2) the information sought was relevant and non-privileged; and (3) the information was crucial to preparation of the case. ECF No. 206.

173. Thereafter on November 2, 2015, PGERS filed its Opposition explaining that the discovery sought was not privileged because Ms. Munich's involvement in the 2005-2006 Wal-Mex internal investigation consisted entirely of guiding a preliminary fact-gathering process that did not involve the rendering of legal advice. ECF No. 224. Moreover, PGERS noted that the *Shelton* factors on which defendants relied were inapplicable as that case concerned discovery from in-house ***trial*** counsel that concurrently represented the defendant in the lawsuit, whereas Ms. Munich was never Walmart's litigation counsel and was not qualified to provide Walmart legal advice regarding the Suspected Corruption. *Id.*

174. Defendants filed their Reply on November 9, 2015, stating that the *Shelton* test applied to non-trial lawyers, and therefore, was the proper standard on which the Court should base its ruling. ECF No. 236.

175. The Court denied defendants' Motion for a Protective Order regarding deposition and document discovery from Ms. Munich on September 29, 2016, finding that the requested relief was "***wholly general***" and that defendants' "***blanket objections [did] not provide the Court with enough information to grant as narrow a protective order as is necessary under the facts***." ECF No. 288 at 3-4.

c. Timing of Depositions

176. On August 17, 2016, defendants moved for a protective order seeking to prohibit PGERS from proceeding with any depositions during the pendency of PGERS's Motion for Class Certification based on arguments made in its class certification briefing that PGERS had not suffered an injury-in-fact and lacked constitutional Article III standing due to its trading history. ECF Nos. 280, 281.

177. PGERS filed its Response on September 6, 2016, explaining that defendants' request on postponing discovery until after a ruling on class certification had already been considered and denied by the Court when it ruled on defendants' Motion to Sequence Discovery. ECF No. 282.

178. The Court denied defendants' Motion for a Protective Order on September 12, 2016, calling defendants' motion "another attempt to postpone merits discovery until after class certification." ECF No. 283 at 1. The Court explained that it had previously "entered an order denying Defendants' request to sequence class and merits discovery" and that its "ruling on this issue remain[ed] in effect." *Id.*

d. Ronald Halter and Joseph Lewis

179. Defendants moved the Court for a protective order on May 22, 2017, seeking to stay enforcement of subpoenas PGERS issued to Ronald Halter and Joseph Lewis for testimony and documents pursuant to the Court's Order granting PGERS's motion to compel (ECF No. 364). ECF Nos. 386, 387. Defendants argued that their then-pending motion for reconsideration of the Court's Order (ECF No. 384) would impact the scope of discovery. PGERS filed its opposition the next day on May 23, 2017. ECF No. 388. Defendants, in

turn, filed their Reply on May 26, 2017. ECF No. 393. On March 29, 2018, the Court issued its ruling denying defendants' Motion for Protective Order, stating that it had already addressed the privilege issues relevant to Halter and Lewis in its ruling on defendants' Motion to Reconsider (ECF No. 424), and good cause did not exist to stay enforcement of the issued subpoenas. ECF No. 426.

e. Douglas McMillon

180. On January 24, 2017, Walmart moved for a fifth Protective Order seeking to prohibit PGERS from deposing Douglas McMillon, the Company's current CEO and former head of Walmart's International Division. ECF No. 306. Walmart urged the Court to grant its request based upon PGERS's purported failure to demonstrate that McMillon – a so-called "apex deponent" whose deposition was presented as being overly intrusive – possessed unique or special knowledge regarding identified subjects relevant to the litigation. ECF No. 307.

181. On February 7, 2017, PGERS filed its Opposition, describing Walmart's failure to work cooperatively with PGERS in scheduling McMillon's deposition in direct defiance of the Court's September 12, 2016 Order (ECF No. 283). ECF No. 314. Moreover, PGERS argued that irrespective of Walmart's defiance of a standing order, its request for protective relief should be denied because the apex doctrine did not apply where, as here, the deponent had personal knowledge of the acts and statements relevant to this case, including for example, McMillon's direct involvement in communications concerning the bribery allegations described in *The New York Times* article. *Id.*

182. Thereafter on February 14, 2017, Walmart filed its Reply stating that the apex doctrine requires a showing of "unique or special knowledge," and therefore, a showing that a deponent was directly involved and has knowledge of certain matters, is insufficient for purposes of the Rule. ECF No. 316.

183. The Court issued its ruling denying Walmart's Motion for a Protective Order on May 11, 2017, finding that "Plaintiff seeks to depose McMillon for a legitimate purpose because he has unique personal knowledge" and that "there is no basis on which the Court can conclude that Plaintiff is attempting to harass McMillon or inflate discovery costs." ECF No. 368 at 4. The Court also noted that plaintiff "offered to minimize the inconvenience to McMillon by limiting the allotted time for the deposition and scheduling the deposition at a time and place that is most convenient for McMillon." *Id*.

2. Additional Discovery Motions

a. The Charles Holley Documents

184. On March 30, 2017, PGERS moved the Court to compel the production of documents withheld as privileged or work product, or in the alternative, to preclude defendants from arguing truthfulness, completeness, or innocent intent. ECF No. 338. The impetus of the motion arose during the deposition of Charles Holley, when counsel for Walmart instructed Holley not to answer any questions regarding certifications he signed in connection with Walmart's December 8, 2011 10-Q and March 27, 2012 10-K. Based on Walmart's refusal to permit testimony regarding these statements, PGERS sought the production of all documents related to the statements at issue in Walmart's various SEC filings, including the subject matter of the statements. *Id.* Among other things, PGERS

argued that Walmart waived the privilege by placing its counsel's advice at issue: "Wal-Mart may not argue that these statements, which purportedly came from its counsel, were truthful, complete, and innocently made, while withholding and blocking all of the documentary and testimonial evidence . . . ." ECF No. 340 at 9.

185. On April 13, 2017, Walmart filed its Opposition, arguing that Holley did not waive the privilege when he stated that he relied on information provided by counsel to certify the truthfulness of the disclosures at issue. ECF No. 355.

186. In its Reply filed on May 11, 2017, PGERS stated that Holley admitted that the information set forth in the statements at issue came from counsel and that defendants had argued that the statements were truthful, complete, and innocently made. ECF No. 370. Therefore, Walmart could not defend the veracity and completeness of the statements without placing its counsel's advice at issue. *Id.*

187. Then on May 26, 2017, Walmart moved for leave to file a sur-reply, stating that PGERS had raised new arguments in its Reply that were not included in its opening motion, including, among other things, that Walmart did not satisfy its burden to establish that the documents sought were protected by the attorney-client privilege. ECF No. 392. In its Opposition filed on June 9, 2017, PGERS explained that it merely offered counterpoints to Walmart's response, noting that if sur-replies were permitted every time a movant pointed out in a reply that its adversary had failed to carry its burden, sur-replies would be the rule, not the exception. ECF No. 397. In its Reply filed June 14, 2017, Walmart reiterated that PGERS's assertions that it had failed to meet its burden constituted new arguments that

entitled it to file a sur-reply. ECF No. 400. On March 9, 2018, the Court granted Walmart's motion for leave. ECF No. 409.

188. Thereafter on March 14, 2018, Walmart filed its Sur-Reply, stating that it had met its burden by providing a privilege log detailing the bases for its assertions of privilege and by referencing testimony and evidence supporting the protected nature of the documents that PGERS sought. ECF No. 410.

189. The Court issued its ruling denying PGERS's motion, stating that the Court was not convinced that Walmart placed its counsel's advice at issue, in part, because Walmart had not indicated that its defense would rely on the veracity or completeness of the SEC disclosures. ECF No. 423.

b. Interrogatory Responses and Documents

190. On March 31, 2017, Walmart filed a Motion to Compel Responses to Interrogatories and Production of Documents. ECF No. 342. Walmart argued that PGERS improperly refused to provide answers to its interrogatories based on its assertion that Walmart exhausted the twenty-five-interrogatory limit when one of its interrogatories prompted forty-nine separate responses. ECF No. 343. Walmart also argued that it was entitled to receive in discovery documents PGERS received from third-parties that related to its allegations despite the fact that Walmart might have otherwise already been in possession of such documents. *Id.*

191. PGERS filed its Opposition on April 14, 2017, stating that Walmart's discrete subparts to its various interrogatories exceeded the permissible limit under the Related Question Standard. ECF No. 356. Moreover, PGERS requested that the Court deny

Walmart's document demand as moot, as it had already produced all documents it had received from third-parties. Importantly, Lead Counsel also clarified that Walmart's document demand did not request documents that Lead Counsel had received from third-parties. *Id.*

192. In its Reply filed on April 21, 2017, Walmart argued that it had not exceeded the permissible interrogatory limit under the Related Question Standard because the interrogatory in question pertained to one primary inquiry. ECF No. 361. As for its document demand, Walmart stated that it had reviewed the documents PGERS had produced and that such production did not appear to include any documents that PGERS received from third-parties. *Id.*

193. On March 26, 2018, the Court granted Walmart's motion, stating that the interrogatory in question was properly construed as one question because its answers were logically and factually subsumed within and necessarily related to the primary inquiry of identifying the attorney-client relationship between PGERS and Robbins Geller. ECF No. 414. The Court also ordered PGERS to produce documents pursuant to Walmart's document request regardless of whether Walmart was already in possession of such documents, or alternatively, if PGERS had already produced these documents, to identify them. *Id.*

3. Motions for Order to Show Cause

194. Lead Counsel at all times diligently monitored Walmart's compliance with its obligations under the Federal Rules and this Court's orders. Over the course of the discovery period, Lead Counsel moved this Court for orders to show cause, seeking to ensure that defendants played by the rules.

a. Production of SEC and DOJ Documents

195. On March 10, 2017, PGERS filed a Motion for Order to Show Cause as to why Walmart should not be held in contempt for failure to comply with the Court's September 28, 2016 Order requiring Walmart to produce all relevant, non-privileged documents produced to the SEC and DOJ as part of their investigation into the Suspected Corruption and to produce an affidavit and privilege log ("Production Order"). ECF No. 326. PGERS explained that defendants had directly defied the Production Order by choosing to only produce a subset of documents determined by application of custodian, date range, and search term restrictions – a limitation that defendants had expressly requested in their Opposition and which the Court did not grant. *Id.*

196. In its response filed on March 24, 2017, Walmart argued that application of search parameters represented the best method from which to identify relevant documents pertaining to the government's Mexico bribery investigation, and further, that it was reasonable for Walmart to interpret the Production Order as allowing use of search parameters because the parties had agreed to their use for document discovery generally. ECF No. 333.

197. On April 10, 2017, PGERS filed its Reply and argued that the Production Order never permitted Walmart to use search parameters to limit its production obligations. ECF No. 346. PGERS also remarked that defendants' defiance represented yet another delay tactic and that the Court's granting of its motion was necessary to end Walmart's long record of obstructionism. *Id.* As an example of Walmart's failure to produce all relevant, non-privileged emails, PGERS highlighted the fact that Walmart had yet to produce eight highly

relevant emails over which Walmart had filed a motion to strike but later withdrew it after it was judicially determined by the Delaware Supreme Court that emails were not privileged. *Id*.

198. A week later on April 17, 2017, Walmart moved for leave to file a sur-reply stating that PGERS's Reply expanded upon its opening motion by offering new facts and arguments, including, among other things, information regarding the eight emails Walmart had not produced. ECF No. 360. PGERS filed its opposition on May 1, 2017, stating it did not present any new facts or arguments in its Reply and that Walmart's request for leave to file a sur-reply – a request reserved for only extraordinary circumstances – was an act of gamesmanship that yet again underscored the propriety of PGERS's underlying Motion for Order to Show Cause. ECF No. 363. Walmart replied on May 8, 2017, listing the facts and arguments it believed were raised for the first time in PGERS's Reply. ECF No. 367.

199. On March 26, 2018, the Court granted Walmart's motion for leave and ordered that Walmart submit its sur-reply by March 28, 2018. ECF No. 413.

200. Walmart submitted its Sur-Reply on March 28, 2018, arguing, among other things, that PGERS offered no support for its assertion that the eight "stolen" emails which had been handled by custodians that were unknown to Walmart, were the same as documents possessed by Walmart. ECF No. 421.

201. On March 29, 2018, the Court issued its ruling, finding that defendants' interpretation of the Production Order "[was not] entirely reasonable or in good faith," it "[did] not find it appropriate it to sanction [d]efendants at this time." ECF No. 425 at 3, 7. Although the Court declined to impose sanctions, it nevertheless ordered defendants "to

produce all relevant, non-privileged documents submitted to the SEC and DOJ as part of their investigation into the Mexico bribery investigation" and clarified that "no custodian, date range, or search terms should be applied." *Id*. at 3.

b. Delay of McMillon Deposition

202. On October 18, 2016, PGERS noticed the deposition of Douglas McMillon for February 3, 2017. Rather than discuss any objections it had to the date or the propriety of deposing Walmart's CEO in the many months preceding the noticed date, Walmart waited until January 24, 2017, to file a protective order seeking to preclude the deposition altogether and to inform PGERS that it would not be producing McMillon on the noticed date.

203. Based on this delay, PGERS filed a Motion for an Order to Show Cause on January 26, 2017, requesting that the Court enter one of two orders: (1) an order denying Walmart's protective order as untimely, compelling McMillon to appear for a deposition as re-noticed by Plaintiff, and awarding Plaintiff attorney's fees and costs associated with the enforcement of the Court's September 12, 2016 Order, or (2) an order directing Walmart and McMillon to show cause why Walmart should not be adjudged to be in contempt of Court. ECF No. 310.

204. Walmart filed its Opposition on February 9, 2017, arguing that the Court's September 12, 2016 Order could not govern the propriety of McMillon's deposition as it preceded it, and further, that Walmart was in full compliance with the Order as it had already produced or agreed to produce a number of other high-level officers. ECF No. 315.

205. PGERS filed its Reply brief on February 16, 2017, stating that Walmart was attempting to re-write what was a clear and unambiguous order which mandated that: "Defendants shall produce witnesses for depositions as noticed." ECF No. 317.

206. On May 16, 2017, the Court issued its ruling denying PGERS's Motion for an Order to Show Cause and declined to impose sanctions. ECF No. 372. However, the Court noted that Walmart did not timely file its Motion for a Protective Order as it did not file until ten days before the scheduled deposition. *Id*. Moreover, the Court ordered defendants to "timely file motions related to depositions," stating that "***the Court will not allow [d]efendants to delay scheduled depositions by filing untimely motions***" and that it would "***not tolerate any unnecessary delays in the filing of discovery motions in the future***." *Id*. Media reports were published following the Court's Order, reporting on PGERS's discovery victory and noting the volume of evidence PGERS put forth to prevail on this dispute. Newsham, J., *Wal-Mart CEO Can Be Deposed In Mexico Bribery Case*, LAW360, May 11, 2017 ("Referring to a laundry list of evidence raised by the plaintiffs, including McMillon's sign-offs on the company's statements to investors about the companies investigation and a disclosure that more than 100 of his communications have been found that relate to *The New York Times* articles and the company's anti-corruption program in Mexico, the court said that doctrine doesn't protect McMillon."); Stempel, J., *Wal-Mart CEO to be questioned in U.S. lawsuit over Mexican bribery*, REUTERS, May 11, 2017 ("U.S. District Judge Susan Hickey in Fayetteville, Arkansas, said McMillon's 'direct and personal involvement' in matters underlying a class-action lawsuit justified requiring him to sit for a deposition by the shareholders' lawyers.").

D. Responding to Discovery

207. Over the course of the fact discovery period, PGERS provided thorough discovery responses. Lead Plaintiff provided responses to thirty-two document requests, affirmatively stating the full extent of its document production, and confirming (after its collection and production of over 4,974 pages of discovery) that it had produced all such materials so described that were locatable after it diligently searched all locations at which such material might plausibly exist.

208. PGERS also responded in great detail to eleven interrogatories (including seven contention interrogatories) on topics that included among others: (1) PGERS's history in serving as a named plaintiff or class representative; (2) defendants' false and misleading misstatements; (3) PGERS's basis for asserting falsity; (4) PGERS's basis for asserting scienter; and (5) PGERS's basis for its assertion that it suffered economic loss as a result of defendants' misstatements.

209. On November 11, 2015, Lead Counsel defended the deposition of PGERS's corporate designee, whom defendants questioned on 23 detailed topics covering wide-ranging issues, which required extensive preparation.

E. Protecting the Public's Right of Access

210. Lead Counsel fought vigorously throughout the Litigation to protect the public's right of access to inspect the documents filed on this Court's docket and to prevent abuse of the Stipulated Protective Order (ECF No. 267). In total, PGERS submitted nine filings either in support of its own motions to unseal documents or in opposition to defendants' motion to seal or maintain documents under seal. ECF Nos. 325, 344, 345, 362,

381, 389, 398, 401, 427. As a result of these efforts, the Court in many instances agreed with PGERS that Walmart had failed to establish good cause as to the propriety of their confidentiality designations and ordered the unsealing of various documents for the public to freely access. *See* ECF Nos. 382, 416, 417, 418, 420, 428. In one instance that the Court explained that "Wal-Mart has not met its burden to establish good cause" as it "makes no effort to justify the claim of secrecy" and "simply asserts that the information is confidential." ECF No. 382 at 2.

F. Working with Experts

211. Lead Counsel engaged and worked extensively with expert consultants to establish reliable methodologies by which to establish and compute class-wide damages.

1. Jonathan M. Karpoff

212. Jonathan M. Karpoff ("Dr. Karpoff") is the Washington Mutual Endowed Chair in Innovation and Professor of Finance at the University of Washington's Michael G. Foster School of Business. Dr. Karpoff serves as the Associate Editor for *The Journal of Finance*, *Journal of Financial Economics*, *Journal of Financial and Quantitative Analysis*, and *Management Science*. He is a member of the Financial Economists Roundtable, an international research fellow of the Oxford University Centre for Corporate Reputation, and a trustee of the Financial Management Association International. Dr. Karpoff consults on matters regarding corporate governance, securities fraud, and natural resource valuation issues. He received a BA in Economics from the University of Alaska-Anchorage and MA and Ph.D. in Economics from the University of California, Los Angeles.

213. Robbins Geller retained Dr. Karpoff to explain a method to establish damages on a class-wide basis without reference to Walmart's stock price. With the assistance of Dr. Karpoff, PGERS advanced an alternative damages methodology called the build-up method which measures shareholder losses by the sum total of three cost components a firm incurs as result of fraudulent misconduct: (1) direct costs, (2) restatement loss, and (3) reputation loss. In support of its Motion for Class Certification, PGERS submitted the Report of Jonathan M. Karpoff, wherein Dr. Karpoff explained in detail what these cost components represent as well as the various forms by which to measure them. ECF No. 232. In addition, Dr. Karpoff provided an analysis of the build-up method use in the context of companies facing charges of foreign bribery by U.S. regulators.

214. Dr. Karpoff was deposed by defendants for purposes of class certification where he offered testimony concerning the build-up method and its applications. Lead Counsel worked extensively with Dr. Karpoff to prepare for and defend that deposition.

215. Dr. Karpoff also provided a Reply Report which was filed concurrently with and in support of PGERS's class certification Reply brief. ECF No. 254. In it, Dr. Karpoff offered various rebuttal arguments in response to criticism made by defendants' expert. *Id*. In addition Dr. Karpoff offered a detailed explanation of how the build-method might be implemented in this case, stating, for example, that "in the Wal-Mart case, it may become possible to obtain through discovery much more accurate, detailed, and complete information on Wal-Mart's direct costs." *Id*. at 9.

2. Bjorn I. Steinholt

216. Bjorn I. Steinholt is a Chartered Financial Analyst and a Managing Director at Caliber Advisors, Inc., a full service valuation and economic consulting firm. He has more than twenty-five years of experience providing capital markets consulting, including the valuation of investments. Steinholt is frequently retained to opine on matters concerning materiality, loss causation, and damages in securities class actions. He received a B.S. degree in Computer Science and Engineering from California State University, Long Beach and a Master degree in International Business from the University of San Diego.

217. Lead Counsel retained Steinholt to examine and explain how Walmart's stock trades in an efficient market, to conduct a thorough event study examining all industry, market and Company-specific news during the Class Period, to review and analyze documents related to events surrounding the publication of *The New York Times* article and to provide analyses in connection with determining and proving loss causation and damages. Steinholt also assisted in the development of the proposed Plan of Allocation, and advised PGERS in connection with defendants' efforts to defeat PGERS's "build-up" damages methodology. Steinholt's economic analyses and report were integral to demonstrating that Walmart traded in an efficient market, and allowing PGERS to demonstrate loss causation and the viability damages suffered (under both the "build-up" damages methodology or by reference to market price) by PGERS and the Class of all investors who purchased Walmart stock during the Class Period.

V. THE SETTLEMENT

A. Settlement Negotiations

218. The settlement of $160 million is the result of extensive arm's-length negotiations by the parties. On September 11, 2018, the parties engaged in their first in-person mediation session with the assistance of the Honorable Layn Phillips (Ret.), a former United States Attorney and Federal District Court Judge with over a decade of experience resolving cases as a mediator. The settlement conference was informed by a full round of briefing with exhibits reflecting evidence obtained over six years of litigation and after nearly four years of discovery.

219. Direct negotiations continued for almost two weeks after the in-person session, led by senior attorneys for both sides and facilitated by Mediator Phillips. On September 24, 2018, the parties accepted a mediator's proposal and reached an agreement-in-principle to settle the case for $160 million. The parties immediately informed the Court that they had reached an agreement-in-principle to settle the case and on September 26, 2018, the parties filed a joint motion to stay a ruling on defendants' motion to certify order for interlocutory appeal. ECF No. 431. The Court granted the parties' joint motion the next day and ordered that by October 27, 2018, the parties "file with the Court either a notice informing the Court that the parties have resolved all claims or a motion to lift the stay in this case." ECF No. 432.

220. Having reached an agreement-in-principle, the parties continued negotiations in the ensuing weeks to finalize agreements on the specific terms of the Stipulation of

Settlement ("Stipulation"). The parties executed the Stipulation and its detailed exhibits on October 26, 2018.

B. Preliminary Approval Order

221. On October 26, 2018, PGERS submitted its Unopposed Motion for Preliminary Approval of Settlement, Memorandum of Law, and the Stipulation. ECF Nos. 433-435. PGERS asked the Court pursuant to Rule 23 to preliminarily approve (1) the proposed settlement as embodied in the Stipulation; and (2) the form and method for providing notice of settlement to Class Members.

222. The Court heard argument on the matter on December 4, 2018, during which Lead Counsel informed the Court that Robbins Geller would be seeking attorneys' fees of 30%, and providing the Court with a list of cases awarding class counsel fees of 30% or more.

223. On December 6, 2018, the Court issued its Order which, *inter alia*:

(a) preliminarily approved the Stipulation and the settlement as being fair, reasonable, and adequate to Class Members, subject to further consideration at the Settlement Hearing;

(b) scheduled the final Settlement Hearing pursuant to Rule 23(d) for April 4, 2019, to determine, *inter alia*, whether: (1) the proposed settlement is fair, reasonable, and adequate to Class Members and should be approved by the Court; (2) the Judgment as provided under the Stipulation should be entered and whether the release by the Class of the Released Claims should be provided to the Released Defendant Parties; (3) whether the proposed Plan of Allocation of the proceeds of the settlement is fair and

reasonable and should be approved by the Court; and (4) counsel's application for an award of attorneys' fees and expenses, including Lead Plaintiff's expenses, should be approved;

(c) approved the form, substance, and requirements of: the Notice of Proposed Settlement of Class Action, the Proof of Claim and Release form, and the Summary Notice. The Court also found that the procedure for mailing and distributing the Notice, and for publishing the Summary Notice was adequate under applicable law;

(d) approved the appointment of Gilardi & Co. LLC as the Claims Administrator;

(e) ordered the Claims Administrator to cause the Notice and the Proof of Claim and Release form ("Claim Form") to be mailed by First-Class Mail to all potential Class Members by no later than January 4, 2019 ("Notice Date"); and

(f) ordered the Claims Administrator to publish the Summary Notice twice in *The Wall Street Journal* and once over the *Business Wire* within seven calendar days of the Notice Date. ECF No. 442.

224. Upon final approval of the Stipulation and settlement by the Court and entry of a judgment that becomes a final judgment, the Net Settlement Fund will be distributed according to the Plan of Allocation (described below) to Class Members who submit valid, timely Claims Forms. Further terms of the settlement are set forth in the Stipulation. A summary of the settlement was set forth in the Notice.

C. Notice to the Class Meets the Requirements of Due Process and Rule 23 of the Federal Rules of Civil Procedure

225. As required by the Court's Preliminary Approval Order, beginning January 4, 2019, the Claims Administrator, Gilardi & Co. LLC, mailed copies of the Notice to potential Class Members.

226. The Notice provides Class Members with information on: (a) the essential terms of the settlement, including the procedure for opting out of the Class; (b) their right, and the procedure, to object, to any aspect of the settlement, the Plan of Allocation, or Lead Counsel's fee and expense application; (c) the date, time and place of the Settlement Hearing; and (d) the procedure by which a Claim Form should be submitted to the Claims Administrator. The Notice also contains information regarding Lead Counsel's fee and expense application and the proposed plan of allocating the Net Settlement Fund among Authorized Claimants.

227. Filed herewith is the Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), submitted herewith. Ms. Sylvester is an employee of Gilardi who oversaw the notice services provided by Gilardi for this case.

228. In the aggregate, as of the date of this Declaration, I am informed that Gilardi has disseminated over 1.7 million copies of the Notice to potential Class Members and their nominees. Sylvester Decl., ¶11.

229. In addition, in compliance with the Court's Preliminary Approval Order, my understanding is that a Summary Notice was published over *Business Wire* on January 11, 2019, and in *The Wall Street Journal* on January 11, 2019 and again on January 18, 2019.

Id., ¶12. Information regarding the settlement, including downloadable copies of the Notice and Claim Form, was posted on the website established by the Claims Administrator specifically for this settlement, www.WalmartSecuritiesSettlement.com. *Id.*, ¶14. This method of giving notice, previously approved by the Court, is appropriate, because it directs notice in a "reasonable manner to all class members who would be bound by the props[ed judgment]." Fed. R. Civ. P. 23(e)(1).

230. As explained in the accompanying Memorandum, the Notice fairly apprises Class Members of their rights with respect to the settlement and therefore is the best notice practicable under the circumstance and complies with the Court's Preliminary Approval Order (ECF No. 442), Federal Rule of Civil Procedure 23, the PSLRA, and due process.

D. The Plan of Allocation Is Fair and Reasonable

231. As set forth fully in the Notice, the Plan of Allocation provides for the distribution of the Net Settlement to Class Members who timely submit valid Claim Forms that are accepted for payment by the Court. The goal of the Plan of Allocation is to equitably distribute the Net Settlement proceeds to Class Members who suffered economic loss as a proximate result of the alleged wrongdoing.

232. To this end, PGERS engaged damages expert Bjorn I. Steinholt, a Chartered Financial Analyst and Managing Director of Caliber Advisors, Inc., to develop the Plan of Allocation. Although PGERS advanced alternative damage methodologies throughout the Litigation, settlement was reached prior to the submission of *Daubert* motions and the Court did not have an opportunity to determine which methodology would be employed. Therefore, damages here are based on the traditional statutory measure of damages embodied

in the PSLRA. Accordingly, in developing the Plan of Allocation, Mr. Steinholt calculated the estimated artificial inflation in the per share prices of Walmart publicly traded common stock based upon consideration of price changes of said stock in reaction to the corrective disclosure, price changes attributable to market or industry forces, and non-fraud related Walmart specific information.

233. To have a Recognized Loss Amount under the Plan of Allocation, shares of Walmart publicly traded common stock must have been purchased or acquired during the Class Period and held through April 20, 2012. As set forth in greater detail in the Notice, the calculation of the Recognized Loss Amount is based upon various formulas that take into account: (a) when the shares were sold; (b) whether the shares were held at the close of trading on July 20, 2012; (c) the amount of the alleged artificial inflation per share; (d) the purchase/acquisition price; and (e) the purchase/acquisition price minus the average closing price between April 23, 2012 and the date of sale.

234. In sum, the Plan of Allocation represents a method by which to weigh, in a fair and equitable manner, the claims of Authorized Claimants against one another for the purpose of making *pro rata* allocation of the Net Settlement Fund.

E. Questions of Law and Fact Added Risks and Uncertainty

235. Based upon information revealed in *The New York Times*'s April 21, 2012 article concerning Walmart's alleged Mexican bribery scheme, other publicly available information, and evidence obtained throughout the Litigation, Lead Counsel believes that it could have prevailed on the merits in this case.

236. However, despite the promise of this case, continued litigation poses substantial risks to a potential recovery by the Class. As set forth in greater detail below, these risks included, *inter alia*: (a) the elimination of either of PGERS's proposed damages methodology based on Walmart's Motion to Certify Order for Interlocutory Appeal or through an adverse ruling on future *Daubert* motions, and (b) the inherent risks of trial and appeals processes.

1. PGERS's Damages Methodology

237. Lead Counsel advanced two alternative damage methodologies throughout the Litigation and firmly believes that under the express language of the PSLRA, Congress never intended for price impact to be the sole measure of damages. Importantly, because the express terms of the PSLRA confine the 90-day bounce back rule to price-based damage models, PGERS was allowed to explore alternative measures of damages that stood to offer a significantly larger recovery for the Class.

238. However, despite unambiguous statutory language, no clear binding authority exists in the case law that explicitly authorizes a party to depart from traditional statutory measures for damages. And, while this Court agreed that the "PSLRA does not prohibit recovery under PGERS's build-up method," it never explicitly endorsed its use and instead "decline[d], at [that] stage of the litigation, to force PGERS to elect one of its two alternative damages methodologies." ECF No. 404 at 4-5. The Court's ruling left open the possibility that it could have later forced PGERS to rely on statutory measures to prove its damages.

239. Adding to this risk, soon after the Court denied Walmart's third motion to dismiss, Walmart moved the Court to certify its Order for interlocutory appeal on

October 20, 2017. ECF No. 405. Specifically, the motion sought certification of two questions: (1) "Can a plaintiff in a Rule 10b-5 class action assert a claim for damages based on costs paid and other losses sustained by the defendant company?"; and (2) "Can a plaintiff in a Rule 10b-5 class action involving a publicly traded security avoid the limitation on damages in the [PSLRA] by claiming to calculate damages without reference to the security's market price?" *Id*. at 1. The arguments Walmart advanced in support of its motion for certification pursuant to 28 U.S.C. §1292(b) underscore the uncertainty associated with PGERS's position: both questions presented controlling questions of law, had substantial grounds for difference of opinion, and that certification would materially advance the termination of the litigation. ECF No. 406.

240. At the time of settlement, Walmart's motion remained pending. Had the Court chosen to certify its order, the Eighth Circuit may well have overturned the Court's Motion to Dismiss Order precluding PGERS from using the build-up method to measure class-wide damages and greatly reducing the size of a recovery the Class could potentially receive.

2. Prevailing on the Merits

241. While Lead Counsel firmly believes in the merits of PGERS's claims, continued litigation presented substantial risks. For its part, Walmart vehemently denied that PGERS had any valid claims and has always maintained that defendants were not liable for any alleged wrongdoing.

242. Despite the strength of plaintiff's case, continued litigation would still require PGERS to clear several significant hurdles to reach trial (***e.g.***, summary judgment motions, *Daubert* motions), and even if it had cleared these hurdles, PGERS would face the myriad

risks associated with trial and, if it prevailed at trial, the years-long appeals process that inevitably follows a victory at trial.

VI. THE SETTLEMENT IS IN THE BEST INTERESTS OF THE CLASS AND WARRANTS APPROVAL

243. Based upon consideration of the strengths, weaknesses, and the inherent risks involved with continued litigation, this settlement serves the best interests of the Class in that it avoids substantial risk and provides a substantial, certain, and immediate recovery to the Class. Moreover, it provides Class Members a recovery in the range of 80% to 100% of estimated damages, depending on the number of Claims submitted by Class Members, which is exponentially greater than the reported average recovery for class-action 10b-5 cases. NERA Study at 35, Fig. 27.

VII. THE APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

244. Lead Counsel is applying to the Court for an award of attorneys' fees and expenses in connection with the services rendered in this Litigation. Specifically, Lead Counsel is applying for a fee of 30% of the Settlement Fund (*i.e.*, $160 million), and for $616,964.66 in litigation expenses, plus interest at the same rate and for the same time as that earned on the Settlement Fund. Lead Counsel also seeks approval of an award to PGERS pursuant to 15 U.S.C. §78u-4(a)(4) directly relating to its representation of the Class.

245. In determining whether a requested award of attorneys' fees is fair and reasonable, district courts are guided by the following factors: (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed; (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the time and labor involved; (6) the reaction of the class; and (7) the

comparison between the requested attorney fee percentage and percentages awarded in similar cases. *Khoday v. Symantec Corp.*, 2016 U.S. Dist. LEXIS 55543, at *25 (D. Minn. Apr. 5, 2016).

246. Based on the consideration of each of the foregoing factors as further discussed below, and on the additional legal authorities set forth in the accompanying Memorandum, we respectfully submit that Lead Counsel's requested fee should be granted.

A. Application for Attorneys' Fees

1. The Requested Fee of 30% Is Fair and Reasonable

247. For its extensive efforts on behalf of the Class, Lead Counsel is applying for compensation from the Settlement Fund on a percentage basis. As set forth in the accompanying Memorandum, the percentage method is the appropriate method of fee recovery because, among other things, it aligns the lawyer's interest in being paid a fair fee with the interest of the Class in achieving the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy, has been recognized as appropriate by the United States Supreme Court for cases of this nature, and represents the overwhelming trend in the Eighth Circuit and most other circuits.

248. Based on the result achieved for the Class, the extent and quality of work performed, the risks of the litigation and the contingent nature of the representation, Lead Counsel submits that a 30% fee award is justified and should be approved. PGERS, a sophisticated institutional investor that the Court appointed years ago to protect the best interests of the Class, approves this fee request. *See* accompanying Declaration of Walter Moore in Support of Settlement, ¶5. But the appropriateness of this request is best

demonstrated by the extreme disparity between the $160 million settlement PGERS and Robbins Geller achieved versus the 15 other plaintiffs and law firms that tried and failed to recover anything for investors based on the same underlying facts. Even the DOJ and SEC have failed to bring any charges or recover any money based on these same facts.

249. I respectfully submit that the work undertaken by Lead Counsel in the prosecution of this case has been time-consuming and challenging. The risks and difficulties presented by this case were apparent from the outset as evidenced by the fact that over a dozen other firms tried and failed to obtain any recovery for claims related to the Suspected Corruption. Moreover, as described in more detail above, Robbins Geller faced significant uncertainty in advancing a novel damages methodology that had never been explicitly upheld by a higher court. Despite these risks, Robbins Geller has all times represented the Class on a contingent basis, and has not received any payment for its services in pursuing claims against defendants on behalf of the Class.

250. This Litigation was vigorously litigated and settled only after Robbins Geller had, *inter alia*: (a) conducted an extensive factual investigation; (b) successfully opposed two rounds of motions to dismiss; (c) successfully opposed two rounds of motions to strike; (d) obtained class certification and overcame a Rule 23(f) petition; (e) litigated five miscellaneous cases to enforce compliance with third-party subpoenas; (f) obtained more than 2.7 million pages in document discovery; (g) deposed five fact witnesses, one of which was deposed two times; (h) made a document request pursuant to FOIA and litigated the case through summary judgment; and (i) engaged in settlement negotiations with the assistance of a highly reputable mediator.

2. The Settlement Achieved

251. As discussed in greater detail above, the $160 million dollar settlement was achieved as a result of Robbins Geller's extensive efforts on behalf of the Class, including a factual investigation, discovery, complicated motion practice, and resolve in advancing a novel damages methodology. As a result of this settlement, Class Members will benefit and receive compensation for 80% to 100% of their estimated damages and avoid the very substantial risk of no recovery in the absence of a settlement.

3. The Risk, Magnitude and Complexity of the Litigation

252. Courts have recognized that the risk, magnitude, and complexity of the issues in a case are significant factors to be considered in making a fee award. The contested issues in this action involved difficult issues of fact and law regarding defendants' alleged misstatements or omissions of material fact made in SEC filings, shareholder reports, and their website. In addition, there were extremely difficult and complex issues involved in engaging in discovery across multiple jurisdictions, prosecuting a wholly independent lawsuit through summary judgment based on a FOIA request, and in developing a novel damage methodology.

253. There are numerous cases where class counsel in contingent fee cases such as this, after expenditures of tens of thousands of hours and significant expenses, have received no compensation whatsoever –as happened to over a dozen plaintiffs' firms that brought separate cases based on the same facts underlying this case. Despite the most vigorous and competent of efforts, including trials to jury verdict, success in contingent litigation such as this is never assured.

254. As discussed in greater detail above, this action posed significant risks from its outset. The PSLRA's "bounce-back" rule severely limited the potential recovery in this case and defendants fiercely opposed PGERS's proposed alternative damage methodology and were seeking interlocutory review of this damage methodology at the time of settlement. Defendants also at all times disputed the merits of PGERS's claims. Were this settlement not achieved, even if PGERS prevailed through trial, PGERS and the Class faced potentially years of costly and risky appeals, with ultimate success being far from certain. I respectfully submit that Lead Plaintiff's Counsel is entitled to a fee of 30% of the Settlement Amount because of the significant risk factors in the Litigation, as confirmed by the outcomes of all 15 other cases based on the same underlying facts.

4. Quality of Representation

255. I maintained daily control and monitoring of the work performed by my firm in this case. For most of my career, I served as an Assistant (and Special Assistant) United States Attorney in three different judicial districts, during which time I was fortunate enough to work on some of the most significant and ground-breaking investigations and cases in the DOJ. I also trained and supervised dozens of prosecutors. I have led the prosecution of this Litigation since its inception, spanning years and seemingly countless hours and briefs. Other attorneys and paralegals at Robbins Geller undertook particular tasks appropriate to their levels of skill and experience. Together, we and our co-counsel worked extremely hard to reach this settlement. We never stopped pursuing every possible legal and factual avenue, including ones untraveled before us, to advance the Class's claims –while defendants were defeating all other would-be class actions. Based on all of this work and an outcome that,

once all of the claims are administered, will either be unprecedented or among the top handful of recoveries under the PSLRA, I support Lead Plaintiff's Counsel's application for an award of attorneys' fees and expenses.

256. The quality of the work performed by counsel in attaining a settlement should also be evaluated in light of the quality of opposing counsel. Robbins Geller was opposed in this Litigation by very skilled and highly respected counsel. At various times throughout the Litigation, defendants were represented by the international law firms of Gibson, Dunn Crutcher LLP and Latham & Watkins LLP. The lawyers from each firm vigorously defended the interests of their clients and forced Robbins Geller to litigate (and re-litigate) every arguable issue in the case. In the face of these knowledgeable and formidable defense teams, Robbins Geller was able to develop a case that was sufficiently strong to persuade defendants to reach a settlement that amounts to an outstanding recovery for the Class.

5. The Reaction of the Class to Date

257. While the time for Class Members to exclude themselves from the Class or object to the fee and expense application or the settlement does not expire until March 14, 2019, to date, not a single objection has been received and no Class Members with actual monetary claims have excluded themselves from the Class. Should any objections to the fee and expense application be received, Lead Counsel will address them in reply papers to be filed no later than seven calendar day before the Settlement Hearing, as required by the Court's Preliminary Approval Order.

258. In sum, given the complexity and uniquely challenging nature of the Litigation, the responsibility and risk undertaken by Lead Plaintiff's Counsel, the difficulty of proving

liability and damages, the experience of Lead Plaintiff's Counsel and counsel for defendants, and the contingent nature of Lead Plaintiff's Counsel's agreement to prosecute the Litigation, Lead Counsel respectfully submits that the requested attorneys' fees are reasonable and should be approved.

B. Application for Litigation Expenses

259. Lead Plaintiff's Counsel also request an award of $616,964.66 in litigation expenses and charges incurred in prosecuting the Litigation for the benefit of the Class. *See* Declaration of Jason Forge Filed on Behalf of Robbins Geller, Declaration of Jerry E. Martin Filed on Behalf of Barrett Johnston Martin & Garrison, LLC and the Declaration of Geoff Culbertson Filed on Behalf of Patton Tidwell & Culbertson, LLP, submitted herewith. Lead Counsel respectfully submits that this amount is appropriate, fair, and reasonable, and should be approved.

260. Lead Counsel understood from inception of the Litigation that, in the event that PGERS's claims were not successfully resolved, Lead Counsel would not recover any of its expenses. Lead Counsel further understood that it would never be compensated for the lost use of the funds advanced to litigate the Litigation. Thus, in addition to its fundamental concern – furthering the interests of the Class – Lead Counsel had additional motivation to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the effective and efficient prosecution of the Litigation.

261. In total, the application for expenses is well within the limit of $1,000,000 contained in the Notice mailed to Class Members. As noted above, in response to over 1.7 million Notices, there were no objections to the expenses as of the date of this Declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of February, 2019, at San Diego, California.

/s/ Jason A. Forge
JASON A. FORGE

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 28, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Jason A. Forge

JASON A. FORGE

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EXHIBIT 1

NERA
ECONOMIC CONSULTING

29 January 2019

Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

Record Pace of Filings, Despite Slower Merger-Objection Growth
Average Case Size Surges to Record High
Settlement Values Rebound from Near-Record Lows

By Stefan Boettrich and Svetlana Starykh

Insight in Economics™

Foreword

I am excited to share NERA's *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* with you. This year's edition builds on work carried out over numerous years by many members of NERA's Securities and Finance Practice. In this year's report, we continue our analyses of trends in filings and settlements and present new analyses, such as how post-class-period stock price movements relate to voluntary dismissals. While space does not permit us to present all the analyses the authors have undertaken while working on this year's edition, or to provide details on the statistical analysis of settlement amounts, we hope you will contact us if you want to learn more about our work related to securities litigation. On behalf of NERA's Securities and Finance Practice, I thank you for taking the time to review our work and hope you find it informative.

Dr. David Tabak
Managing Director

Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

Record Pace of Filings, Despite Slower Merger-Objection Growth
Average Case Size Surges to Record High
Settlement Values Rebound from Near-Record Lows

By Stefan Boettrich and Svetlana Starykh[1]

29 January 2019

Introduction and Summary[2]

In 2018, the pace of securities class action filings was the highest since the aftermath of the 2000 dot-com crash, with 441 new cases. While merger objections constituted about half the total, filing growth of such cases slowed versus 2017, indicating that the explosion in filings sparked by the *Trulia* decision may have run its course.[3] Filings alleging violations of Rule 10b-5, Section 11, and/or Section 12 of the Securities Act of 1933 ("Securities Act") were roughly unchanged compared to 2017, but accelerated over the second half of the year, with the fourth quarter being one of the busiest on record.

The steady pace of new securities class actions masked fundamental changes in filing characteristics. Aggregate NERA-defined Investor Losses, a measure of total case size, came to a record $939 billion, nearly four times the preceding five-year average. Even excluding substantial litigation against General Electric (GE), aggregate Investor Losses doubled versus 2017. Most growth in Investor Losses stemmed from cases alleging issues with accounting, earnings, or firm performance, contrasting with prior years when most growth was tied to regulatory allegations. Filings against technology firms jumped nearly 70% from 2017, primarily due to cases alleging accounting issues or missed earnings guidance.

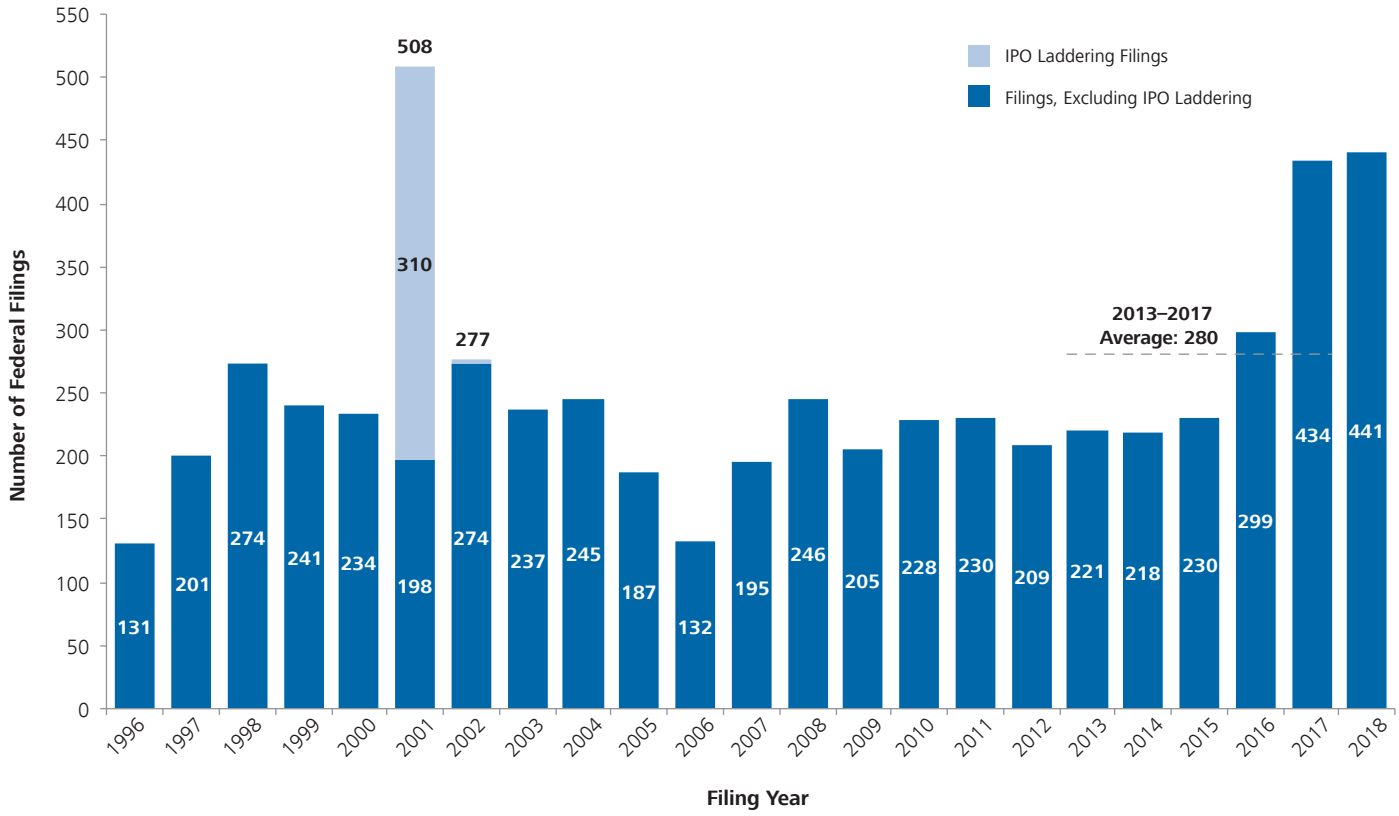
The average settlement value rebounded from the 2017 near-record low, mostly due to the $3 billion settlement against Petróleo Brasileiro S.A.—Petrobras. The median settlement nearly doubled, primarily due to higher settlements of many moderately sized cases. Despite a rebound in settlement values in 2018, the number of settlements remained low, with dismissals outnumbering settlements more than two-to-one. An adverse number of cases were voluntarily dismissed, which can partially be explained by positive returns of targeted securities during the PSLRA bounce-back periods. The robust rate of case resolutions has not kept up with the record filing rate, driving pending litigation up more than 6%.

Trends in Filings

Number of Cases Filed

There were 441 federal securities class actions filed in 2018, the fourth consecutive year of growth (see Figure 1). The filing rate was the highest since passage of the PSLRA, with the exception of 2001 when new IPO laddering cases dominated federal dockets. The dramatic year-over-year growth seen in each of the past few years resulted in a near doubling of filings since 2015, but growth moderated considerably in 2018 to 1.6%. The 2018 filing rate is well above the post-PSLRA average of approximately 253 cases per year, and solidifies a departure from the generally stable filing rate in the years following the 2008 financial crisis.

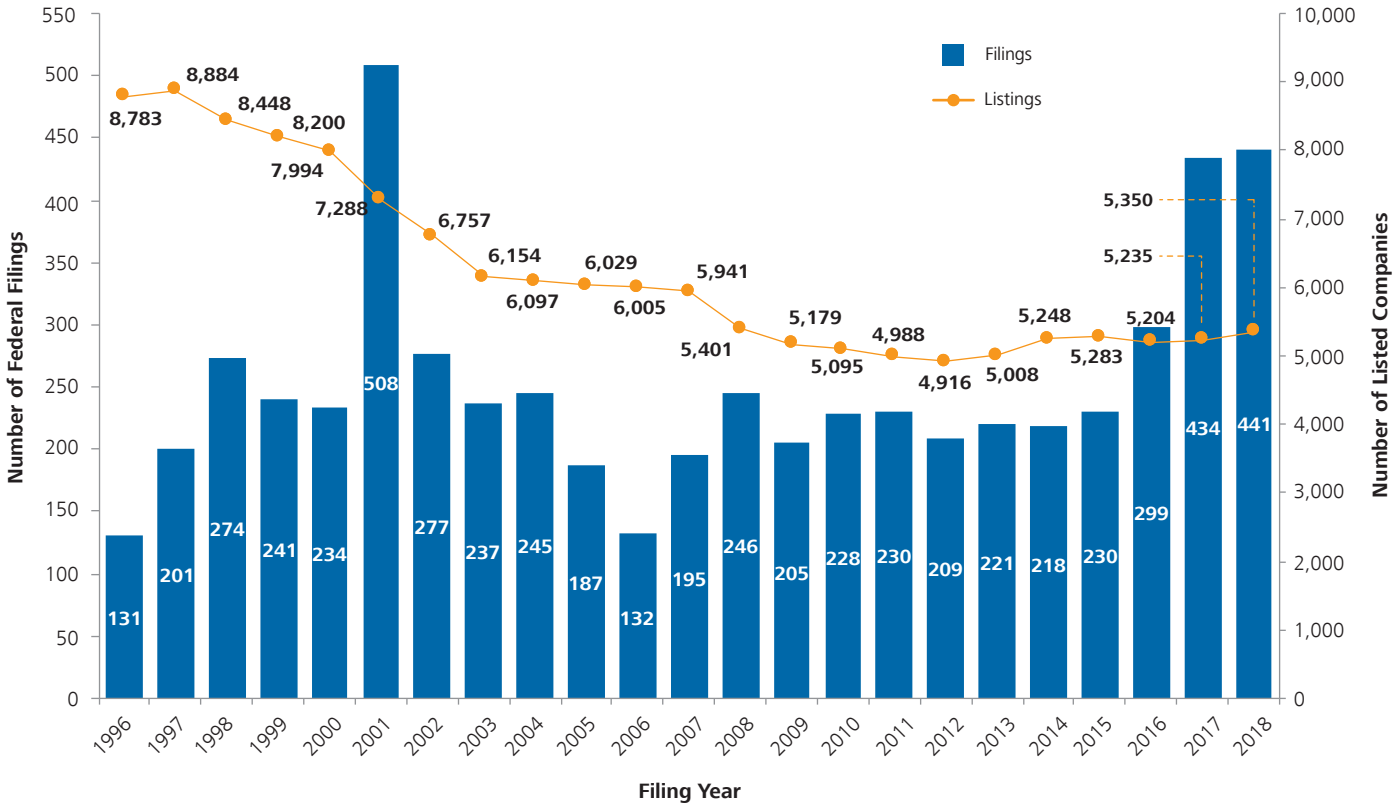
Figure 1. **Federal Filings**
January 1996–December 2018



As of November 2018, there were 5,350 companies listed on the major US securities exchanges (see Figure 2). The 441 federal securities class action suits filed in 2018 involved approximately 8.2% of publicly listed companies. The overall risk of litigation to listed firms has increased substantially since early in the decade, when only about 4.0% of public companies listed on US exchanges were subject to a securities class action.

Broadly, the chance of a publicly listed company being subject to securities litigation depends on the number of filings relative to the number of listed companies. While the number of listed companies has increased by 7% over the last five years, the longer-term trend is toward fewer listings. Since the passage of the PSLRA in 1995, the number of listings on major US exchanges has steadily declined by about 3,000, or nearly 40%. Recent research attributed this decline to fewer new listings and an increase in delistings, mostly through mergers and acquisitions.[4]

Figure 2. **Federal Filings and Number of Companies Listed in the United States**
January 1996–December 2018



Note: Listed companies include those listed on the NYSE and Nasdaq. Listings data from 2016 through 2018 were obtained from World Federation of Exchanges (WFE). The 2018 listings data is as of November 2018. Data for prior years was obtained from Meridian Securities Markets and WFE.

Despite the long-term drop in the number of listed companies, the average number of securities class action filings has *increased* from 216 per year over the first five years after the PSLRA to about 324 per year over the past five years. The long-term trend toward fewer listed companies coupled with more class actions implies that the average probability of a listed firm being subject to such litigation has increased from about 2.6% after passage of the PSLRA to 3.7% over the past five years, and 8.0% over the past two years.

Recently, the rising average risk of class action litigation was driven by dramatic growth in merger-objection cases that, prior to 2016, were mostly filed in various state courts. Since then, state court rulings have driven such litigation onto federal dockets. Hence the increase in the typical firm's litigation risk might be less than indicated above, since 1) the risk of merger-objection litigation is specific to firms planning or engaged in M&A activity and 2) many merger-objection cases would otherwise have been filed in state courts.

The average probability of a firm being targeted by what is often regarded as a "Standard" securities class action—one that alleges violations of Rule 10b-5, Section 11, and/or Section 12—was only 4.0% in 2018, albeit higher than the average probability of about 2.6% following the PSLRA and 3.5% between 2013 and 2017.

Filings by Type

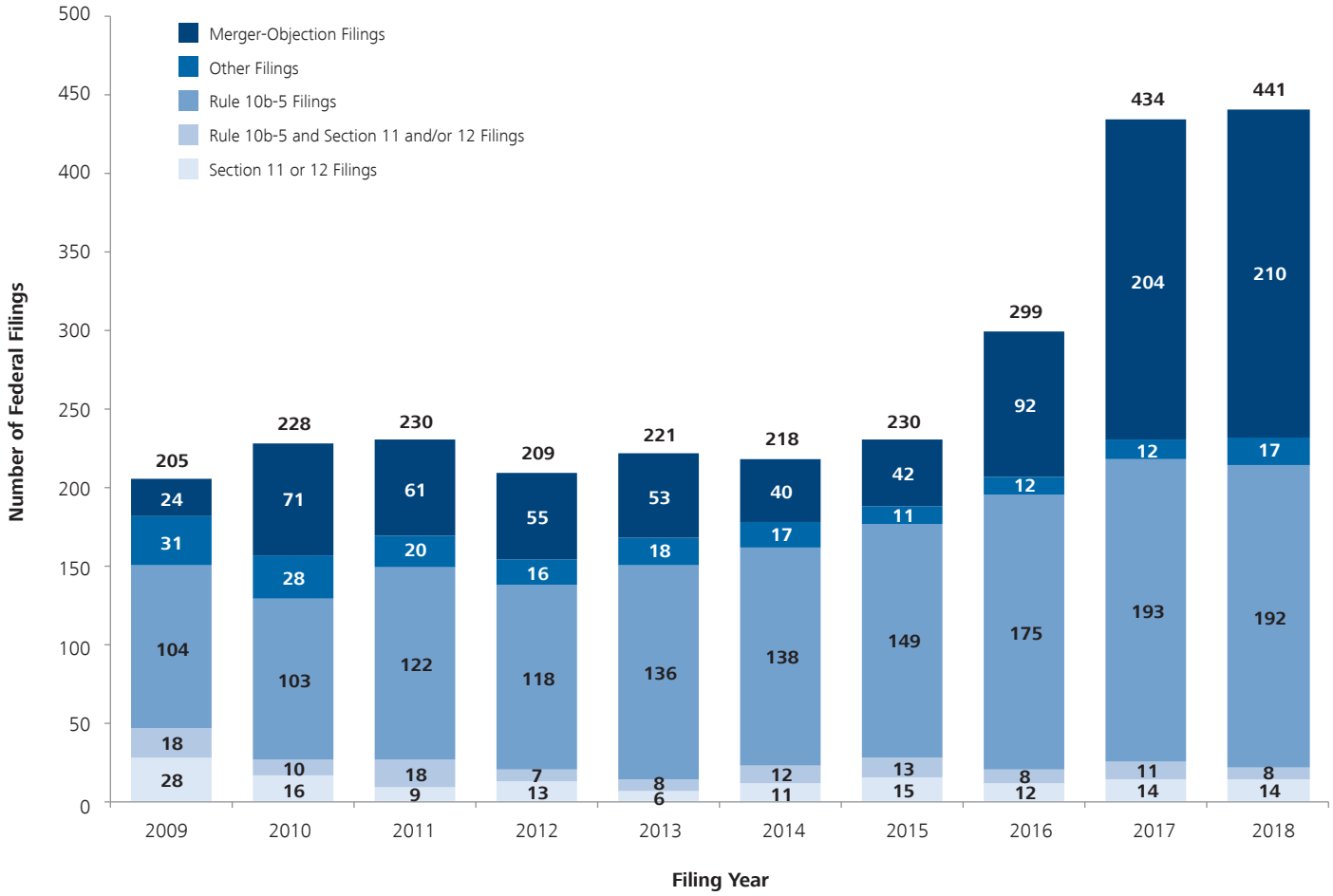
In 2018, the 441 securities class action filings were about evenly split between Standard securities class actions and merger objections, roughly matching the number seen in 2017 (see Figure 3). There were 214 Standard securities cases filed, down slightly from 2017. Prior to 2018, Standard filings grew for five consecutive years, the longest expansion on record, and by over 50% since 2013. Despite the slowdown in 2018, monthly filing growth over the second half of the year was robust, and capped by 64 filings in the fourth quarter, one of the busiest quarters on record.

Despite the 210 merger-objection filings in 2018 making up about half of all filings, yearly filing growth of such cases slowed to almost zero, as the number of filings roughly matched the level seen in 2017. The tepid filing growth implies that the rapid growth following various state-level decisions limiting "disclosure-only" settlements (including the *Trulia* decision) has likely run its course.[5] Rather, the stagnant growth in federal merger-objection filings was likely driven by relatively stagnant M&A activity.[6]

Although aggregate merger-objection filings (including those at the state level) may correspond with the rate of mergers and acquisitions, such deal activity does not appear to have historically been the primary driver of federal merger-objection filings over multiple years. The number of federal merger-objection filings generally fell between 2010 and 2015, despite increased M&A activity. The higher filing counts in 2016 and 2017 likely stemmed from trends in the choice of jurisdiction rather than trends in deal volume.[5]

Besides Standard and merger-objection cases, a variety of other filings rounded out 2018. Several filings alleged fraudulent initial coin and cryptocurrency offerings, manipulation of derivatives (e.g., VIX products and metals futures), and breaches of fiduciary duty (including client-broker disputes involving churning and improper asset allocation).

Figure 3. **Federal Filings by Type**
January 2009–December 2018



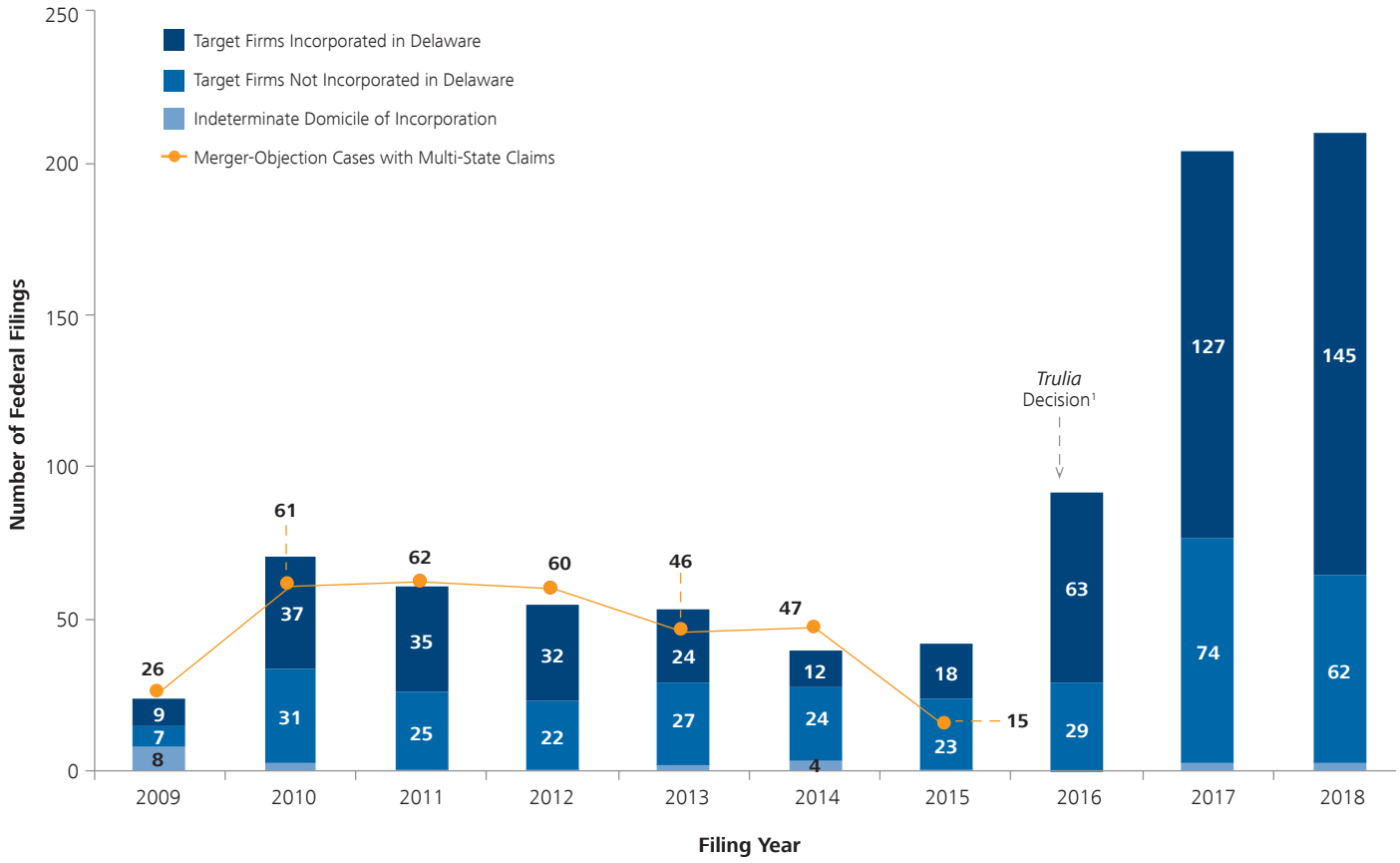
Merger-Objection Filings

In 2018, federal merger-objection filings were relatively unchanged versus 2017 (see Figure 4). Growth in federal merger-objection filings in 2016 and 2017 largely followed various state court rulings barring disclosure-only settlements, the most notable being the 22 January 2016 *Trulia* decision in the Delaware Court of Chancery.[7] Research suggested that such state court decisions would simply drive merger objections to alternative jurisdictions, such as federal courts.[8] This has largely been borne out thus far.

The dramatic slowdown in merger-objection filings growth implies that plaintiff forum selection is less of a growth factor; in 2018 and going forward, merger and acquisition activity will likely be the primary driver of federal merger-objection litigation. This assumes, however, that corporations don't increasingly adopt forum selection bylaws, and that federal courts don't increasingly follow the Delaware Court of Chancery's lead on rejecting disclosure-only settlements.[9] For instance, after the Seventh Circuit ruled strongly against a disclosure-only settlement in *In re: Walgreen Co. Stockholder Litigation*, the proportion of merger objections filed in that circuit fell by more than 60% the following year.[10]

Federal merger-objection filings typically allege a violation of Section 14(a), 14(d), and/or 14(e) of the Securities Exchange Act of 1934, and/or a breach of fiduciary duty by managers of a firm being acquired. Such filings are frequently voluntarily dismissed.

Figure 4. **Federal Merger-Objection Cases and Merger-Objection Cases with Multi-State Claims**
January 2009–December 2018



Notes: Counts of merger-objection cases with multi-state claims based on data obtained from Matthew D. Cain and Steven D. Solomon, "Takeover Litigation in 2015," Berkeley Center for Law, Business and the Economy, 14 January 2016. Data on multi-state claims unavailable for 2016–2018. State of incorporation obtained from the Securities and Exchange Commission.
[1] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

Filings Targeting Foreign Companies

Foreign companies with securities listed on US exchanges have been disproportionately targeted in Standard securities class actions since 2010 (see Figure 5).[11] In 2018, foreign companies were targeted in about 25% fewer cases than in 2017, and in only about 20% of complaints, just above the share of listings. This contrasts with persistent growth in foreign firm exposure to securities litigation over the preceding four years.

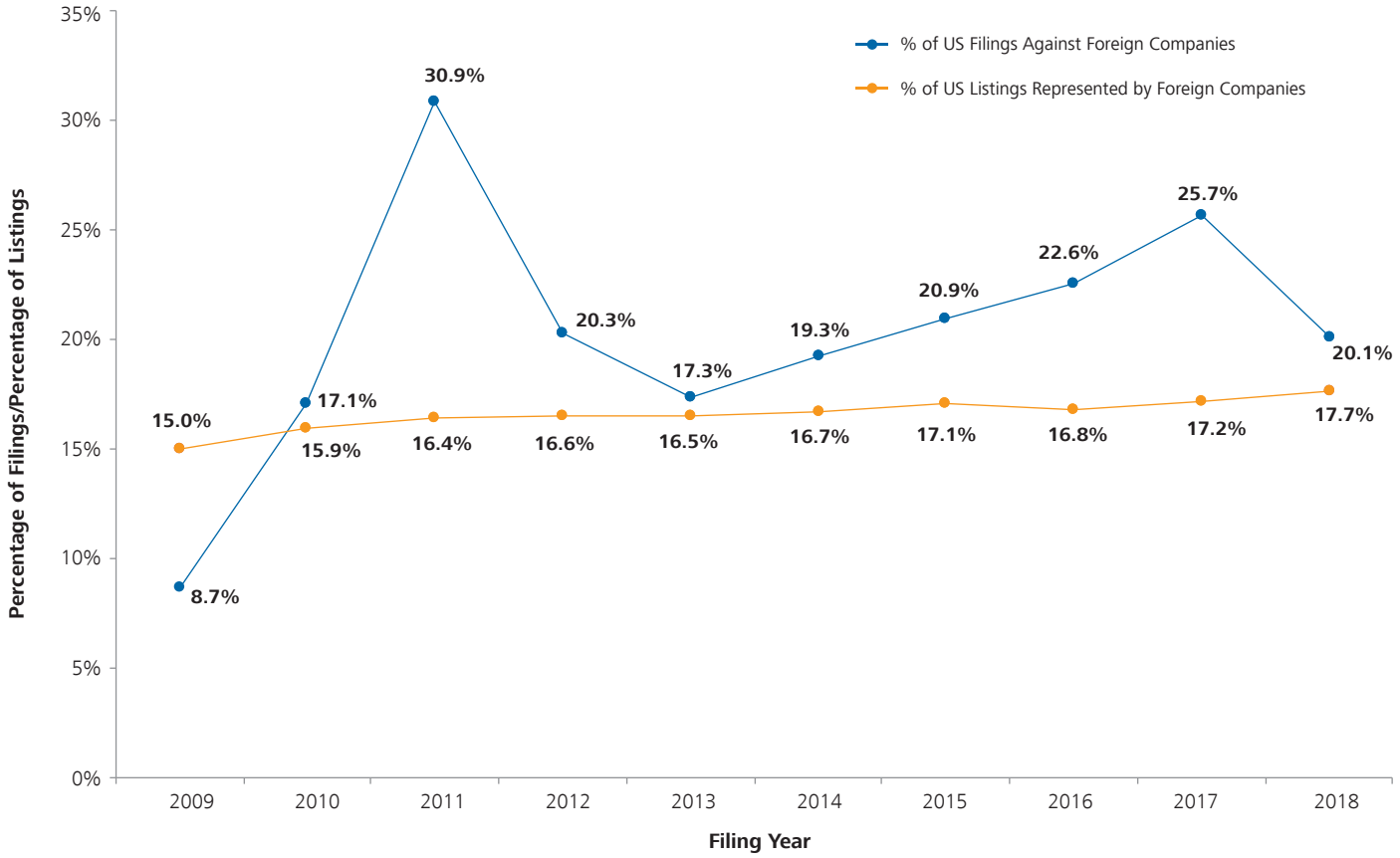
The reversion in claims against foreign firms mirrors a wider slowdown in filings with regulatory allegations. Over the last few years, growth in regulatory filings explained much of the growth in foreign filings, with 50% to 80% of new foreign cases including such allegations. That trend has reversed; in 2018, 75% of the drop in foreign filings stemmed from fewer claims related to regulation.

The slowdown in foreign regulatory filings can also be tied to fewer complaints in 2018 alleging similar regulatory violations, which adversely targeted foreign firms and particularly those domiciled in Europe. For instance, in 2017 there were multiple filings related to pharmaceutical price fixing, emissions defeat devices, and financing schemes by Kalani Investments Limited.

Filings against foreign companies spanned several economic sectors, led by a considerable jump against firms in the Electronic Technology and Technology Services sector (accounting issues were most common). Filings against foreign companies in the Health Technology and Services sector dropped by half. In past years, such filings usually claimed regulatory violations; none did in 2018.

In 2011, a record 31% of filings targeted foreign companies, mostly due to a surge in litigation against Chinese companies, which was mainly related to a proliferation in so-called "reverse mergers" years earlier. A reverse merger is a merger in which a private company merges with a publicly traded company listed in the US, thereby enabling access to US capital markets without going through the process of obtaining a new listing.

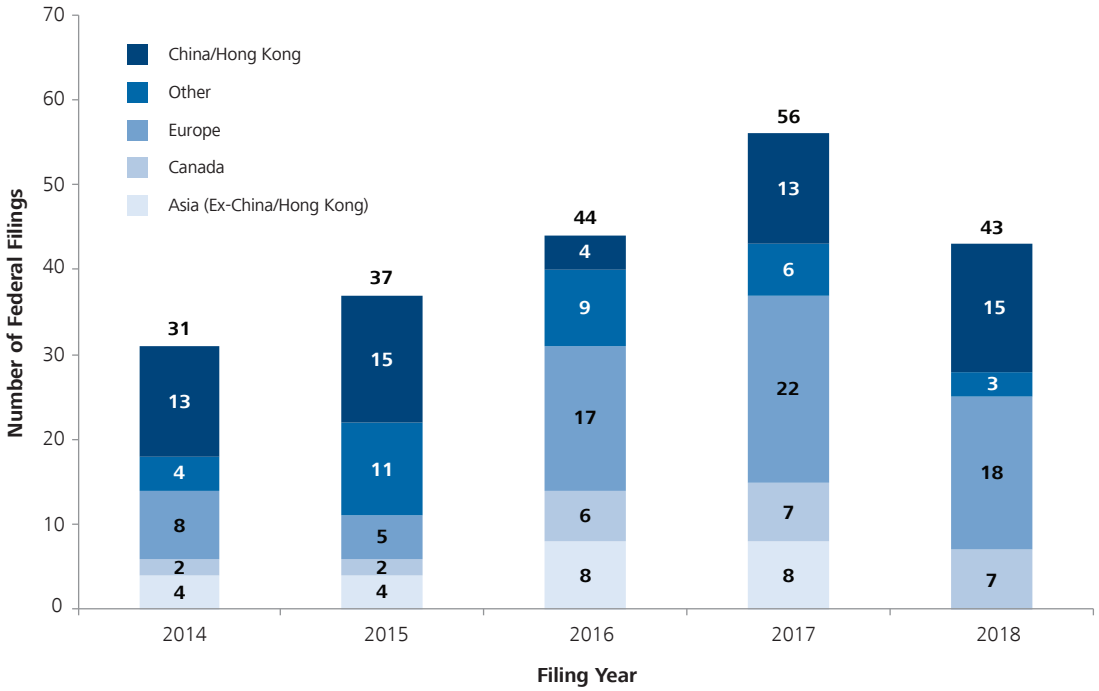
Figure 5. **Foreign Companies: Share of Filings and Share of Companies Listed on US Exchanges**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2009–December 2018



Note: Foreign issuer status determined based on location of principal executive offices.

Internationally, only Chinese firms listed on US exchanges were subject to more securities class actions in 2018 than in 2017 (see Figure 6). Filings against European firms slowed, partially due to fewer regulatory filings. There were zero filings against Israeli companies, despite an increase in listings and litigation against such companies in previous years.

Figure 6. **Filings Against Foreign Companies**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12 by Region
January 2014–December 2018



Note: Foreign issuer status determined based on location of principal executive offices.

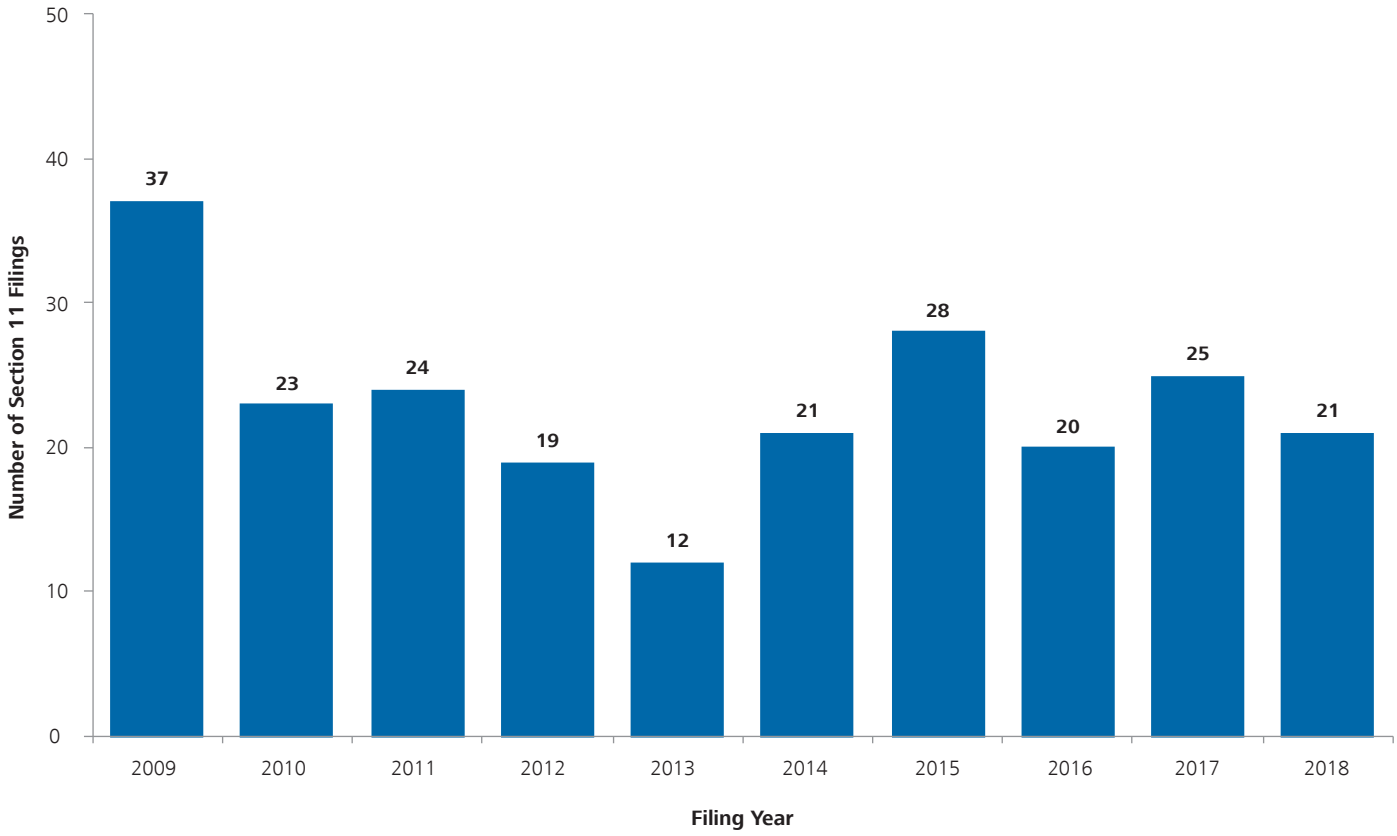
Section 11 Filings

There were 21 federal filings alleging violations of Section 11 in 2018, which approximates the five-year average (see Figure 7).

On 20 March 2018, the US Supreme Court ruled in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that state courts have jurisdiction over class actions with claims brought under the Securities Act.[12] The ruling allows plaintiffs to litigate Section 11 claims in state courts, including plaintiff-friendly California state courts.

The full effect of the *Cyan* decision on federal filing trends remains to be seen, but of the 21 Section 11 filings in 2018, 14% involved firms headquartered in California, down from a quarter in 2016 (prior to the US Supreme Court granting certiorari). Of the three California firms, at least two have stated in filings with the SEC that claims under the Securities Act must only be brought in federal courts.[12]

Figure 7. **Section 11 Filings**
January 2009–December 2018



Aggregate NERA-Defined Investor Losses

In addition to the number of cases filed, we also consider the total potential size of these cases using a metric we label "NERA-defined Investor Losses."

NERA's Investor Losses variable is a proxy for the aggregate amount that investors lost from buying the defendant's stock, rather than investing in the broader market during the alleged class period. Note that the Investor Losses variable is not a measure of damages because any stock that underperforms the S&P 500 would have Investor Losses over the period of underperformance; rather, it is a rough proxy for the relative size of investors' potential claims. Historically, Investor Losses have been a powerful predictor of settlement size. Investor Losses can explain more than half of the variance in the settlement values in our database.

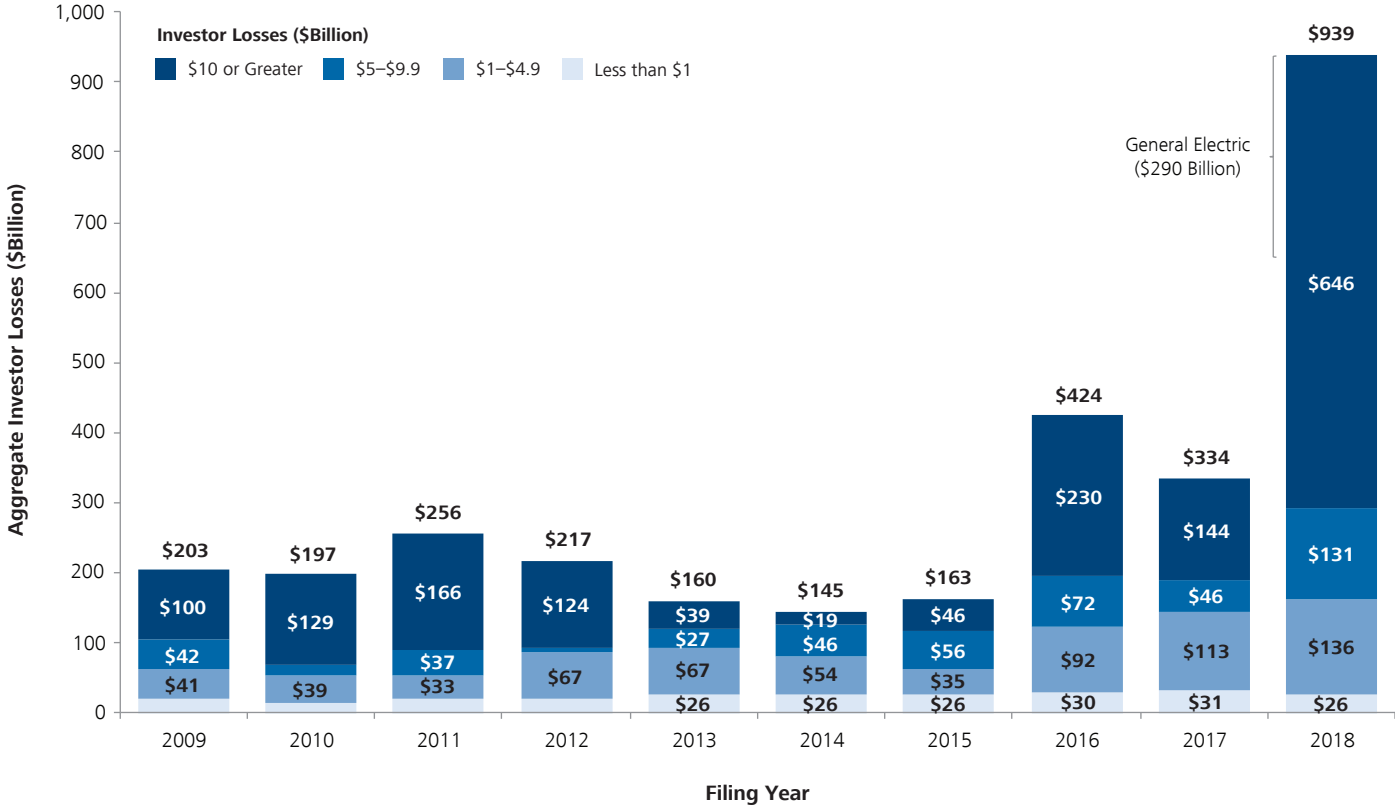
We do not compute NERA-defined Investor Losses for all cases included in this publication. For instance, class actions in which only bonds and not common stock are alleged to have been damaged are not included. The largest excluded groups are IPO laddering cases and merger-objection cases.

Despite a relatively constant rate of Standard filings in 2018, the size of those filings (as measured by NERA-defined Investor Losses) surged to nearly $1 trillion (see Figure 8). Total Investor Losses were dominated by litigation against GE, equal to about 45% of Investor Losses from all other cases combined, an especially impressive metric given the record aggregate case size.

NERA-defined Investor losses in 2018 totaled $939 billion, more than double that of any prior year and nearly four times the preceding five-year average of $245 billion. The total size of filings in all but the smallest strata grew, led by cases with more than $10 billion in Investor Losses. Coupled with the relatively stable overall filing rate, this suggests a systematic shift toward larger filings. In 2018, there were a record number of filings in each of the three largest strata, while only 88 cases had Investor Losses less than $1 billion, a record low.

Once again, there were several very large filings alleging regulatory violations, including a stock drop case against Johnson & Johnson related to claims of allegedly carcinogenic talcum powder, and a data privacy case against Facebook. Besides cases alleging regulatory violations, other very large cases included a filing against NVIDIA regarding excess inventory of GPUs (used for cryptocurrency mining) and large drug development cases against Bristol-Myers Squibb and Celgene.

Figure 8. **Aggregate NERA-Defined Investor Losses**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2009–December 2018



Over the past couple of years, growth in aggregate Investor Losses was concentrated in filings alleging regulatory violations, a substantial number of which were also *event-driven* securities cases (i.e., stock drop cases stemming from a specific event or occurrence). Between 2015 and 2017, growth in the total size of regulatory cases was due to an increased filing rate (from 31 to 57 cases) and higher median Investor Losses (from $308 million to $811 million).

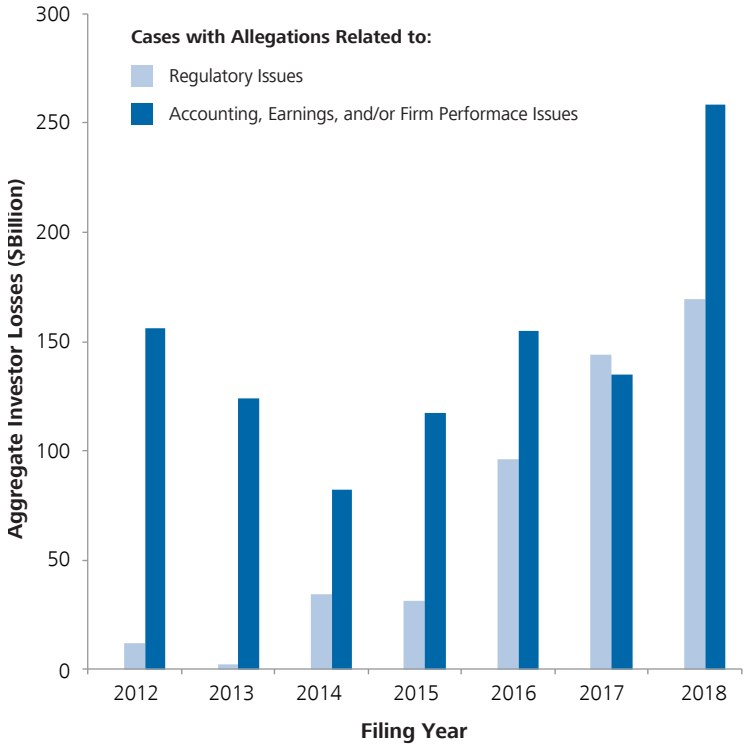
In 2018, regulatory cases were again large (half had Investor Losses greater than $4 billion), but the vast majority of total Investor Losses stemmed from what have historically been more typical securities cases, namely those that allege accounting issues, misleading earnings guidance, and/or firm performance issues.[14] This was led by litigation related to accounting issues at GE. Excluding GE, aggregate Investor Losses of such cases nearly doubled to a record $258 billion (see Figure 9).

Growth in the total size of cases alleging accounting, earnings, and/or performance issues primarily stems from growth in individual case size, as opposed to more filings. The median case with such allegations had more than $650 million in Investor Losses, about twice the average of $322 million over the preceding five years.

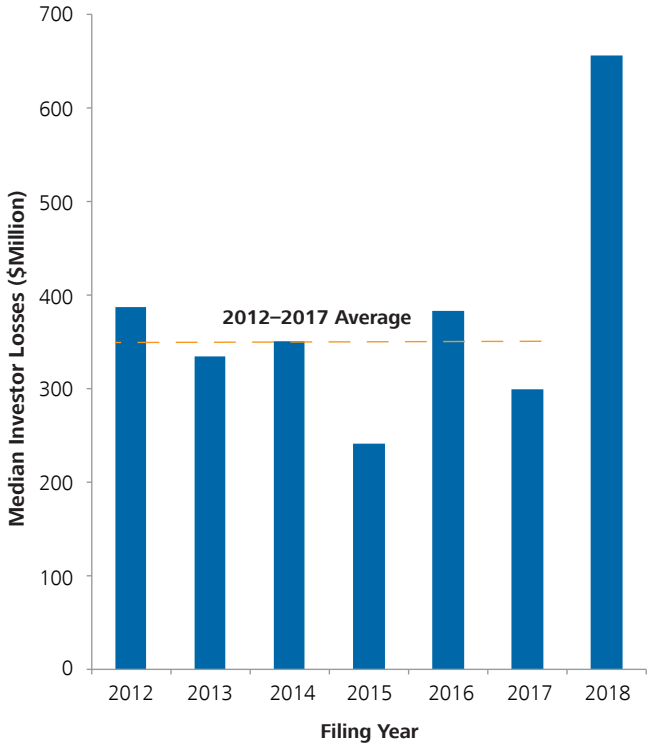
Details of the size of cases with specific types of allegations are discussed in the *Allegations* section below.

Figure 9. **NERA-Defined Investor Losses**
Filings Alleging Accounting Issues, Missed Earnings Guidance, and/or Misleading Future Performance
Excludes 2018 GE Filings

Aggregate NERA-Defined Investor Losses
January 2012–December 2018



Median NERA-Defined Investor Losses
January 2012–December 2018



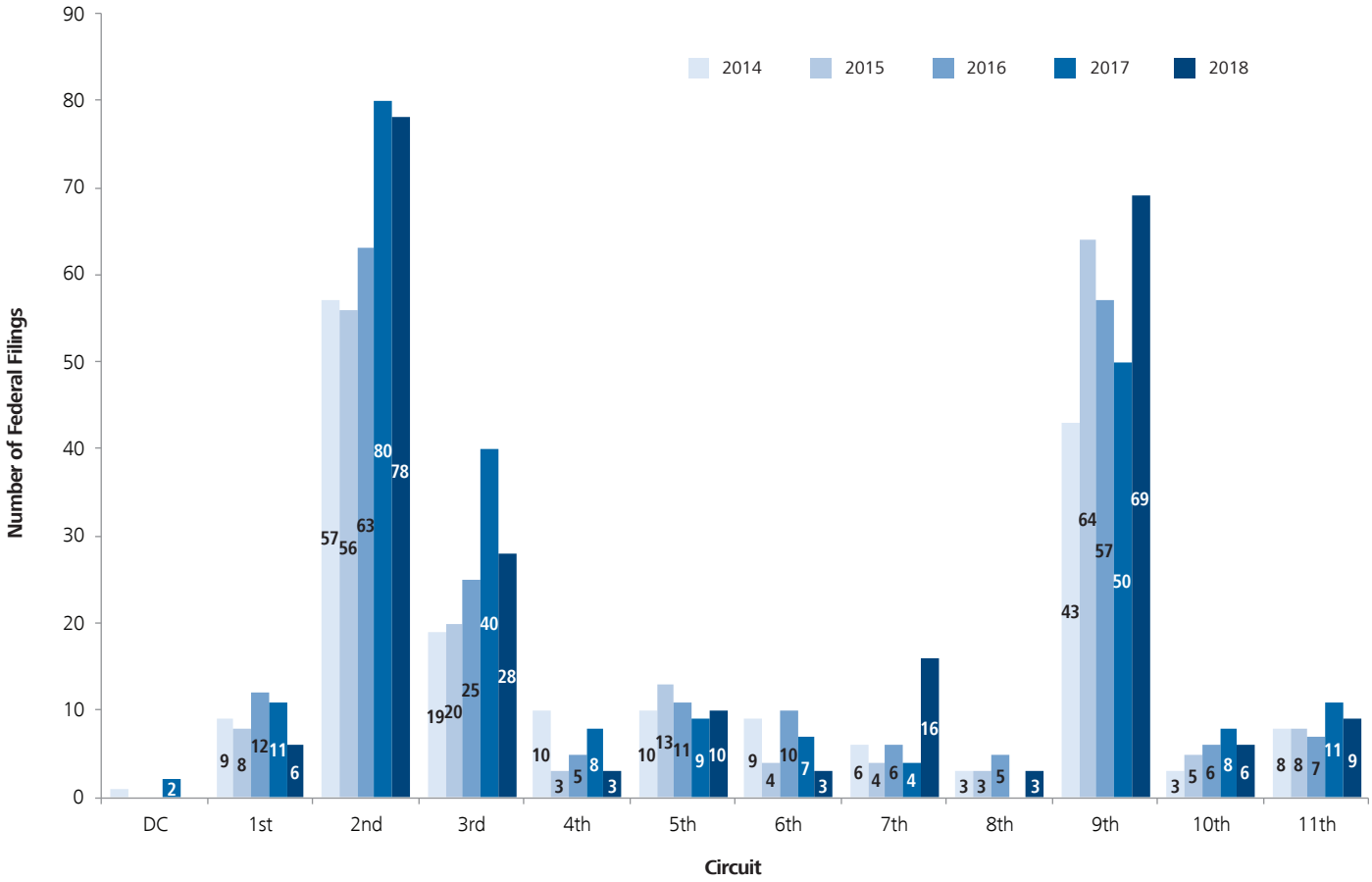
Note: Regulatory cases with parallel accounting, performance, or missed earnings claims are excluded.

Filings by Circuit

Filings in 2018 (excluding merger objections) were again concentrated in the Second and Ninth Circuits. The concentration of filings in these circuits has increased in 2018, during which they received 64% of filings, up from an average of 57% over the prior two years (see Figure 10). While the Second Circuit received the most filings, the most growth was in the Ninth Circuit, which includes Silicon Valley, mostly due to more litigation against firms in the Electronic Technology and Technology Services sector.

Merger-objection filings, not included in Figure 10, have become increasingly active in the Third Circuit, which includes Delaware. The Third Circuit received 82 merger-objection cases in 2018, double the number in 2017 and more than an eightfold increase over 2016. Nearly four-in-ten merger-objection cases were filed in the Third Circuit, twice the concentration of 2017 and coming amidst only a slight increase in the percentage of target firms incorporated in Delaware (see Figure 4). This corresponds with a decline in filings in every other circuit except the Second Circuit, where filings increased from 15 to 26.

Figure 10. **Federal Filings by Circuit and Year**
Excludes Merger Objections
January 2014–December 2018

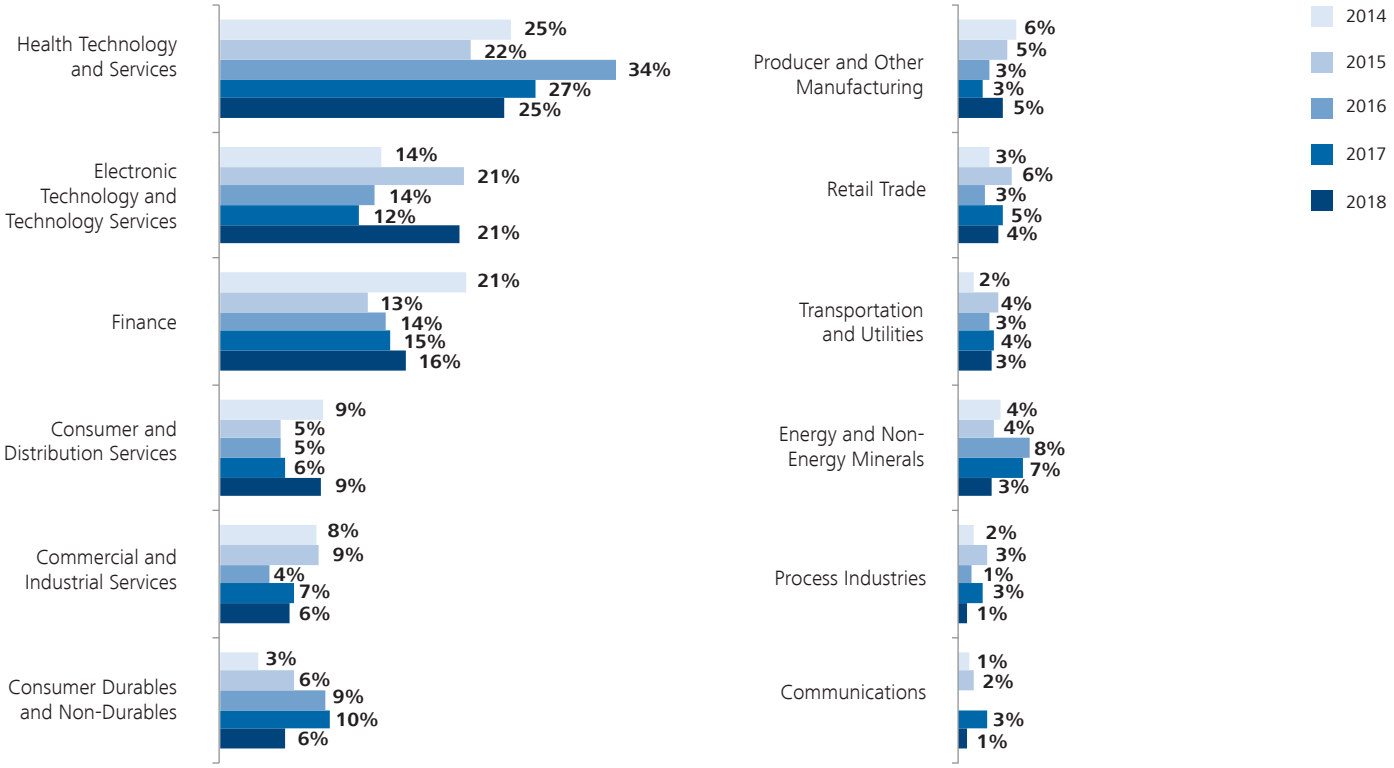


Filings by Sector

In 2018, filing counts were highest in the three historically dominant sectors, which include firms involved in health care, technology, and financial services (see Figure 11). The share of filings in these sectors increased to 62% in 2018 from about 54% in 2017, primarily due to a surge in filings against firms in the technology sector. Despite the drop in the percentage of health care companies targeted, the percentage of targeted firms in the Drugs industry (SIC 283) was nearly unchanged from 2017.

Firms in technological industries were especially at risk of securities class actions alleging accounting issues, misleading earnings guidance, or firm performance issues.[15] The industry with the highest percentage of constituent companies targeted with such allegations was the Computer and Office Equipment industry (SIC 357), with more than 9% of listed companies subject to litigation. This was followed by the Electronic Components and Accessories industry (SIC 367), with 6% of firms targeted. In the Drugs industry (SIC 283), 5% of firms were targeted with a filing with such claims (mostly related to misleading announcements regarding future performance).

Figure 11. **Percentage of Filings by Sector and Year**
Excludes Merger Objections
January 2014–December 2018



Note: This analysis is based on the FactSet Research Systems, Inc. economic sector classification. Some of the FactSet economic sectors are combined for presentation.

Allegations

In contrast with growth observed in recent years, filings with regulatory claims (i.e., those alleging a failure to disclose a regulatory issue) slowed to 41 in 2018 from 57 in 2017, a drop from 26% of Standard cases to 19% (see Figure 12). While fewer regulatory cases were filed, the median case size grew fourfold to over $4 billion (as measured by NERA-defined Investor Losses). The slowdown in regulatory filings was partially offset by more allegations of accounting issues and missed earnings guidance, which grew 8% and 13%, respectively.

While the size of filed cases (as measured by NERA-defined Investor Losses) grew in each allegation category, those alleging accounting issues and missed earnings guidance were especially large and more frequently targeted technology firms. The median size of accounting claims exceeded $600 million in 2018 (a level not seen since 2008), with filings over the second half of the year being especially large. Firms in the technology sector had the most accounting claims, making up 29% of the total (up from 21% in 2017). Moreover, more than one-in-three filings against firms in the technology sector alleged accounting issues.

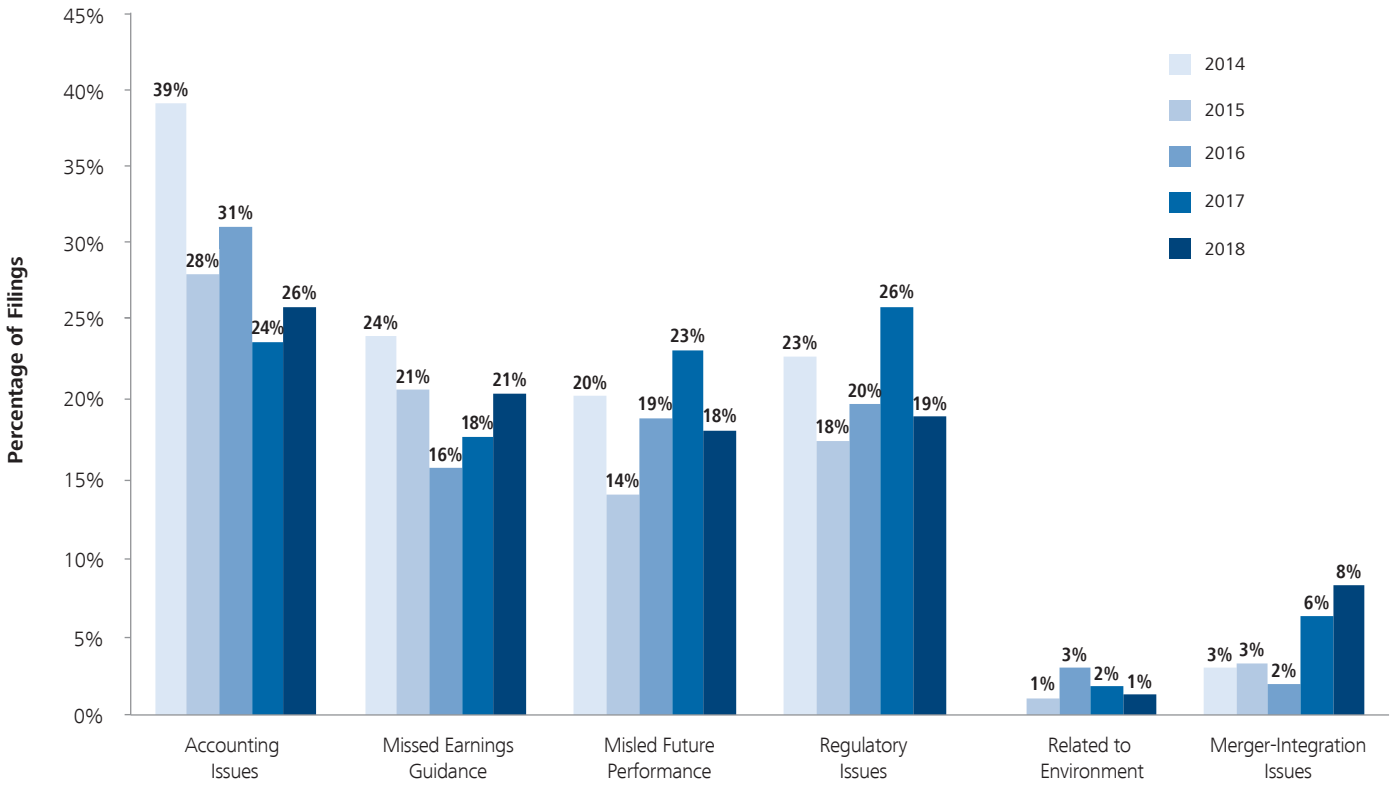
Filings claiming missed earnings guidance grew for the second straight year. Although the percentage of filings alleging missed guidance roughly matched that of 2015, the median case size (as measured by Investor Losses) was three times larger in 2018 than in 2015. Filings against firms in the technology sector with missed earnings guidance claims grew 70% since 2017 and constituted the largest share of such claims (at 27%).

In 2018, 8% of filings included merger integration allegations (i.e., claims of misrepresentations by a firm involved in a merger or acquisition). The substantial increase in litigation in 2017 corresponded with a 14% increase in announced M&A deals with US targets.[16] However, in 2018, despite a 12% slowdown in announced deal activity over the first three quarters, the number of federal merger integration filings rose.[17] The largest merger integration filing related to the failed Tribune Media/ Sinclair merger, making up 20% of total Investor Losses.

As in prior years, most allegations related to misleading firm performance in 2018 were against firms in the health care sector. Within health care, firms in the Drugs industry (SIC 283) were subject to two-in-three filings.

Most complaints include a wide variety of allegations, not all of which are depicted here. Due to multiple types of allegations in complaints, the same case may be included in multiple categories.

Figure 12. **Allegations**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2014–December 2018

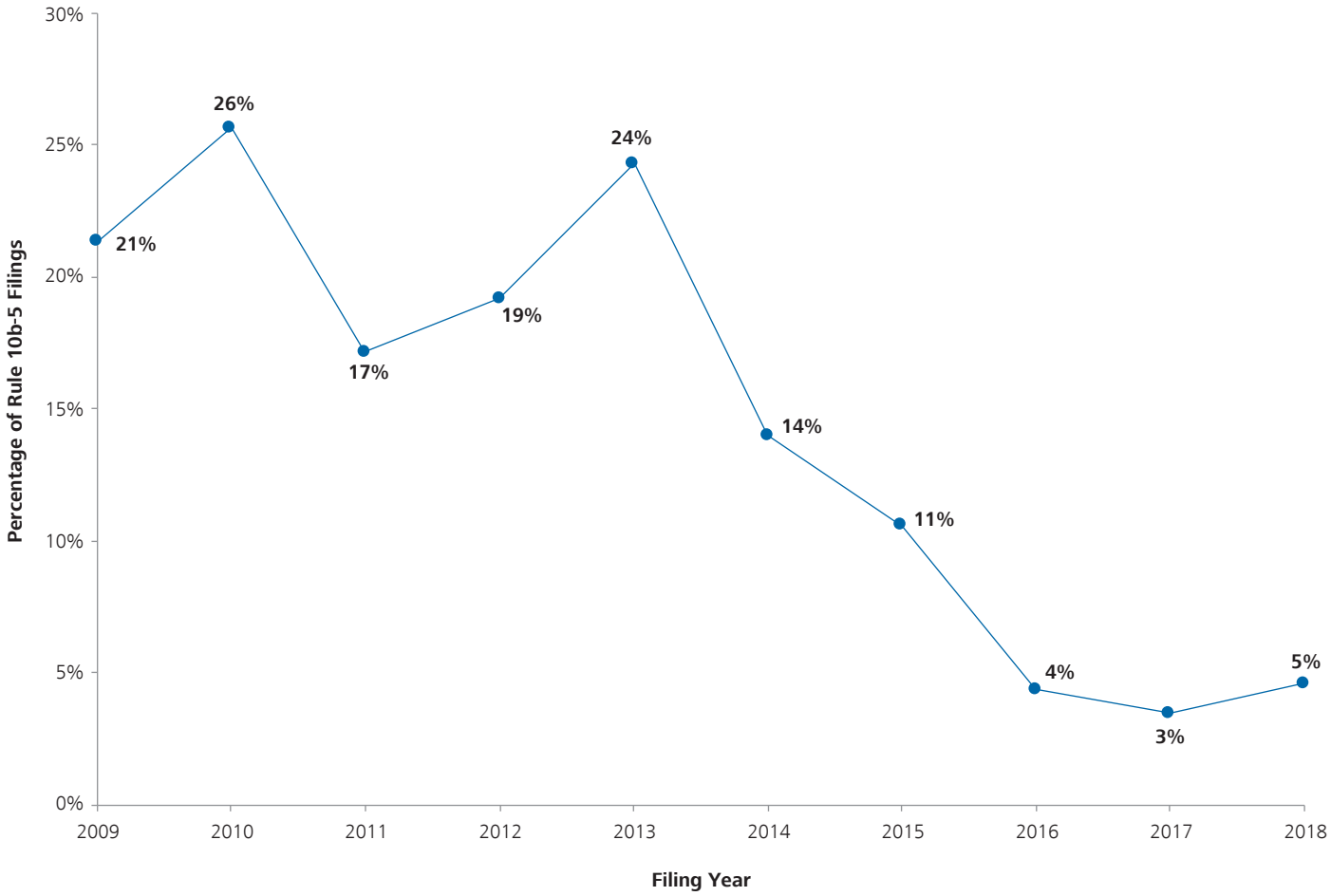


Alleged Insider Sales

Historically, Rule 10b-5 class action complaints have frequently alleged insider sales by directors and officers, usually as part of a scienter argument. Since 2013, in the wake of a multiyear crackdown on insider trading by prosecutors, the percentage of 10b-5 class actions that alleged insider sales has decreased nearly every year (see Figure 13).[18] This trend also corresponds with increased corporate adoption of 10b5-1 trading plans, allowing insiders to plan share sales while purportedly not in possession of material non-public information.[19]

Cases alleging insider sales were more common in the aftermath of the financial crisis, when a quarter of filings included insider trading claims. In 2005, half of class actions filed included such claims.

Figure 13. **Percentage of Rule 10b-5 Filings Alleging Insider Sales by Filing Year**
January 2009–December 2018



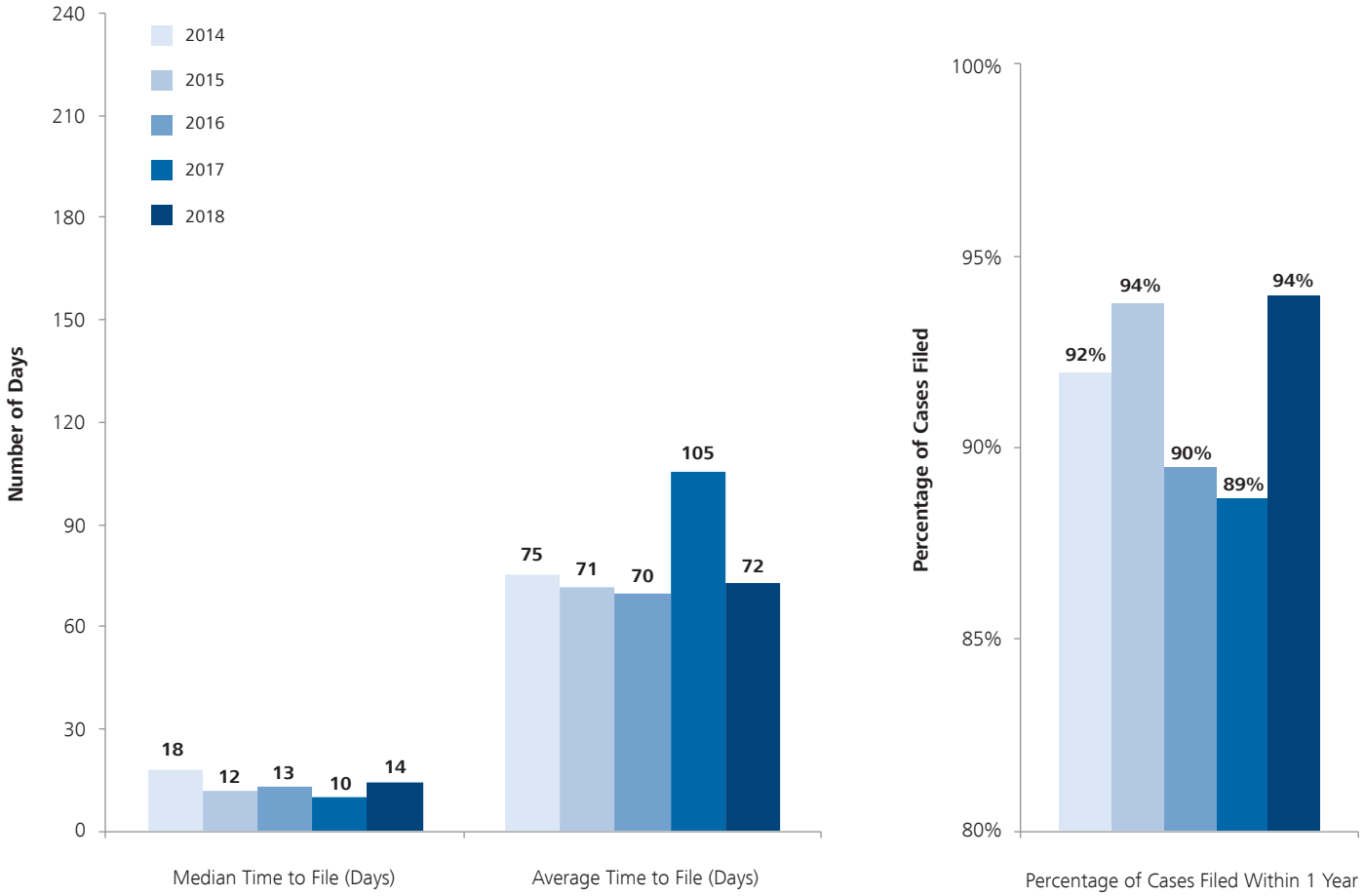
Time to File

The term "time to file" denotes the time that has elapsed between the end of the alleged class period and the filing date of the first complaint. Figure 14 illustrates how the median time and average time to file Rule 10b-5 cases (in days) have changed over the past five years.

The median time to file fell by about half over the last decade, to 14 days in 2018, indicating that it took 14 days or less to file a complaint in 50% of cases. Since the beginning of the decade, there has been a lower frequency of cases with long periods between the point when an alleged fraud was revealed and the filing of a related claim. The average time to file has followed a similar trajectory, but in 2017 was affected by 10 cases with very long filing delays. In 2017, one case against Rio Tinto, regarding the valuation of mining assets in Mozambique, took more than 4.5 years to file and boosted the average time to file by nearly 9%.[20]

Despite the small minority of cases with very long times to file, the data generally point toward a lower incidence of cases with long periods between revelations of alleged fraud and the date a related claim is filed.

Figure 14. **Time to File Rule 10b-5 Cases from End of Alleged Class Period to File Date**
January 2014–December 2018



Note: This analysis excludes cases where the alleged class period could not be unambiguously determined.

Analysis of Motions

NERA's statistical analysis has found robust relationships between settlement amounts and the stage of the litigation at which settlements occur. We track filings and decisions on three types of motions: motion to dismiss, motion for class certification, and motion for summary judgment. For this analysis, we include securities class actions in which purchasers of common stock are part of the class and in which a violation of Rule 10b-5, Section 11, and/or Section 12 is alleged (i.e., Standard cases).

As shown in the figures below, we record the status of any motion as of the resolution of the case. For example, a motion to dismiss that had been granted but was later denied on appeal is recorded as denied.

Motions for summary judgment were filed by defendants in 7.1%, and by plaintiffs in only 1.9%, of the securities class actions filed and resolved over the 2000–2018 period, among those we tracked.[21]

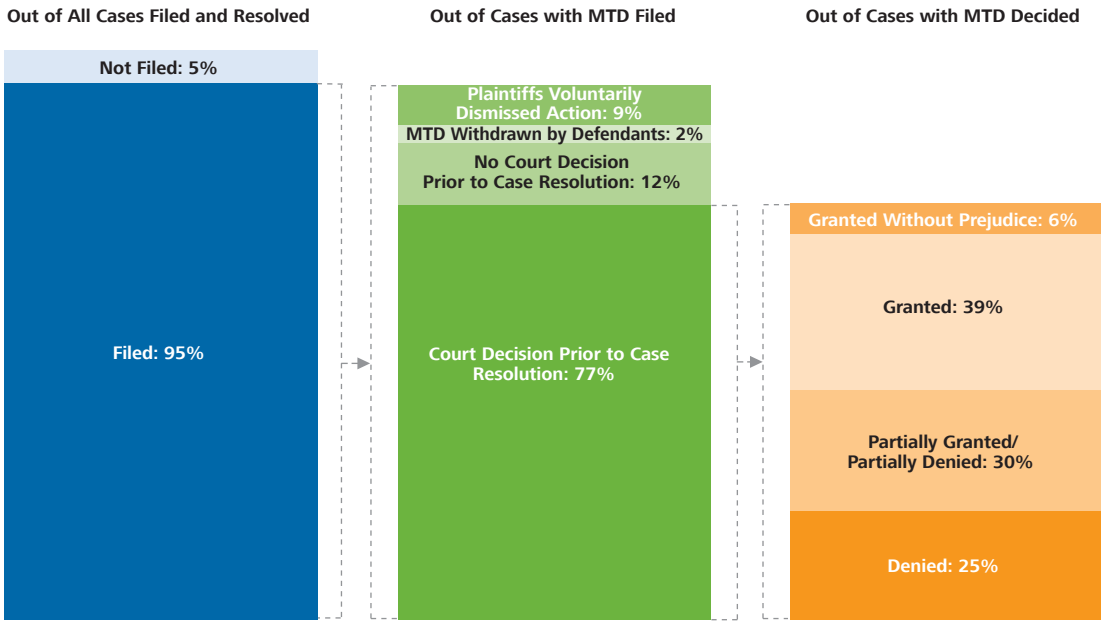
Outcomes of motions to dismiss and motions for class certification are discussed below.

Motion to Dismiss

A motion to dismiss was filed in 95% of the securities class actions tracked. However, the court reached a decision on only 77% of the motions filed. In the remaining 23% of cases, either the case resolved before a decision was reached, plaintiffs voluntarily dismissed the action, or the motion to dismiss was withdrawn by defendants (see Figure 15).

Out of the motions to dismiss for which a court decision was reached, the following three outcomes classify all of the decisions: granted with or without prejudice (45%), granted in part and denied in part (30%), and denied (25%).

Figure 15. **Filing and Resolutions of Motions to Dismiss**
Cases Filed and Resolved January 2000–December 2018



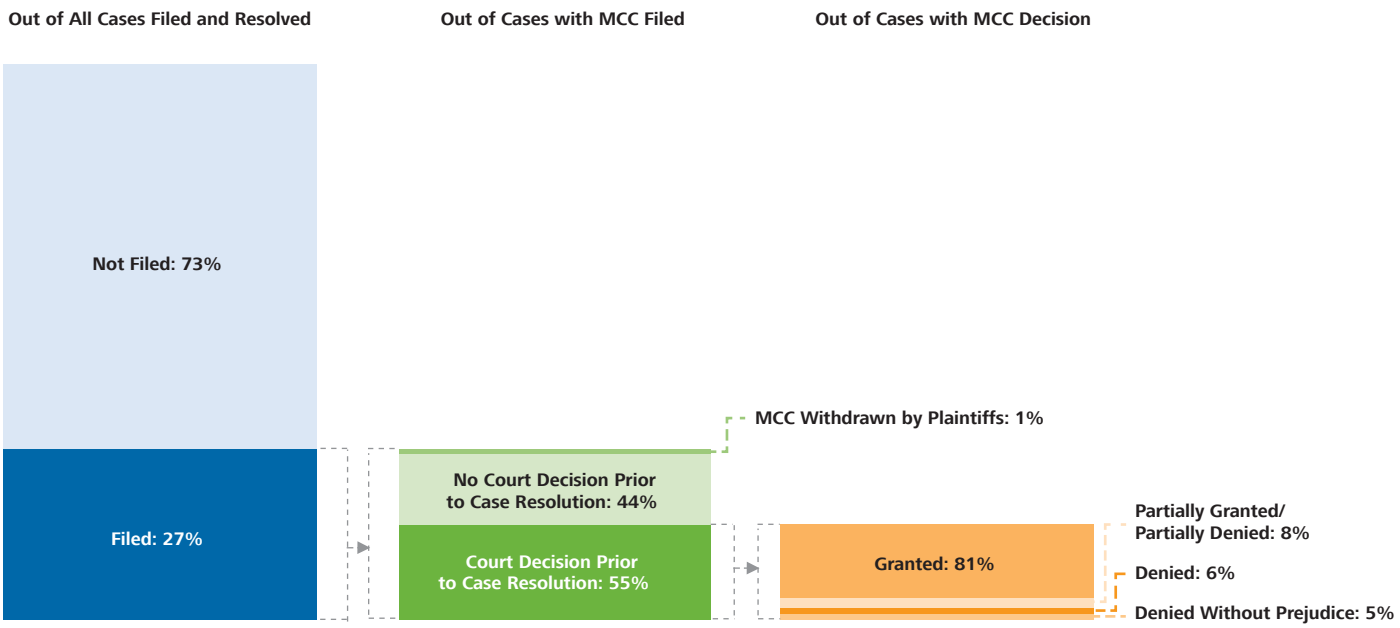
Note: Includes cases in which holders of common stock are part of the class and a Rule 10b-5, Section 11, and/or Section 12 is alleged. Excludes IPO laddering cases.

Motion for Class Certification

Most cases were settled or dismissed before a motion for class certification was filed: 73% of cases fell into this category. Of the remaining 27% (in which a motion for class certification was filed), the court reached a decision in only 55% of cases. Overall, only 15% of the securities class actions filed (or 55% of the 27%) reached a decision on the motion for class certification (see Figure 16).

According to our data, 89% of the motions for class certification that were decided were granted partially or in full.

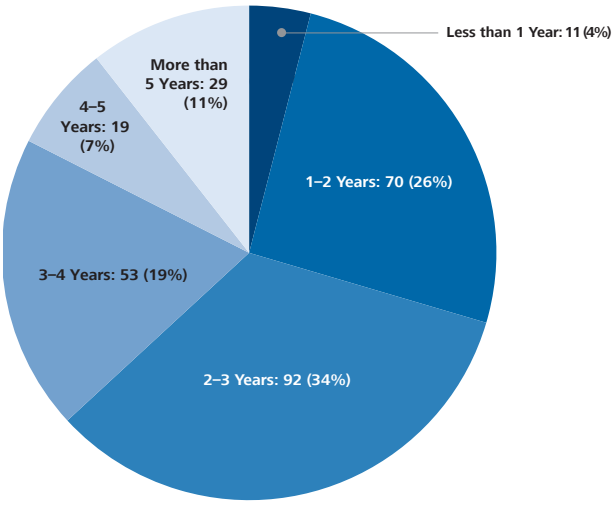
Figure 16. **Filing and Resolutions of Motions for Class Certification**
Cases Filed and Resolved January 2000–December 2018



Note: Includes cases in which holders of common stock are part of the class and a Rule 10b-5, Section 11, and/or Section 12 is alleged. Excludes IPO laddering cases.

Approximately 64% of the decisions handed down on motions for class certification were reached within three years of the complaint's original filing date (see Figure 17). The median time was about 2.5 years.

Figure 17. Time from First Complaint Filing to Class Certification Decision
Cases Filed and Resolved January 2000–December 2018



Note: Includes cases in which holders of common stock are part of the class and a 10b-5 or Rule 10b-5, Section 11, and/or Section 12 is alleged. Excludes IPO laddering cases.

Trends in Case Resolutions

Number of Cases Settled or Dismissed

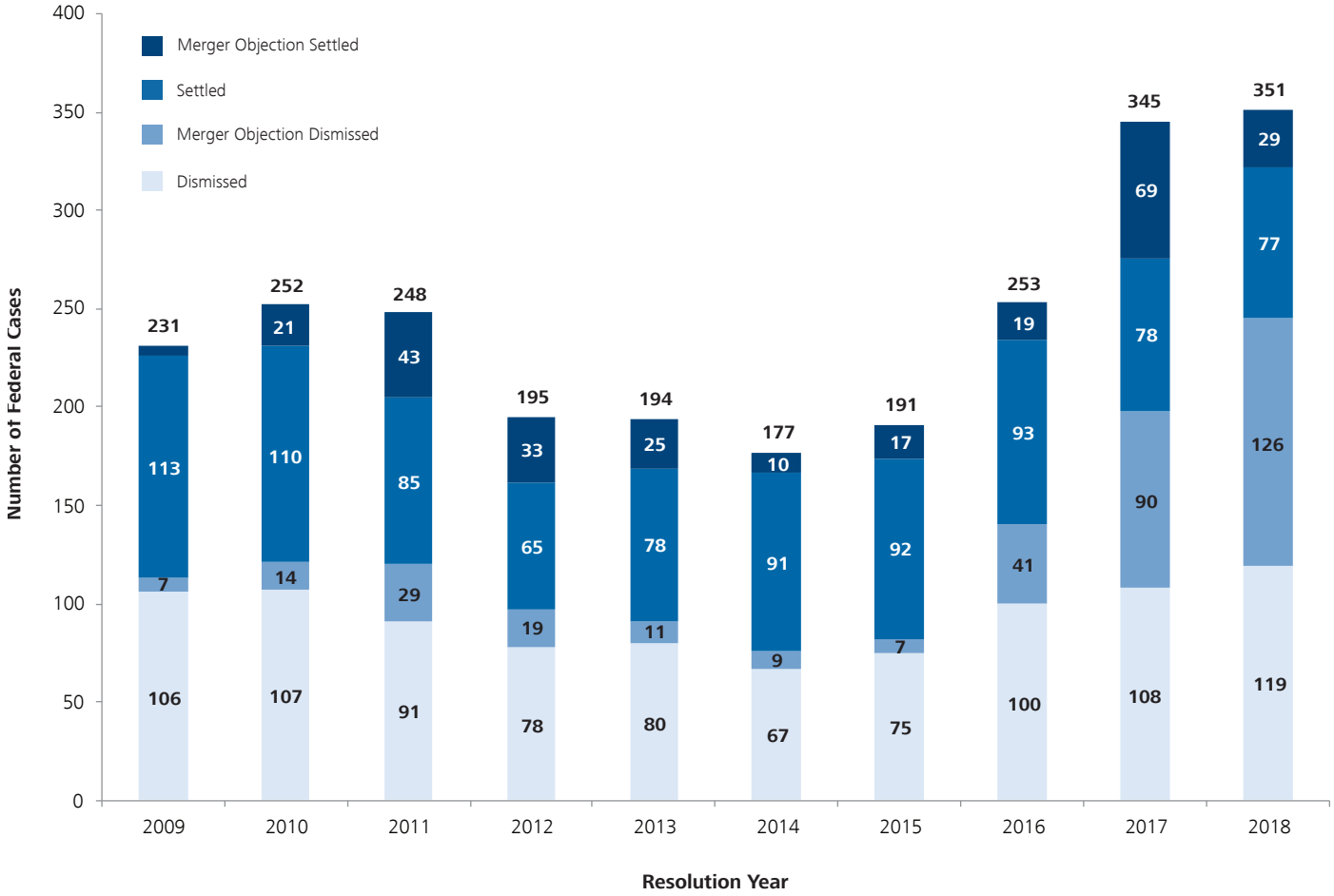
In total, 351 securities class actions were resolved in 2018, the second consecutive year in which a record number of cases concluded (see Figure 18). Resolution numbers were once again dominated by a record number of dismissals, which outnumbered settlements two-to-one for the first time.

Of the 351 resolutions, slightly less than half were resolutions of merger-objection cases (most of which were voluntarily dismissed). The uptick in resolutions over the last few years is largely due to the surge of federal merger-objection cases in the wake of the *Trulia* decision in early 2016.[22] Prior to *Trulia*, only about 13% of resolutions concerned merger-objection litigation. Merger objections had an outsized impact on resolution statistics: despite making up only about 33% of all active cases, they constituted 44% of resolutions.[23]

In 2018, 196 resolutions were of "Standard" securities class actions—those alleging violations of Rule 10b-5, Section 11, and/or Section 12. Standard settlement and dismissal counts closely matched those of 2017, and again more cases were dismissed than settled.

For the second consecutive year, an inordinate number of Standard cases were dismissed within a year of filing, most of which were voluntary dismissals. As shown in Figure 31, the decision to voluntarily dismiss litigation may change with the size of estimated damages to the class. For instance, plaintiffs may be more likely to voluntarily dismiss litigation if the price of the security at issue subsequently increases during the PSLRA bounce-back period.

Figure 18. **Number of Resolved Cases: Dismissed or Settled**
January 2009–December 2018



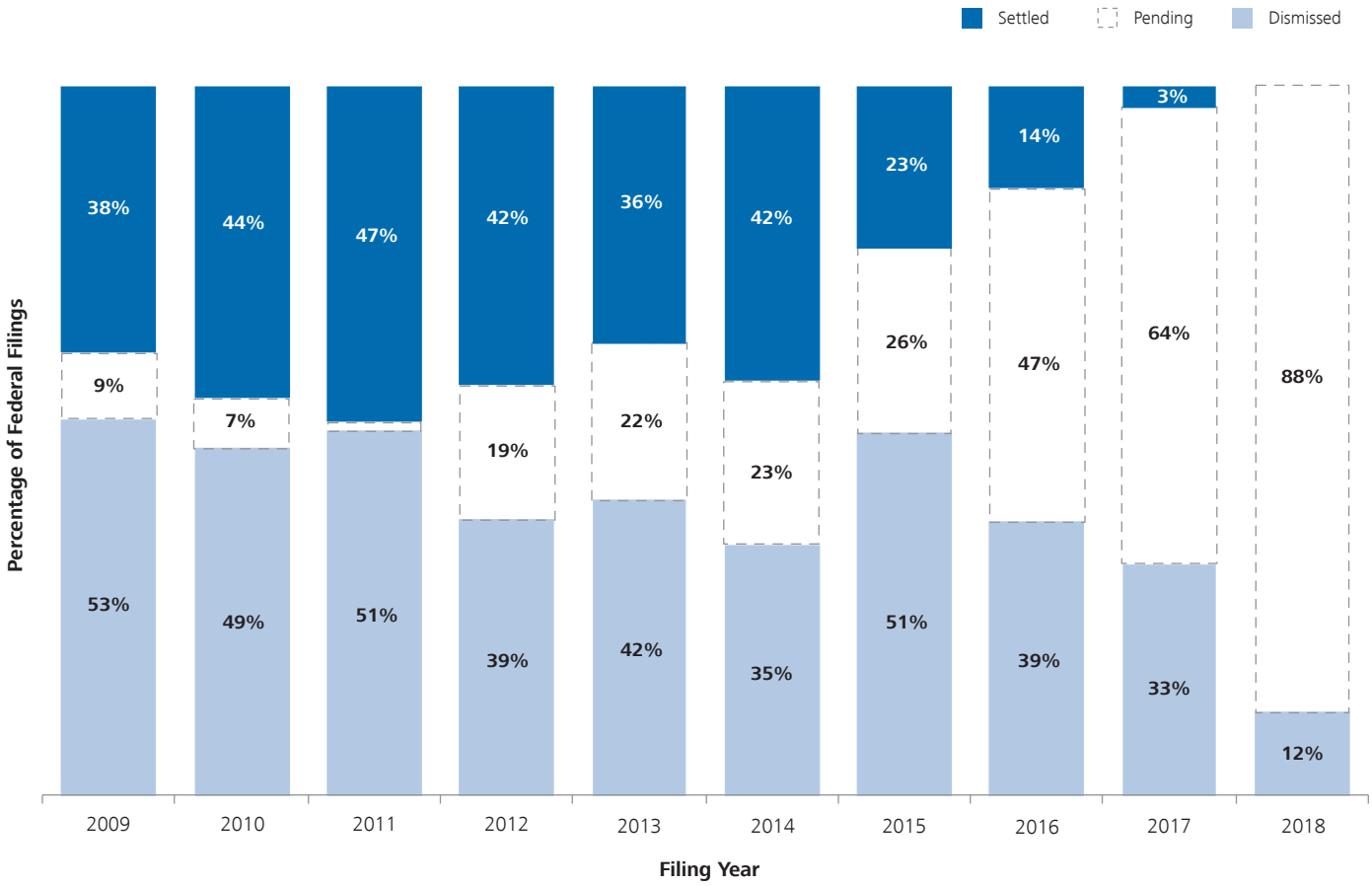
Case Status by Year

Figure 19 shows the current resolution status of cases by filing year. Each percentage represents the current resolution status of cases filed in each year as a proportion of all cases filed in that year. Merger-objection cases are excluded, as are verdicts.

Historically, more cases settled than were dismissed. However, the rate of case dismissal has steadily increased. While only about a third of cases filed between 2000 and 2002 were dismissed, in 2015, the most recent year with substantial resolution data, at least half of filed cases were dismissed.[24]

While dismissal rates have been climbing since 2000, the ultimate dismissal rate for cases filed in more recent years is less certain. On one hand, the dismissal rate may increase further, as there are more pending cases awaiting resolution. On the other hand, it may decrease because recent dismissals have more potential than older ones to be appealed or re-filed, and cases that were recently dismissed without prejudice may ultimately result in settlements.

Figure 19. **Status of Cases as Percentage of Federal Filings by Filing Year**
Excludes Merger Objections and Verdicts
January 2009–December 2018



Note: Dismissals may include dismissals without prejudice and dismissals under appeal.

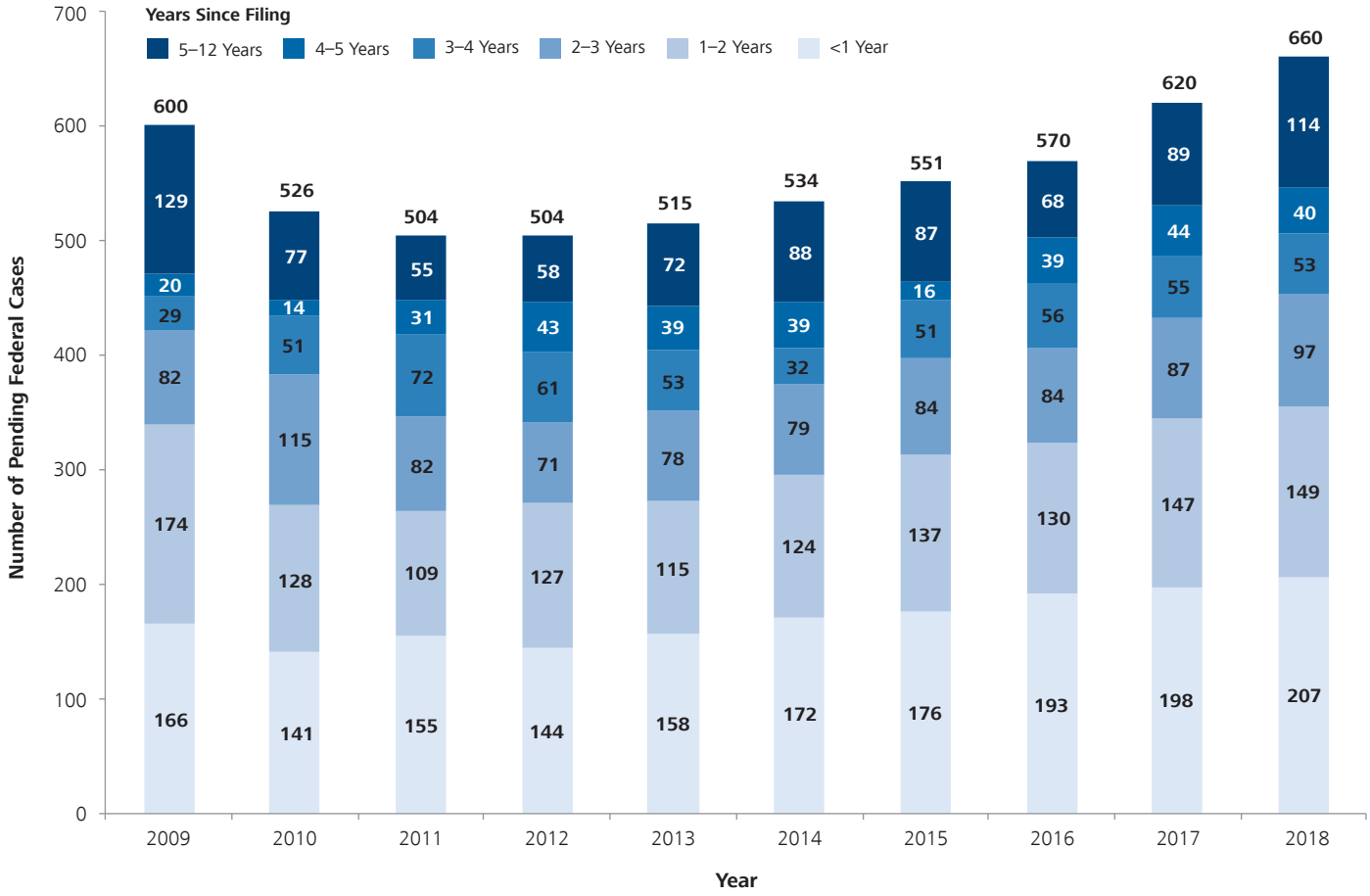
Number of Cases Pending

The number of Standard securities class actions pending in the federal system has steadily increased from a post-PSLRA low of 504 in 2012 (see Figure 20).[25] Since then, pending case counts have increased between 2% and 9% annually. In 2018, the number of pending Standard cases on federal dockets increased to 660, up 6% from 2017 and 31% from 2012.

Generally, since cases are either pending or resolved, a change in filing rate or a lengthening of the time to case resolution potentially contributes to changes in the number of cases pending. If the number of new filings is constant, the change in the number of pending cases can be indicative of whether the time to case resolution is generally shortening or lengthening.

About 50% of the long-term growth in pending litigation can be explained by recent filing growth (filed over the past two years), the vast majority of which is simply due to more cases being filed that have yet to be resolved. Delayed resolution of older filings (i.e., cases filed before 2017) explains the other 50% or so of growth in pending litigation since 2011. More old cases on federal dockets has driven the median age of pending cases up 14% since 2015 to about 1.9 years, the highest since 2010.[26]

Figure 20. **Number of Pending Federal Cases**
Excludes Merger Objections
January 2009–December 2018



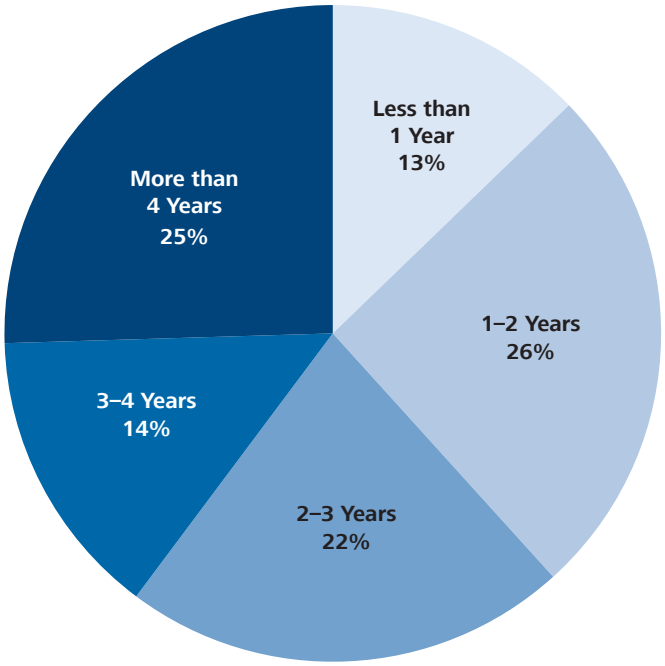
Note: The figure excludes, in each year, cases that had been filed more than 12 years earlier. Years since filing are end-of-year calculations. The figure also excludes IPO laddering cases. The 12-year limit ensure that all pending cases were filed post-PSLRA.

Time to Resolution

The term "time to resolution" denotes the time between the filing of the first complaint and resolution (whether through settlement or dismissal). Figure 21 illustrates the time to resolution for all securities class actions filed between 2001 and 2014, and shows that about 39% of cases are resolved within two years of initial filing and about 61% are resolved within three years.[27]

The median time to resolution for cases filed in 2016 (the last year with sufficient resolution data) was 2.3 years, similar to the range over the preceding five years. Over the past decade, the median time to resolution declined by more than 10%, primarily due to an increase in the dismissal rate (dismissals are generally resolved faster than settlements).

Figure 21. **Time from First Complaint Filing to Resolution**
Cases Filed January 2001–December 2014



Trends in Settlements

We present several settlement metrics to highlight attributes of cases that settled in 2018 and to compare them with cases settled in past years. We discuss two ways of measuring average settlement amounts and calculate the median settlement amount. Each calculation excludes merger-objection cases and cases that settle with no cash payment to the class, as settlements of such cases may obscure trends in what have historically been more typical cases.

In 2018, the average settlement rebounded to $69 million from a near-record low in 2017, largely due to the $3 billion settlement involving Petróleo Brasileiro S.A.—Petrobras, the fifth-highest settlement ever. Even excluding Petrobras (the only settlement of the year exceeding $1 billion), the average settlement exceeded $30 million, which is about average in the post-PSLRA era (after adjusting for inflation). The median settlement in 2018 was more than twice that of 2017, primarily due to higher settlements of many moderately sized cases and, generally, fewer very small settlements.

The upswing in 2018 settlement metrics may be a prelude to higher settlements in the future. Aggregate NERA-defined Investor Losses of pending cases, a factor that has historically been significantly correlated with settlement amounts, increased for the third consecutive year and currently exceeds $1.4 trillion (or $1.1 trillion excluding 2018 litigation against GE). Excluding GE, average Investor Losses of pending Standard cases have also increased for the third consecutive year to $2.4 billion, but have receded from a 10-year high of $3.8 billion in 2011.

To illustrate how many cases settled over various ranges in 2017 compared with prior years, we provide a distribution of settlements over the past five years. We also tabulated the 10 largest settlements of the year.

Average and Median Settlement Amounts

The average settlement exceeded $69 million in 2018, somewhat less than three times the $25 million average settlement in 2017 (see Figure 22). Infrequent large settlements, such as the 2018 Petrobras settlement, are generally responsible for the wide variability in average settlements over the past decade. Similar spikes to the one observed this year were also seen in 2010, 2013, and 2016, each primarily stemming from mega-settlements.

Figure 22. **Average Settlement Value**
Excludes Merger Objections and Settlements for $0 to the Class
January 2009–December 2018

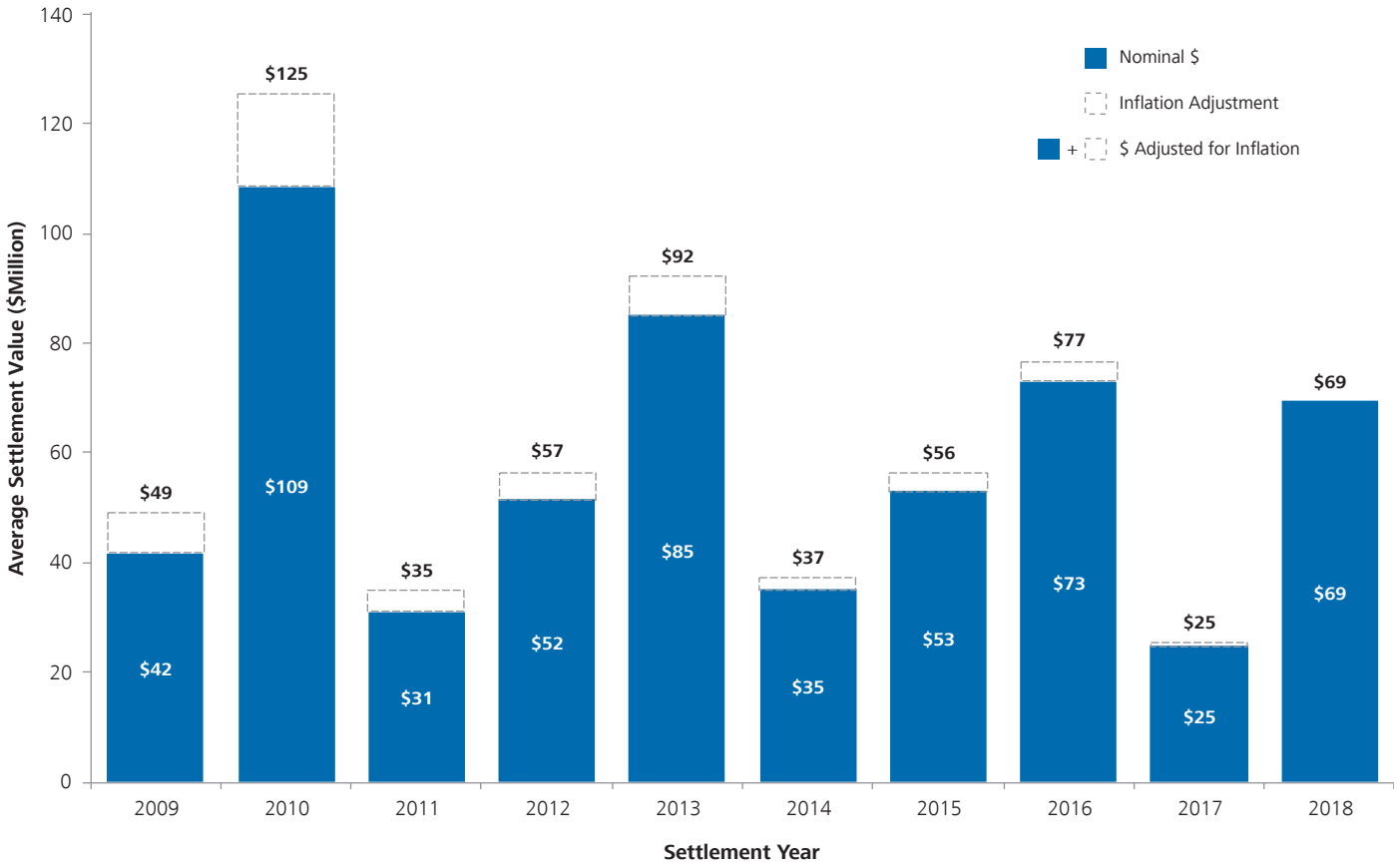
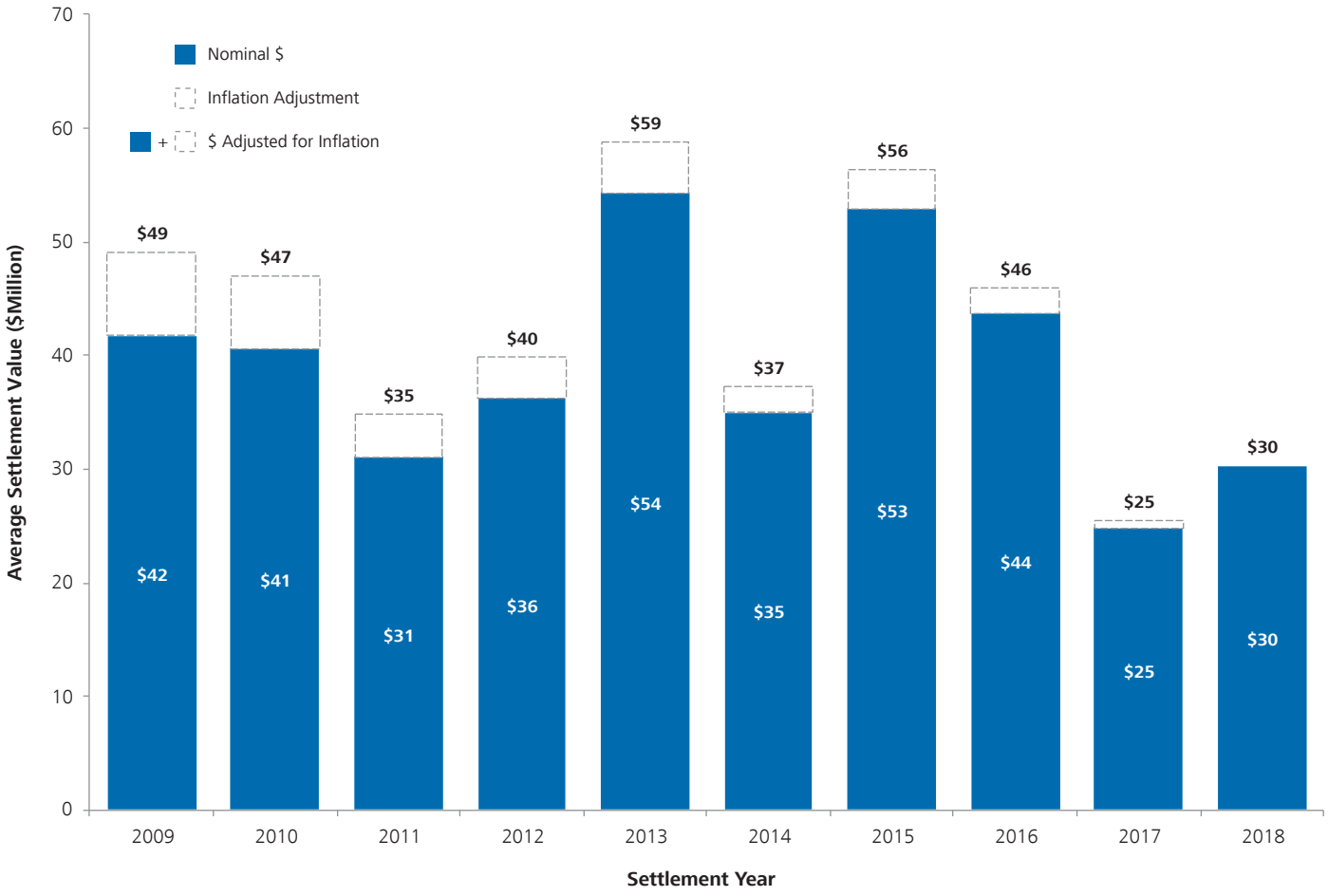


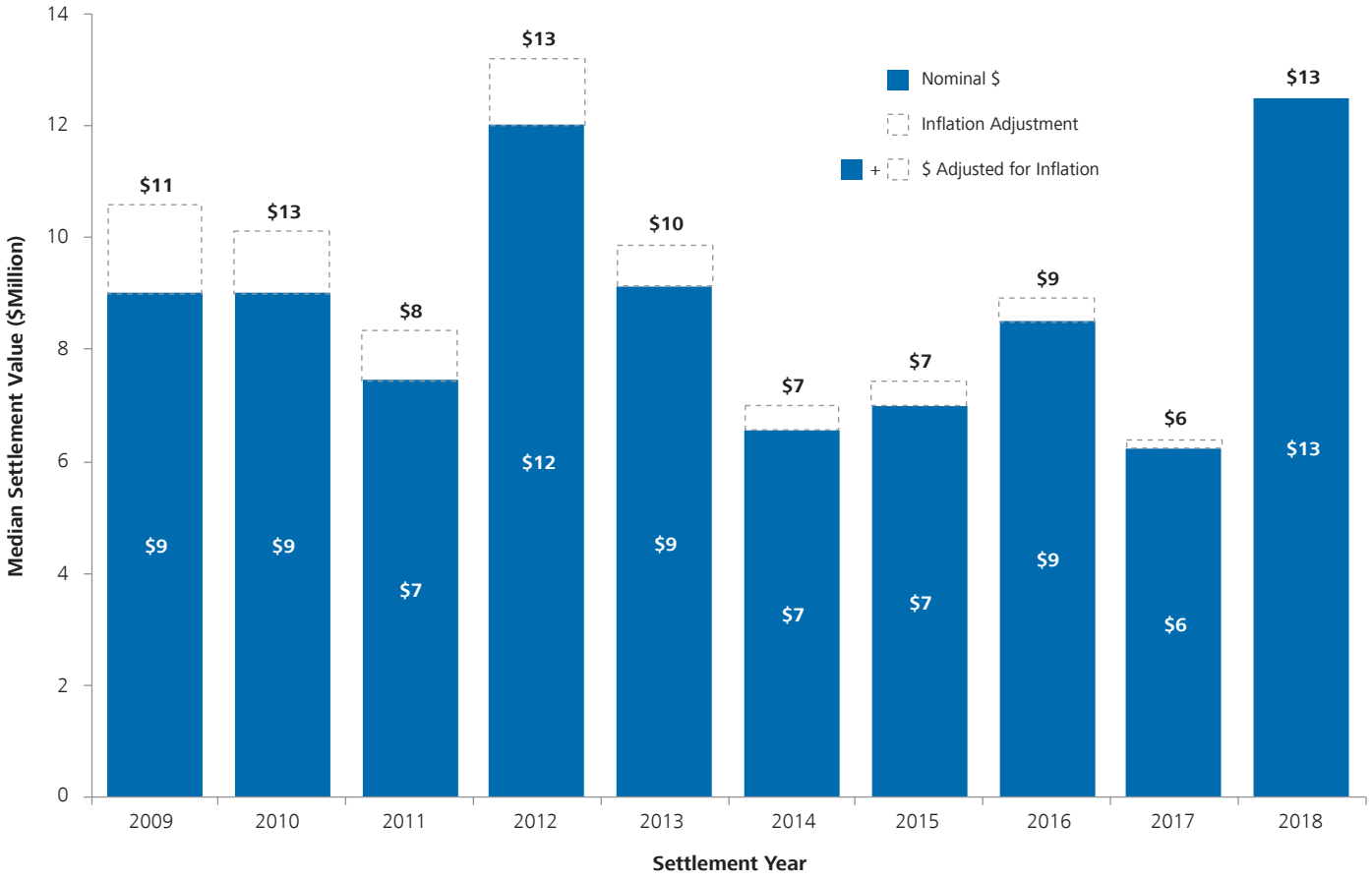
Figure 23 illustrates that, excluding settlements over $1 billion, the average settlement rebounded from the record low seen in 2017 to $30 million. Despite this rebound, and setting aside the $3 billion Petrobras settlement, the 2018 average settlement remained below average compared to the past decade. The metric would have roughly matched the near-record low seen in 2017 but for the $480 million Wells Fargo settlement that was finalized in mid-December 2018.

Figure 23. **Average Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2009–December 2018



The 2018 median settlement was a near-record $13 million. This was driven primarily by relatively high settlements of moderately sized cases (as measured by NERA-defined Investor Losses). Cases of moderate size not only made up the bulk of settlements in 2018 but also had a median ratio of settlement to Investor Losses more than 50% higher than in past years. Moreover, unlike 2017, there were generally few very small settlements.

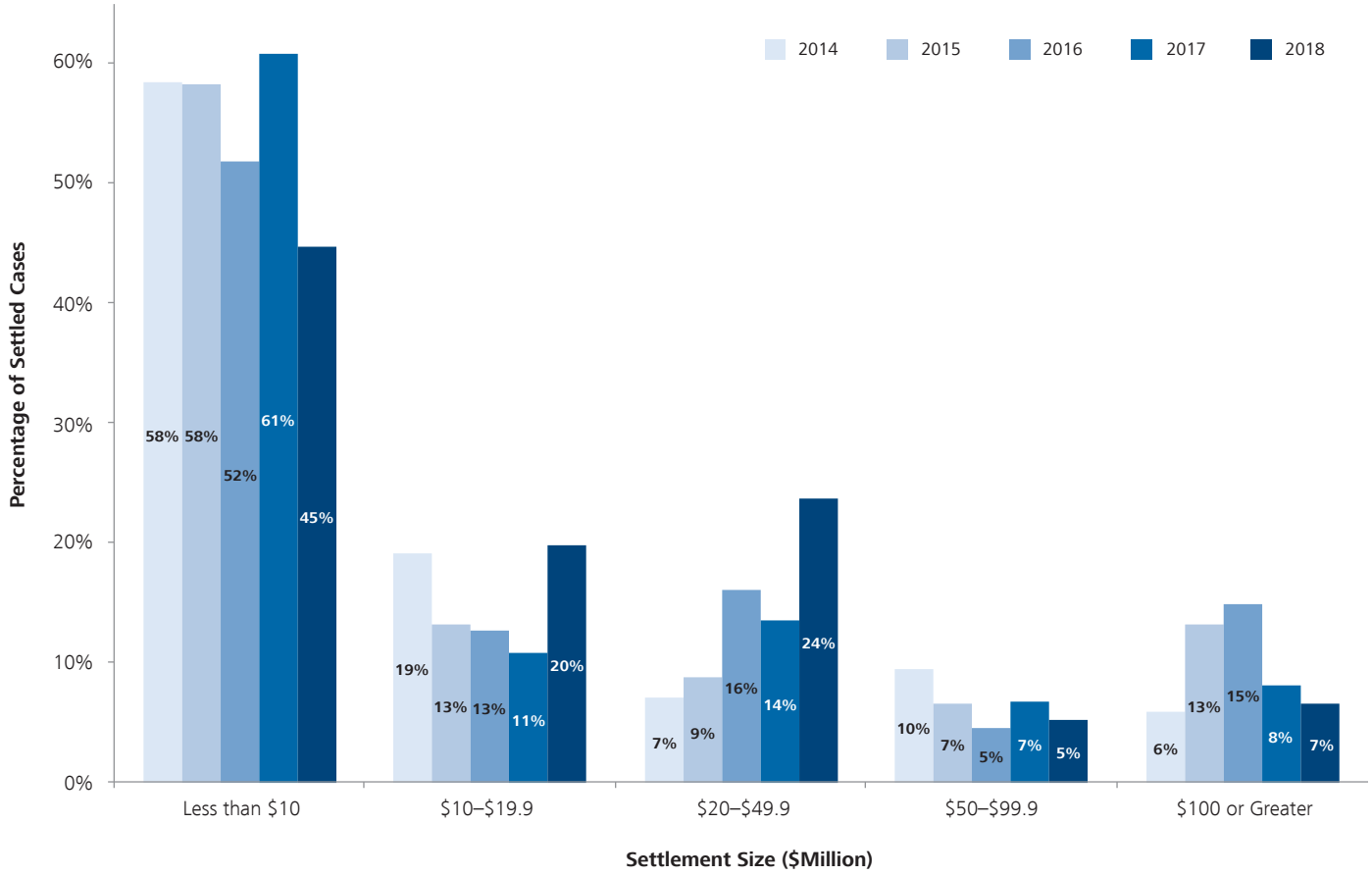
Figure 24. **Median Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2009–December 2018



Distribution of Settlement Amounts

The relatively high settlements of moderately sized cases in 2018 are also captured in the distribution of settlement values (see Figure 25). In 2018, fewer than 45% of settlements were for less than $10 million (the lowest rate since 2010), which stands in stark contrast with 2017, when more than 60% of settlements were in the smallest strata (the highest rate since 2011).

Figure 25. **Distribution of Settlement Values**
Excludes Merger Objections and Settlements for $0 to the Class
January 2014–December 2018



The 10 Largest Settlements of Securities Class Actions of 2018

The 10 largest securities class action settlements of 2018 are shown in Table 1. The two largest settlements, against Petrobras and Wells Fargo & Company, are among many large regulatory cases filed in recent years. Three of the 10 largest settlements involved defendants in the Finance sector. Overall, these 10 cases accounted for about $4.4 billion in settlement value, a near-record 84% of the $5.3 billion in aggregate settlements.

Despite the size of the Petrobras settlement, it is not even half the size of the second-largest settlement since passage of the PSLRA, WorldCom, Inc., at $6.2 billion (see Table 2).

Table 1. **Top 10 2018 Securities Class Action Settlements**

Ranking	Case Name	Total Settlement Value ($Million)	Plaintiffs' Attorneys' Fees and Expenses Value ($Million)
1	Petróleo Brasileiro S.A.—Petrobras (2014)	$3,000.0	$205.0
2	Wells Fargo & Company (2016)	$480.0	$96.4
3	Allergan, Inc.	$290.0	$71.0
4	Wilmington Trust Corporation	$210.0	$66.3
5	LendingClub Corporation	$125.0	$16.8
6	Yahoo! Inc. (2017)	$80.0	$14.8
7	SunEdison, Inc.	$73.9	$19.0
8	Marvell Technology Group Ltd. (2015)	$72.5	$14.1
9	3D Systems Corporation	$50.0	$15.5
10	Medtronic, Inc. (2013)	$43.0	$8.6
	Total	**$4,424.4**	**$527.4**

Table 2. **Top 10 Securities Class Action Settlements**
As of 31 December 2018

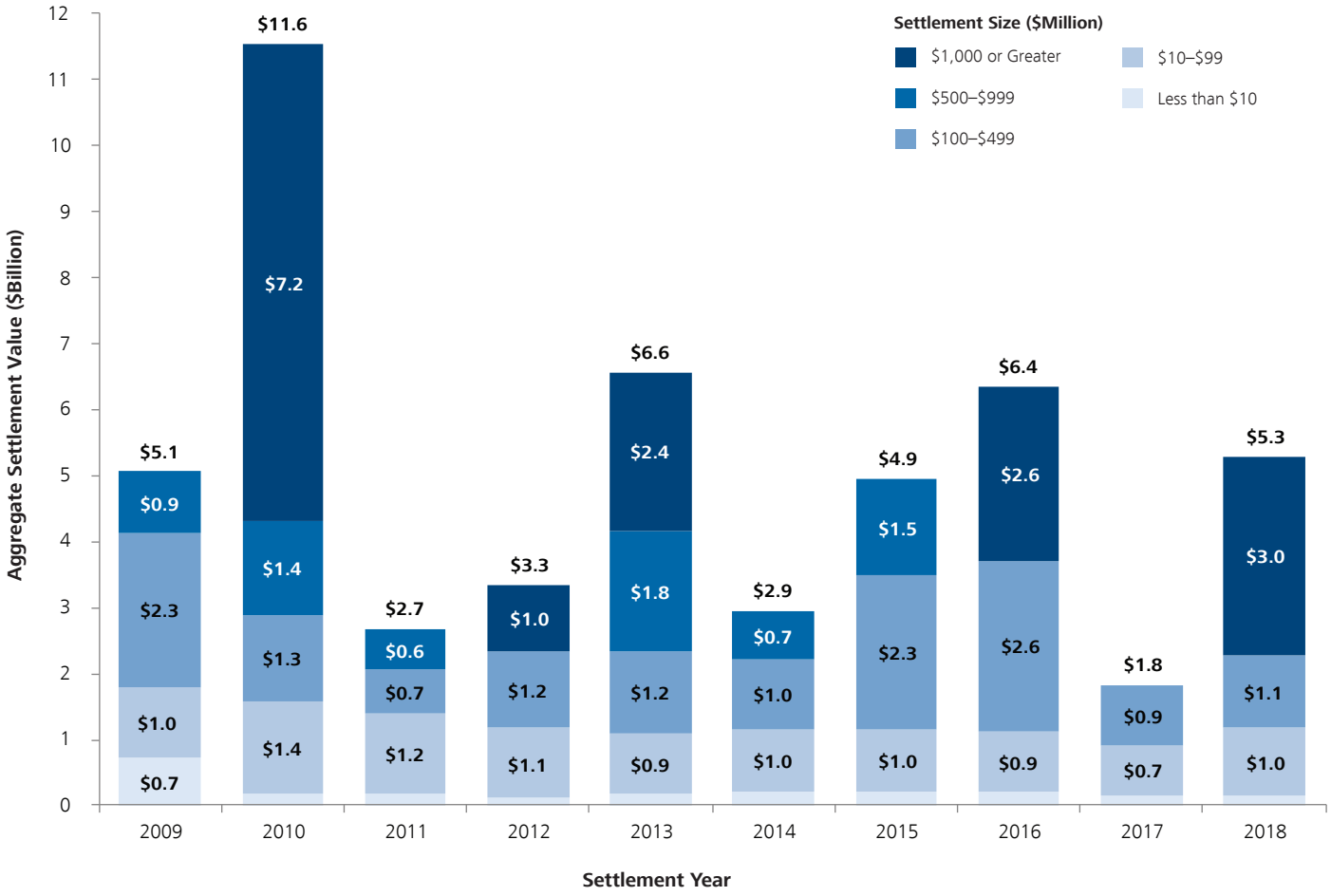
Ranking	Defendant	Settlement Year(s)	Total Settlement Value ($Million)	Codefendant Settlements		Plaintiffs' Attorneys' Fees and Expenses Value ($Million)
				Financial Institutions Value ($Million)	Accounting Firms Value ($Million)	
1	ENRON Corp.	2003–2010	$7,242	$6,903	$73	$798
2	WorldCom, Inc.	2004–2005	$6,196	$6,004	$103	$530
3	Cendant Corp.	2000	$3,692	$342	$467	$324
4	Tyco International, Ltd.	2007	$3,200	No codefendant	$225	$493
5	Petróleo Brasileiro S.A.—Petrobras	2018	$3,000	$0	$50	$205
6	AOL Time Warner Inc.	2006	$2,650	No codefendant	$100	$151
7	Bank of America Corp.	2013	$2,425	No codefendant	No codefendant	$177
8	Household International, Inc.	2006–2016	$1,577	Dimissed	Dismissed	$427
9	Nortel Networks (I)	2006	$1,143	No codefendant	$0	$94
10	Royal Ahold, NV	2006	$1,100	$0	$0	$170
	Total		**$32,224**	**$13,249**	**$1,017**	**$3,368**

Aggregate Settlements

We use the term "aggregate settlements" to denote the total amount of money to be paid to settle litigation by (non-dismissed) defendants based on the court-approved settlements during a year.

Aggregate settlements rebounded to nearly $5.3 billion in 2018, more than double the 2017 total (see Figure 26). More than 80% of the growth stems from the $3.0 billion Petrobras settlement. Excluding Petrobras and Wells Fargo, aggregate settlements are near the 2017 record low, reflecting a persistent slowdown in overall settlement activity.

Figure 26. **Aggregate Settlement Value by Settlement Size**
January 2009–December 2018



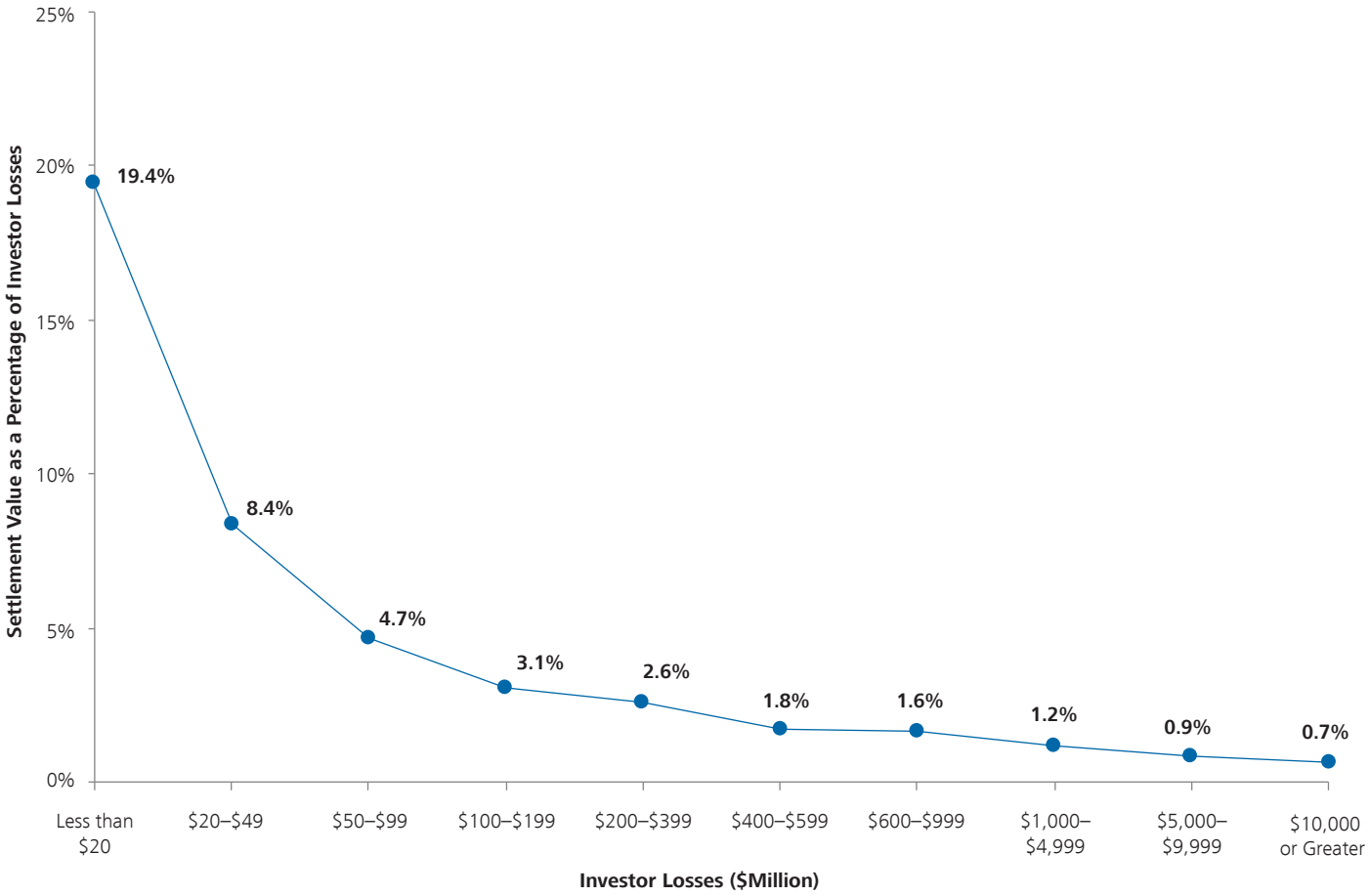
NERA-Defined Investor Losses vs. Settlements

As noted above, our proxy for case size, NERA-defined Investor Losses, is a measure of the aggregate amount investors lost from buying the defendant's stock rather than investing in the broader market during the alleged class period.

In general, settlement size grows as NERA-defined Investor Losses grow, but the relationship is not linear. Based on our analysis of data from 1996 to 2018, settlement size grows less than proportionately with Investor Losses. In particular, small cases typically settle for a higher fraction of Investor Losses (i.e., more cents on the dollar) than larger cases. For example, the ratio of settlement to Investor Loss for the median case was 19.4% for cases with Investor Losses of less than $20 million, while it was 0.7% for cases with Investor Losses over $10 billion (see Figure 27).

Our findings about the ratio of settlement amount to NERA-defined Investor Losses should not be interpreted as the share of damages recovered in settlement, but rather as the recovery compared to a rough measure of the "size" of the case. Notably, the percentages given here apply *only* to NERA-defined Investor Losses. Using a different definition of investor losses would result in a different ratio. Also, the use of the ratio alone to forecast the likely settlement amount would be inferior to a proper all-encompassing analysis of the various characteristics shown to impact settlement amounts, as discussed in the section *Explaining Settlement Values*.

Figure 27. **Median of Settlement Value as a Percentage of NERA-Defined Investor Losses by Level of Investor Losses**
Excludes Settlements for $0 to the Class
January 1996–December 2018

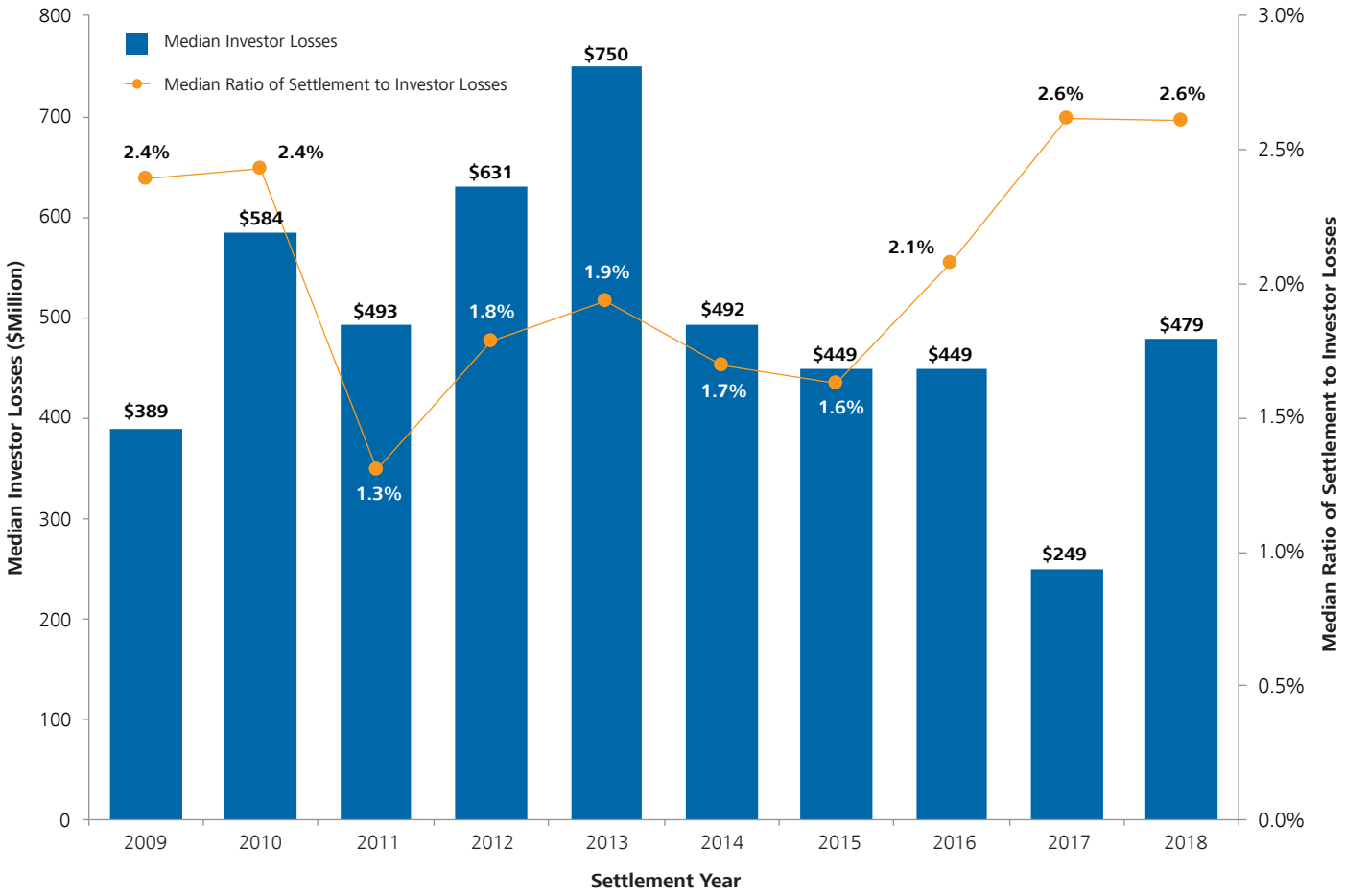


Median NERA-Defined Investor Losses over Time

Prior to 2014, median NERA-defined Investor Losses for settled cases had been on an upward trajectory since the passage of the PSLRA. As described above, the median ratio of settlement size to Investor Losses generally decreases as Investor Losses increase. Over time, the increase in median Investor Losses coincided with a decreasing trend in the median ratio of settlement to Investor Losses. Of course, there are also year-to-year fluctuations.

As shown in Figure 28, the median ratio of settlements to NERA-defined Investor Losses was 2.6% in 2018. This was the third consecutive year of at least a short-term reversal of a long-term downtrend of the ratio between passage of the PSLRA and 2015.

Figure 28. **Median NERA-Defined Investor Losses and Median Ratio of Settlement to Investor Losses by Settlement Year**
January 2009–December 2018



Explaining Settlement Amounts

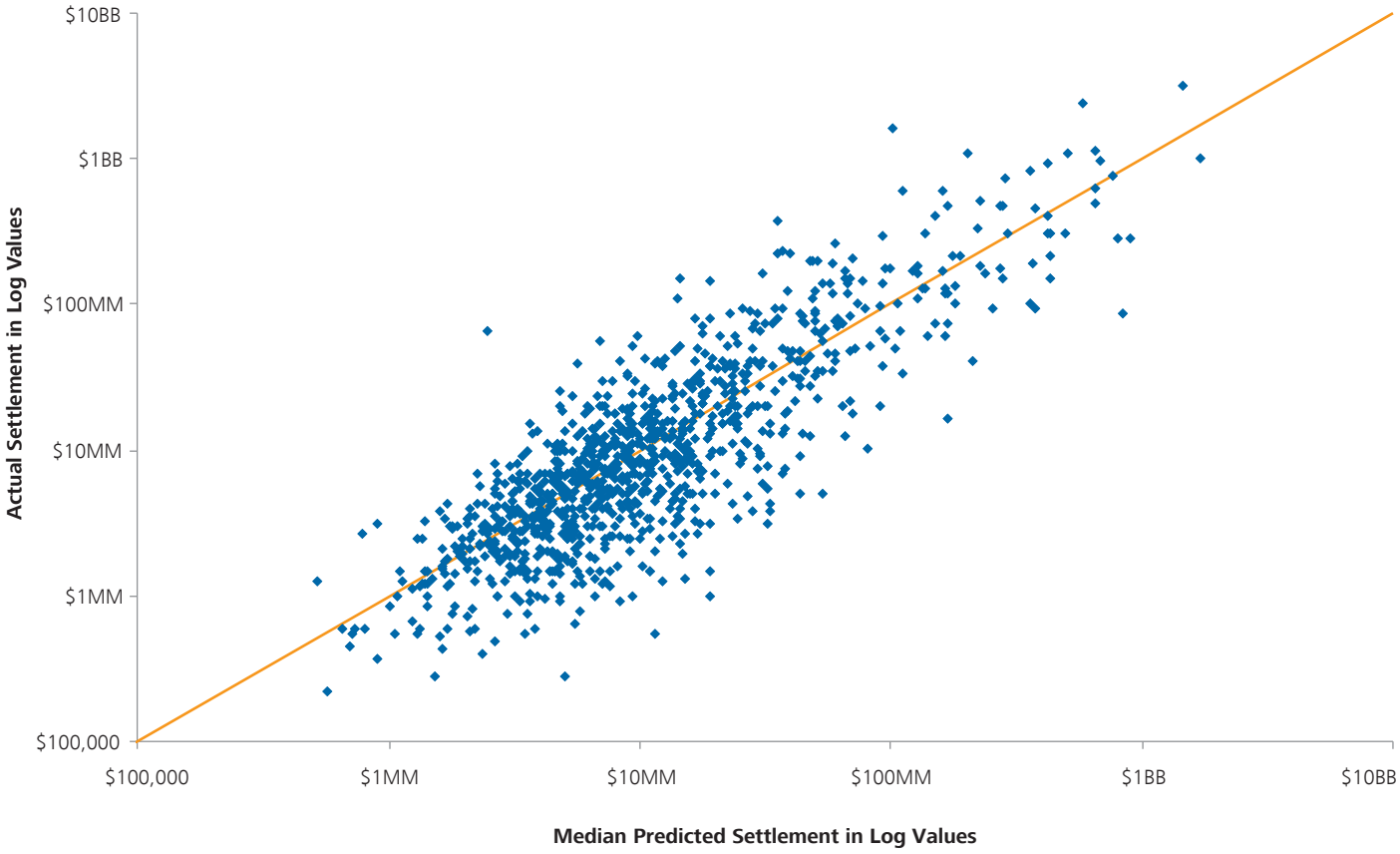
The historical relationship between case attributes and other case- and industry-specific factors can be used to measure the factors correlated with settlement amounts. NERA has examined settlements in more than 1,000 securities class actions and identified key drivers of settlement amounts, many of which have been summarized in this report.

Generally, we find that the following factors have historically been significantly correlated with settlements:

- NERA-defined Investor Losses (a proxy for the size of the case);
- The market capitalization of the issuer;
- Types of securities alleged to have been affected by the fraud;
- Variables that serve as a proxy for the "merit" of plaintiffs' allegations (such as whether the company has already been sanctioned by a governmental or regulatory agency or paid a fine in connection with the allegations);
- Admitted accounting irregularities or restated financial statements;
- The existence of a parallel derivative litigation; and
- An institution or public pension fund as lead plaintiff.

Together, these characteristics and others explain most of the variation in settlement amounts, as illustrated in Figure 29.[28]

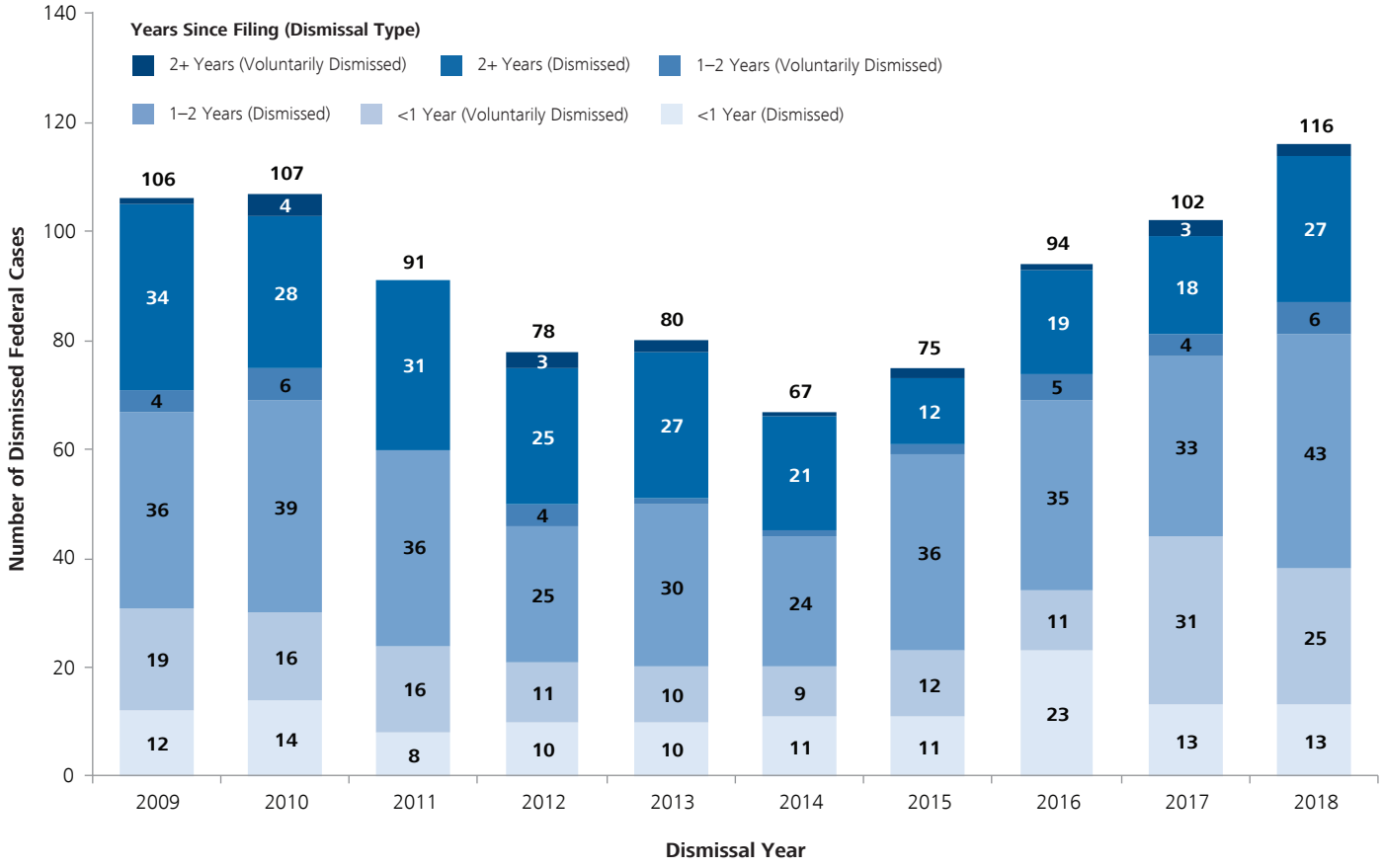
Figure 29. **Predicted vs. Actual Settlements**



Trends in Dismissals

The elevated rate of case dismissal persisted in 2018 (excluding merger objections), with more than 100 dismissals for the second consecutive year (see Figure 30). This partially stems from more cases being filed over the past couple of years, as 75% of dismissals are of cases less than two years old. Additionally, there were 25 voluntary dismissals within a year of filing, an elevated rate for the second year in a row.

Figure 30. **Number of Dismissed Cases by Case Age**
Excludes Merger Objections
January 2009–December 2018



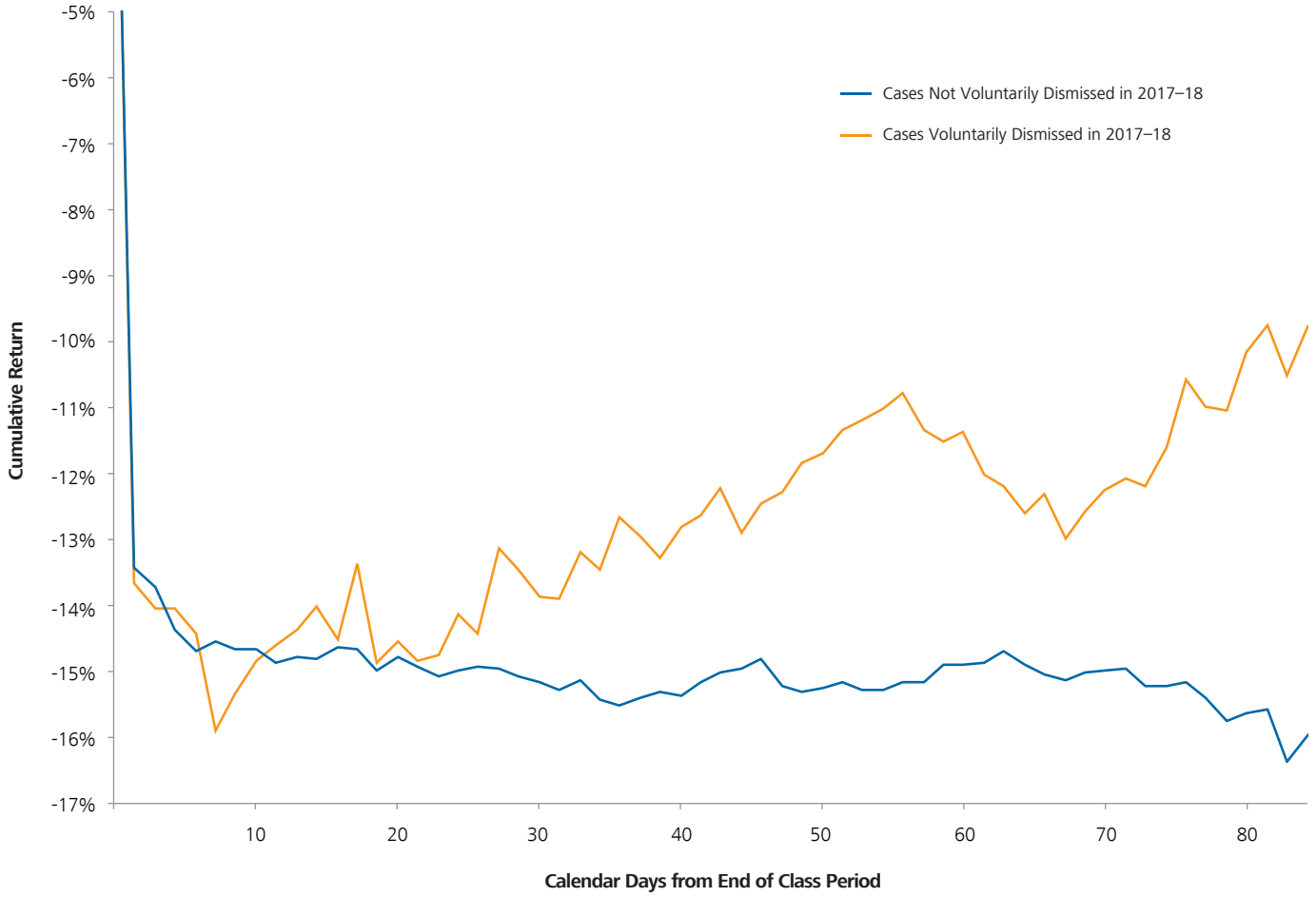
In 2018, about 12% of Standard cases were filed and resolved within the same calendar year, the second-highest rate in at least a decade (after 2017). By the end of the year, 8% of cases were voluntarily dismissed (down from 11% in 2017, but double the 2012–2016 average). Plaintiffs' voluntary dismissal of a case may be a result of perceived case weakness or changes in financial incentives. Recent research also documented forum selection by plaintiffs as a driver of voluntary dismissal without prejudice.[29]

The incentive for plaintiffs (and/or their counsel) to proceed with litigation may change with estimated damages to the class and expected recoveries since filing. For instance, the PSLRA 90-day bounce-back provision caps the award of damages to plaintiffs by the difference between the purchase price of a security and the mean trading price of the security during the 90-day period beginning on the date of the alleged corrective disclosure.

Since most securities class actions are filed well before the end of the bounce-back period (see Figure 14 for time-to-file metrics), plaintiffs may be more likely to voluntarily dismiss litigation if the price of the security at issue subsequently increases. As shown in Figure 31, in 2017 and 2018, the 90-day return of securities underlying cases voluntarily dismissed was about seven percentage points greater, on average, than securities underlying cases not voluntarily dismissed.[30]

The rate of voluntary dismissals was not particularly concentrated in terms of jurisdiction or the specific allegations we track.

Figure 31. **Average PSLRA Bounce-Back Period Returns of Voluntary Dismissals**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, or Section 12
January 2017–December 2018



Note: To control for the impact of outliers on the average of each group, for each day the most extreme 5% of cumulative returns are dropped. Observations on the three final trading days of the bounce-back period for each category are dropped due to incomplete return data.

Trends in Attorneys' Fees

Plaintiffs' Attorneys' Fees and Expenses

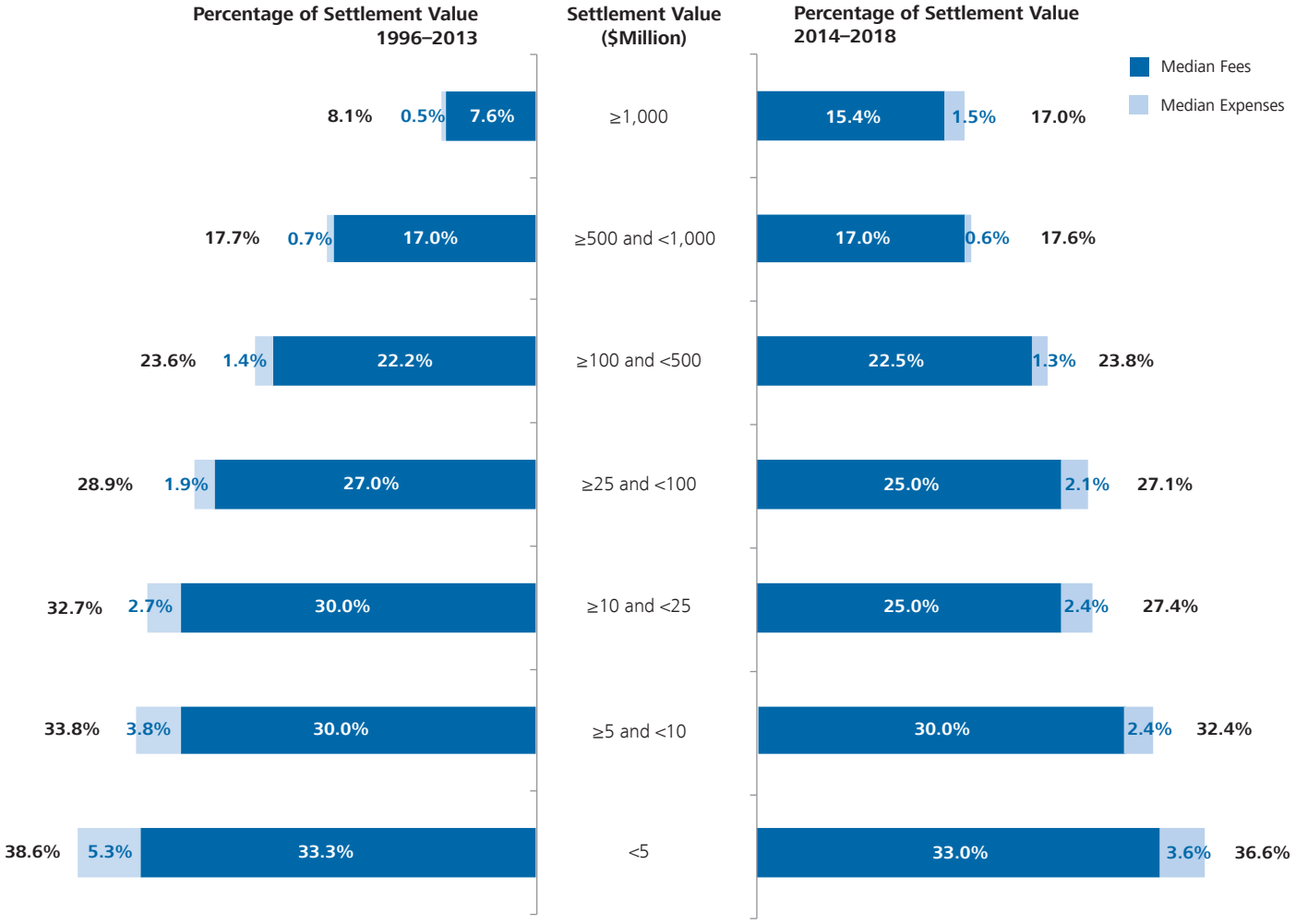
Usually, plaintiffs' attorneys' remuneration is determined as a fraction of any settlement amount in the form of fees, plus expenses. Figure 32 depicts plaintiffs' attorneys' fees and expenses as a proportion of settlement values over ranges of settlement amounts. The data shown in this figure excludes settlements for merger-objection cases and cases with no cash payment to the class.

A strong pattern is evident in Figure 32; typically, fees grow with settlement size, but less than proportionally (i.e., the fee percentage shrinks as the settlement size grows).

To illustrate that the fee percentage typically shrinks as settlement size grows, we grouped settlements by settlement value and reported the median fee percentage for each group. While fees are stable at around 30% of settlement values for settlements below $10 million, this percentage declines as settlement size increases.

We also observe that fee percentages have been decreasing over time, except for fees awarded on very large settlements. For settlements above $1 billion, fee rates have increased.

Figure 32. **Median of Plaintiffs' Attorneys' Fees and Expenses by Size of Settlement**
Excludes Merger Objections and Settlements for $0 to the Class



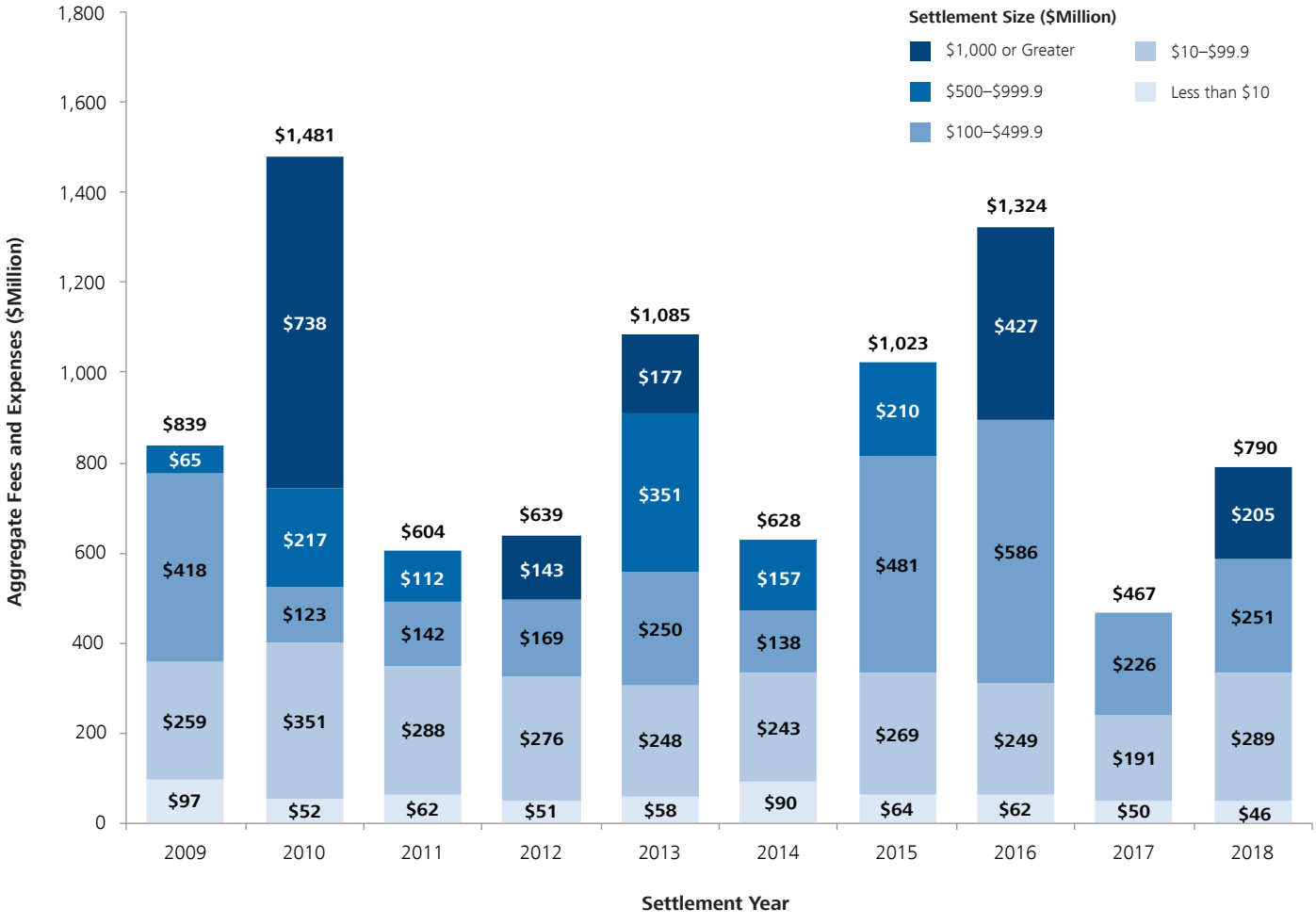
Aggregate Plaintiffs' Attorneys' Fees and Expenses

Aggregate plaintiffs' attorneys' fees and expenses are the sum of all fees and expenses received by plaintiffs' attorneys for all securities class actions that receive judicial approval in a given year.

In 2018, aggregate plaintiffs' attorneys' fees and expenses were $790 million, about 70% higher than in 2017 (see Figure 33). The increase in fees partially reflects the rebound in settlements, but fees grew substantially less than the near-tripling of aggregate settlements. This is partially due to the outsized impact of the $3 billion Petrobras settlement, one of several mega-settlements that historically generates lower fees as a percentage of settlement value.

Note that Figure 33 differs from the other figures in this section because the aggregate includes fees and expenses that plaintiffs' attorneys receive for settlements in which no cash payment was made to the class.

Figure 33. **Aggregate Plaintiffs' Attorneys' Fees and Expenses by Settlement Size**
January 2009–December 2018



Notes

[1] This edition of NERA's report on recent trends in securities class action litigation expands on previous work by our colleagues Lucy Allen, Dr. Vinita Juneja, Dr. Denise Neumann Martin, Dr. Jordan Milev, Robert Patton, Dr. Stephanie Plancich, and others. The authors also thank Dr. Milev for helpful comments on this edition. These individuals receive credit for improving this paper; all errors and omissions are ours.

[2] Data for this report are collected from multiple sources, including Institutional Shareholder Services Inc., complaints, case dockets, Dow Jones Factiva, Bloomberg Finance L.P., FactSet Research Systems, Inc., Nasdaq, Inc., Intercontinental Exchange, Inc., US Securities and Exchange Commission (SEC) filings, and public press reports.

[3] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

[4] Craig Doidge, G. Andrew Karolyi, and René M. Stulz, "The U.S. Listing Gap," National Bureau of Economic Research Working Paper No. 21181, May 2015.

[5] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

[6] For M&A statistics, see "Mergers & Acquisitions Review: First Nine Months 2018," Thomson Reuters, October 2018, available at http://dmi.thomsonreuters.com/Content/Files/3Q2018_MA_Legal_Advisor_Review.pdf.

[7] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

[8] Matthew D. Cain and Steven D. Solomon, "Takeover Litigation in 2015," Berkeley Center for Law, Business and the Economy, 14 January 2016.

[9] Warren S. de Wied, "Delaware Forum Selection Bylaws After Trulia," Harvard Law School Forum on Corporate Governance and Financial Regulation, 25 February 2016.

[10] *In re: Walgreen Co. Stockholder Litigation*, No. 15-3799 (7th Cir. Aug. 10, 2016).

[11] Federal securities class actions that allege violations of Rule 10b-5, Section 11, and/or Section 12 have historically dominated federal securities class action dockets and often been referred to as "Standard" cases.

[12] *Cyan, Inc. v. Beaver County Employees Retirement Fund*, Supreme Court No. 15-1439.

[13] See Restoration Robotics Inc. SEC Form 8-K, filed 17 October 2017, and Snap, Inc. SEC Form S-1, filed 2 February 2017.

[14] Regulatory cases with parallel accounting, performance, or missed earnings claims are excluded.

[15] Industries with fewer than 25 firms listed on US exchanges are dropped.

[16] For M&A statistics, see "Mergers & Acquisitions Review, Full Year 2017," Thomson Reuters, December 2017.

[17] For M&A statistics, see "Mergers & Acquisitions Review, First Nine Months 2018," Thomson Reuters, October 2018.

[18] "SAC to pay $1.8 billion to settle insider trading charges," Chicago Tribune, 4 November 2013, available at https://www.chicagotribune.com/business/ct-xpm-2013-11-04-chi-sac-to-pay-18-billion-to-settle-insider-trading-charges-20131104-story.html.

[19] Filings indicate that most firms in the SP 500 have adopted 10b5-1 plans as of 2014. See "Balancing Act: Trends in 10b5-1 Adoption and Oversight Article," Morgan Stanley, 2019.

[20] This case was filed after the SEC filed a complaint, more than four years after the end of the proposed class period, which plaintiffs in the class action state first revealed the alleged fraud.

[21] Outcomes of the motions for summary judgment are available from NERA but are not shown in this report.

[22] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

[23] Active cases equals the sum of pending cases at the beginning of 2018 plus those filed during the year.

[24] Nearly 90% of cases filed before 2012 have been resolved, providing evidence of longer-term trends about dismissal and settlement rates. Data since then is inconclusive given pending litigation.

[25] We only consider pending litigation filed after the PSLRA.

[26] These metrics exclude merger objections.

[27] Each of the metrics in the *Time to Resolution* sub-section exclude IPO laddering cases and merger-objection cases because the former usually take much longer to resolve and the latter are usually much shorter to resolve.

[28] The axes are in logarithmic scale, and the two largest settlements are excluded from this figure.

[29] Commentary regarding a 2017 ruling in the Southern District of New York indicated that "[p]laintiffs in [*Cheung v. Bristol-Myers Squibb*] had originally filed their lawsuits in a federal district court, but after the federal district court issued a ruling that was unfavorable for the plaintiffs, the plaintiffs voluntarily dismissed their lawsuits without prejudice and then refiled them in Delaware state court." See Colin E. Wrabley and Joshua T. Newborn, "Getting Your Company's Case Removed to Federal Court When Sued in Your 'Home' State," *The Legal Intelligencer*, 19 December 2017. The case referred to is *Cheung v. Bristol-Myers Squibb*, Case No. 17cv6223(DLC), (S.D.N.Y. Oct. 12, 2017).

[30] To control for the impact of outliers on the average of each group, for each day the most extreme 5% of daily cumulative returns are dropped. Observations on the three final days of the bounce-back period for each category are dropped due to incomplete return data.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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