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

MEMORANDUM OF LAW 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)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

Page

SECONDARY AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff City of Pontiac General Employees' Retirement System ("PGERS") respectfully submits this memorandum of law in support of its motion for final approval of: (1) the proposed $160 million all-cash settlement of this Litigation; (2) the proposed Plan of Allocation of the settlement proceeds; (3) Lead Counsel's application for an award of attorneys' fees and expenses; and (4) Lead Plaintiff's application for an award of $1,743.62, pursuant to 15 U.S.C. §78u-4(a)(4). The terms of the proposed settlement are set forth in the previously filed Stipulation of Settlement dated October 26, 2018 ("Stipulation" or "Settlement").[1]

The $160 million Settlement is remarkable in a number of respects. On a macro level, it is the largest securities settlement ever achieved in any Arkansas federal court, and the largest class-action settlement against Walmart anywhere. It amounts to over 80% of the Class's damages, possibly 100%, versus a median recovery of 2.6% in all other class-action securities fraud cases settled in 2018. Defendants defeated 15 other cases filed in four different jurisdictions based on the same underlying facts, without a single penny being recovered for investors. Likewise, the DOJ and SEC had a nearly two-year head start before PGERS could take discovery, yet neither the DOJ nor the SEC has brought a single charge or recovered a single penny for investors. The reason why so many others have failed is because they were up against one of the world's toughest adversaries. PGERS and Lead Counsel faced the same adversary in no-holds-barred litigation for over six years, yet they have accomplished what 15 different law firms, the DOJ, and the SEC could not.

[1] Unless otherwise noted, all defined terms have the same meanings as in the Stipulation.

II. THE LITIGATION[2]

Lead Plaintiff alleged violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 on behalf of the Class.[3] PGERS alleged that in 2005, defendant Duke – the then-CEO of Walmart International – discovered through internal 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"). Forge Decl., ¶13. 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 Walmart's General Counsel's advice. *Id.* 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. *Id.*

PGERS further alleged that in the fall of 2011, Walmart learned that *The New York Times* was actively investigating the Suspected Corruption, and that disclosure of facts showing that Walmart had been aware of the Suspected Corruption in 2005 would have: (a) increased the likelihood of civil and criminal charges; (b) created uncertainty concerning

[2] The Court is respectfully referred to the accompanying 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) ("Forge Decl.") for a more detailed history of the Litigation, the efforts of counsel in obtaining this result, and the factors bearing on the reasonableness of the Settlement and Plan of Allocation.

[3] The Class consists of all Persons who purchased or otherwise acquired the publicly traded common stock of Walmart between December 8, 2011 and April 20, 2012, and who were allegedly damaged by Defendants' alleged violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934. Excluded from the Class are: Defendants, Duke's family, Walmart's subsidiaries and affiliates, the officers and directors of the Company or any of the Company's subsidiaries or affiliates at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. Also excluded from the Class is any Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court.

Walmart's senior executives and officers who had been involved in the Suspected Corruption; and (c) jeopardized Walmart's growth strategy. *Id.*, ¶14.

PGERS' complaint further alleged that 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 Walmart's 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. *Id.*, ¶15. On April 21, 2012, *The New York Times* published its article exposing many of the facts that Lead Plaintiff alleged Defendants had concealed since 2005 and 2006. *Id.*, ¶16. On this news, Walmart's stock declined, causing PGERS and the Class to suffer damages.

Given the lengthy history of the Litigation, and the exhaustive efforts of Lead Counsel to obtain the proposed Settlement, the Court is respectfully referred to the Forge Declaration for a detailed recitation of the case's procedural and litigation history. The Forge Declaration also identifies the unique challenges faced by PGERS to prove its claims and recover substantial damages for the Class, the parties' significant settlement negotiation efforts, assisted by retired Federal District Court Judge Layn Phillips serving as mediator, and the reasons why the requested relief should be granted in its entirety.

III. THE NOTICE OF PROPOSED SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS AND IS REASONABLE

Rule 23(c)(2) requires the "'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 173 (1974) (class notice designed to fulfill due process requirements).[4] Under Rule 23(e), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." Fed. R. Civ. P. 23(e)(1). The standard for measuring the adequacy of a class action settlement notice is reasonableness. *See Bredthauer v. Lundstrom*, No. 4:10cv3132, 2012 WL 4904422, at *3 (D. Neb. Oct. 12, 2012); *Reynolds v. Credit Bureau Servs., Inc.*, No. 8:15CV168, 2016 WL 389977, at *5 (D. Neb. Feb. 1, 2016) (stating notice is adequate if "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'").

Here, in accordance with the Court's December 6, 2018 Order ("Preliminary Approval Order"), beginning on January 4, 2019, the Claims Administrator caused the Notice of Proposed Settlement of Class Action (the "Notice") and Proof of Claim and Release (the "Claim Form") to be mailed to potential Class Members and their nominees.[5] In addition, the Summary Notice was published, twice in *The Wall Street Journal* and once over the *Business Wire*. Sylvester Decl., ¶12. As of February 28, 2019, over 1.7 million copies of the Notice have been mailed to potential Class Members and nominees. *Id.*, ¶11.

[4] Citations are omitted and emphasis is added throughout, unless otherwise indicated.

[5] *See* Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶4-11, submitted herewith.

The Notice contains a description of the claims asserted, the Settlement, the Plan of Allocation, and Class Members' rights to participate in and object to the Settlement or the fees and expenses that Lead Counsel intends to request, or to exclude themselves from the Class. Information regarding the Settlement, including downloadable copies of the Notice and Claim Form, was also posted on a website devoted solely to the administration of the Settlement: www.WalmartSecuritiesSettlement.com. *Id.*, ¶14.

The notice program, approved by the Court, which combined an individual, mailed Notice and Claim Form to all potential Class Member and nominees who could be identified with reasonable effort, and a Summary Notice published twice in a preeminent business publication and over the internet, contained all of the information required by §21D(a)(7) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and is adequate to meet the due process and Rules 23(c)(2) and (e) requirements for providing notice to the Class. *See Klug v. Watts Regulator Co.*, No. 8:15CV61, 2016 U.S. Dist. LEXIS 169155, at *24 (D. Neb. Dec. 7, 2016) (finding that "the combination of the summary postcard notice delivered by mail and the reference to a website that contains the complete notice, the claim form, the proposed settlement agreement, and other case information, is the best notice practicable under the circumstances"); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F.3d 913, 917 (8th Cir. 2011) (holding notice sufficient when it "provide[d] 'shareholders with sufficient information for them to make a "rational decision whether they should intervene in the settlement approval procedure,"'" "discussed in detail the terms of the settlement and included an estimate of the fees and expenses," and "provided a toll free number that allowed shareholders to obtain more information").

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Standards for Final Approval of Class Action Settlements

In complex class action lawsuits such as this, the policy of favoring voluntary resolution through settlement is particularly strong. *Beaver Cty. Emps. Ret. Fund v. Tile Shop Holdings, Inc.*, No. 0:14-cv-00786-ADM-TNL, 2017 U.S. Dist. LEXIS 91651, at *5 (D. Minn. June 14, 2017); *see George v. Uponor Corp.*, No. 12-249 (ADM/JJK), 2015 WL 5255280, at *6 (D. Minn. Sept. 9, 2015) ("'The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context.'"). Indeed, in the Eighth Circuit, "'strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.'" *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999).

In deciding whether to approve a proposed settlement of a class action under Rule 23(e), the court must find that the proposed settlement is fair, reasonable, and adequate. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). The Eighth Circuit has established four factors to determine whether a proposed settlement is "fair, reasonable, and adequate: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *Id.* As discussed herein and in the Forge Declaration, an analysis of the relevant factors weighs unequivocally in favor of granting final approval of the Settlement.

In exercising its discretion, the court's examination is limited to determining that the settlement agreement is not the product of fraud or overreaching by, or collusion between,

the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *See Petrovic*, 200 F.3d at 1148 (judges should not substitute their judgment for that of the litigants); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("'neither the trial court in approving the settlement nor this Court in reviewing the approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute'") (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)). As explained below, applying these criteria demonstrates that the Settlement warrants this Court's final approval.

B. The Settlement Is Entitled to a Presumption of Fairness

As noted above, the Eighth Circuit recognizes that "'strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.'" *Petrovic*, 200 F.3d at 1148 (quoting *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)). Indeed, district courts in the Eighth Circuit have held that "'there is a presumption of fairness when a settlement is negotiated at arm's length by well-informed counsel.'" *Tile Shop*, 2017 U.S. Dist. LEXIS 91651, at *6 (citing *In re Charter Commc'ns, Inc.*, No. 4:02-cv-1186-CAS, 2005 WL 4045741, at *5 (E.D. Mo. June 30, 2005)).[6] In this context, courts afford "considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved." *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *see also In re Flag*

[6] *See also In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012) ("'There is usually a presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for approval.'"); *George*, 2015 WL 5255280, at *6 (settlement agreements are presumptively valid, when a settlement has been negotiated at arm's length, discovery is sufficient, the settlement proponents are experienced in similar matters and there are few objectors).

Telecom Holdings, Ltd., No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *13 (S.D.N.Y. Nov. 8, 2010) (“‘“Great weight” is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.’”). This is particularly so when those negotiations are facilitated by a mediator. *See D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (“[A] . . . mediator’s involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).

Here, the Settlement was negotiated between highly experienced counsel with a firm understanding of the strengths and weaknesses of the claims and defenses asserted. The negotiations were at all times hard fought and at arm’s length. Both sides zealously advanced their positions and appeared fully prepared, and qualified, to proceed down the path to trial rather than accept a settlement that was not in the best interests of their respective clients. *See, e.g.*, *Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) (“If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable.”); *Linney v. Cellular Alaska P’ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) (“The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm’s length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.”), *aff’d*, 151 F.3d 1234 (9th Cir. 1998).

In addition, the parties’ settlement discussions were assisted by an experienced mediator. The assistance of a neutral, well-respected mediator to close out the settlement negotiations – in this case, Judge Phillips – further demonstrates that the Settlement was fairly and honestly negotiated. *See, e.g.*, *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-

02509-LHK, 2015 U.S. Dist. LEXIS 26635, at *7 (N.D. Cal. Mar. 3, 2015) (finding Judge Phillips to be "an experienced mediator"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement when parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal Judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742 at *2 (D. Nev. Oct. 19, 2012) (settlement was fair when it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips"). Judge Phillips assisted the parties in this case – with the full participation of Lead Counsel and counsel for Defendants – which ensured the integrity of the process by which the parties negotiated the Settlement.

The Settlement is thus the product of extensive, arm's-length negotiations conducted by experienced counsel and mediated by a well-respected neutral, after extensive and meaningful discovery and litigation efforts. Accordingly, the Settlement is presumptively fair, reasonable, and adequate and final approval should be granted. *See, e.g., Tile Shop*, 2017 U.S. Dist. LEXIS 91651, at *6-*7.

C. The Settlement Is Fair, Reasonable and Adequate Under the Factors Considered in Evaluating a Class Action Settlement in the Eighth Circuit

1. The Merits of the Class' Claims, Weighed Against the Terms of the Settlement, Support Final Approval of the Settlement

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the

amount offered in settlement.'" *Wireless*, 396 F.3d at 933. This case involved allegations that Walmart's rapid expansion into Mexico had been fueled by millions of dollars in bribes to Mexican officials for building permits, and that Walmart and defendant Duke covered up this scheme by electing to forego an independent investigation of the bribery allegations, in direct defiance of their General Counsel's advice. Forge Decl., ¶13. Lead Plaintiff alleged that this cover up caused Walmart stock to trade at artificially inflated prices. Lead Plaintiff firmly believes that, based on the evidence developed to date, it had a strong case on liability. Defendants have the opposite view – and a track record to support it. *Id.*, ¶¶4, 240.

While all cases under the PSLRA face significant risks,[7] here, the Court enjoys the benefit of unprecedented hindsight in assessing the Settlement: 15 other cases filed based on the same facts and all failed to recover anything for investors. Forge Decl., ¶4. Similarly, despite a nearly two-year head start before PGERS could take discovery, neither the DOJ nor the SEC has brought a single charge or recovered a single penny for investors. *Id.* Relative to the lack of any discovery whatsoever from these many other cases and investigations, the significance of the $160 million Settlement is self-evident.

Even if Lead Plaintiff successfully established liability, it faced significant risks in establishing damages. Specifically, Defendants repeatedly challenged one of PGERS's proposed damages methodologies. *Id.*, ¶¶51, 59, 236. During the Litigation, Lead Counsel advanced two alternative damages methodologies, and firmly believes that under the express

[7] *See also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575(SWK), 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."); *In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 422 (S.D. Iowa 2001) (approving settlement and noting "[c]ontinued litigation present[ed] significant risks for plaintiffs" in light of issues present in securities action).

language of the PSLRA, Congress never intended for price impact to be the sole measure of damages. *Id.*, ¶237. Because the express terms of the PSLRA confine the 90-day bounce-back rule to price-based damage models, PGERS advanced an alternative measure of damages to avoid this artificial damages cap. *Id.* Of course prevailing with the argument that the PSLRA does not limit damages to market-price models, as PGERS did, is not the same as prevailing on a *Daubert* challenge to the specific alternative model PGERS advocated (the "build-up" model). This latter fight promised to be long and expensive with a very uncertain outcome, as there is no clear binding authority in the case law that authorizes a specific alternative to the traditional statutory measures for damages. *Id.*, ¶238. Lead Plaintiff retained multiple experts to support the build-up, but Defendants were going to fight it tooth and nail. *Id.*, ¶¶213-217.

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." *Id.*, ¶238; 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. Forge Decl., ¶238.

Demonstrating its relentlessness, 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. This motion remained pending at the time this Settlement was reached. Even if the Court had denied this §1292(b) motion, PGERS would have had to clear a high hurdle under *Daubert*, and even if PGERS had accomplished that feat, the next step would have been an inherently unpredictable and fiercely disputed "battle of the experts

at trial."[8] Both Lead Plaintiff and Defendants retained highly qualified experts whose damages assessments were at substantial odds. A jury's reaction to such expert testimony was anyone's guess.[9] Moreover, even if the build-up method prevailed at trial, it would face years of post-trial challenges. Accordingly, in the absence of a settlement, there was a very real risk that the Class would recover an amount less than the $160 million Settlement Amount – or even nothing at all.

Finally, the Settlement Amount is plainly within the range of reasonableness. The $160 million obtained for the benefit of the Class represents a recovery of between 80% to 100% of estimated statutory damages. This range far exceeds the median recovery of 2.6% of NERA-defined investor losses in similar securities class actions settled in 2018. *See* Stefan Boettrich and Svetlana Starykh, ***Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review***, at 34-36 (NERA Jan. 29, 2019) ("NERA Study").[10]

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[8] *See In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761(CM), 2008 WL 2944620, at *5 (S.D.N.Y. July 31, 2008) (addressing significant risk of establishing damages at trial, particularly when, as here, "the crucial element of damages would likely be reduced at trial to a 'battle of the experts'"); *Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement in securities case when "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law" and "[t]he outcome of that analysis is inherently difficult to predict and risky").

[9] *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *30 (S.D.N.Y. Nov. 7, 2007) ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").

[10] Attached as Ex. 1 to the Forge Decl.

Considering all of the circumstances and risks that Lead Plaintiff would have faced if it continued to litigate the Litigation through trial and appeal(s), Lead Plaintiff and Lead Counsel concluded that the Settlement – which provides an immediate and certain payment of $160 million – was in the best interest of the Class. Thus, this factor strongly supports the Settlement's approval.

2. Defendants' Financial Condition Supports Final Approval of the Settlement

Walmart's unquestionable ability to sustain years' more litigation supports the Settlement because it effectively means that there was no end in sight for this Litigation. *See, e.g., Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 U.S. Dist. LEXIS 72981, at *9 (S.D. W.Va. May 23, 2013) ("Although the court is unaware of any threat to Defendant's solvency, recovery of a litigated judgment cannot be taken for granted in these uncertain economic times. The proposed settlement avoids all risk of eventual insolvency and provides immediate cash to Class Members."). While the risk of a debilitating judgment might force a premium from some defendants, here, Walmart is paying a premium ***with no risk*** that any judgment would be debilitating in light of its resources. Accordingly, this factor supports final approval of the Settlement.

3. The Complexity and Expense of Further Litigation Supports Final Approval of the Settlement

Courts have consistently recognized that the complexity, expense, and likely duration of the litigation are critical factors in evaluating the reasonableness of a settlement, especially when the settlement being evaluated is a securities class action. *See, e.g.*, *Charter*, 2005 WL 4045741, at *4 ("'Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation

imposes upon already scarce judicial resources.'"). This case is no exception. "While all cases carry the potential for uncertain verdicts, securities cases in particular are complex and difficult to prove." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257 (E.D. Va. 2009). The record here speaks for itself in terms of the dozens of briefs on myriad complex issues, including attorney-client privilege, selective waiver, and expert-related damages issues.

In the absence of a settlement, this case would require the expenditure of substantial additional time and money, "'all the while class members would receive nothing.'" *Wireless*, 396 F.3d at 933. A trial in this case would take weeks and would be a complicated undertaking for the Court and jurors. *See AOL*, 2006 WL 903236, at *8 (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials"). Even if Lead Plaintiff was successful at trial, post-trial motions and appeals certainly would follow. The post-trial process likely would span years, during which time the Class would receive no distribution of any damages award. In addition, a post-trial motion or an appeal of any favorable verdict would carry the risk of reversal, in which case the Class would receive no recovery at all – ever. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming a lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor). Accordingly, analysis of this factor supports final approval of the Settlement.

4. The Reaction of the Class to Date Supports Final Approval of the Settlement

Pursuant to this Court's Preliminary Approval Order, the Court-approved Notice and Claim Form were mailed to potential Class Members who could be identified with

reasonable effort and the Summary Notice was published twice in *The Wall Street Journal*, and once over the *Business Wire*.[11] The Notice advises the Class of the terms of the Settlement and the Plan of Allocation as well as the procedure and deadline for filing objections. As of February 28, 2019, over 1.7 million Notices and Claim Forms have been mailed to potential Class Members and nominees. *Id.*, ¶11. While the objection deadline, March 14, 2019, has not yet passed, not a single Class Member has filed a response to the Settlement, the Plan of Allocation, or Lead Counsel's request for an award of attorneys' fees and expenses, and no Class Members with statutory damages have sought exclusion from the Class.[12]

Of course, even if there are objection(s), "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "'A certain number of . . . objections are to be expected in a class action.'" *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 533 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011). Moreover, "a relatively small number of class members who object is an indication of a settlement's fairness." 2 Herbert

[11] *See* Sylvester Decl., ¶¶4-12.

[12] *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. 4:03-MD-015, 2004 WL 3671053, at *13 (W.D. Mo. Apr. 20, 2004) (finding lack of objections to be "strong indicator[]" that the class as a whole views the settlement as fair, and weighs heavily in favor of settlement). In addition, to date, only 66 requests for exclusion from the Class have been received. *See* Sylvester Decl., ¶15.

Newberg & Alba Conte, *Newberg on Class Actions* §11.48 (3d ed. 1992); *see also Petrovic*, 200 F.3d at 1152 (approving settlement where less than 4% of the class objected).[13]

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate, and therefore deserves this Court's final approval.

V. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE

Lead Counsel also seeks approval of the Plan of Allocation. The Plan of Allocation is set forth in the Notice mailed to Class Members. The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Claim Form.

Assessment of a plan of allocation in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Charter*, 2005 WL 4045741, at *5; *In re Ikon Office Sols., Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992); *Atlas v. Accredited Home Lenders Holding Co.*, No. 07-CV-00488-H (CAB), 2009 U.S. Dist. LEXIS 103035, at *13 (S.D. Cal. Nov. 4, 2009). District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982).

The objective of a plan of allocation is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. An allocation formula need

[13] In accordance with the Preliminary Approval Order, PGERS will respond to any objections on or before March 28, 2019.

only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White*, 822 F. Supp. at 1420. Here, although Lead Plaintiff 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. Forge Decl., ¶232. Therefore, the Plan of Allocation is based on the traditional statutory measure of damages embodied in the PSLRA. *Id.* In developing the Plan of Allocation, PGERS's damages expert calculated the estimated artificial inflation in the per share price of Walmart publicly traded common stock based upon consideration of price changes in the stock in reaction to the corrective disclosures, price changes attributable to market or industry forces, and non-fraud related Walmart-specific information. *Id.* Lead Counsel believes that the Plan of Allocation will result in a fair and equitable distribution of the proceeds among Class Members who submit valid Claim Forms and, thus, it should be approved. No one has objected to the Plan of Allocation.

VI. THE AWARD OF ATTORNEYS' FEES

A. A Reasonable Percentage of the Fund Recovered Is the Preferred Approach for Awarding Attorneys' Fees in Common Fund Cases

For its efforts in creating a $160,000,000 common fund, Lead Counsel seeks a percentage of the fund recovered as attorneys' fees. In *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241 (8th Cir. 1996), the Eighth Circuit approved the percentage method in awarding attorneys' fees from a common fund. *Id.* at 246. Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved,

but also 'well established.'" *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005). Supporting authority for the percentage method in other Circuits is overwhelming.[14]

It has long been recognized in equity that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this doctrine is to avoid unjust enrichment and to spread litigation costs proportionately among all the beneficiaries. *Id.* This rule, known as the common fund doctrine, is firmly rooted in American case law. *See, e.g., Trs. v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

In *Blum*, the United States Supreme Court stated that the percentage method of computing fees was the proper approach in the "common fund" context when, as here, the fees are paid out of (not in addition to) the fund recovered. 465 U.S. at 900 n.16. Courts in this Circuit almost uniformly use the percentage-of-the-fund approach in awarding attorneys' fees in common fund cases. *See, e.g., Khoday v. Symantec Corp.*, No. 11-cv-180 (JRT/TNL), 2016 U.S. Dist. LEXIS 55543, at *24 (D. Minn. Apr. 5, 2016) (awarding 33-1/3% of a $40 million settlement, noting "'[a] routine calculation of fees involves the common-fund doctrine, which is based on a percentage of the common fund recovered'").

[14] Two Circuits have ruled that the percentage method is ***mandatory*** in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other Circuits and commentators have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (authorizing percentage method and holding that use of lodestar/multiplier method was abuse of discretion); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum v. Stenson*, 465 U.S. 886 (1984), recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

Compensating counsel in common fund cases on a percentage basis makes good sense. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method.[15] Second, it provides plaintiffs' counsel with a strong incentive to obtain the maximum possible recovery under the circumstances.[16] Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of awarding fees that is consistent with class members' due process rights. Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (June 2000).

B. Consideration of Relevant Factors Support the Fee Requested

In examining the reasonableness of a 30% fee here, it is instructive to look at the factors typically considered by the courts in this and other Circuits. *Petrovic*, 200 F.3d at

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[15] Courts are encouraged to look to the private marketplace in setting a percentage fee. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The judicial task might be simplified if the judge and the lawyers [spent] their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character."); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 959 (7th Cir. 2013) (approving 27.5% fee of $200,000,000 settlement based on a market rate analysis).

[16] In *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), the court stated:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. . . .
>
> At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Id. at 325-26.

1157. Although the "Eighth Circuit has not laid out factors that a district court must consider when determining whether a percentage of the common fund is reasonable, . . . this District has relied on factors set forth by other Circuits, including the following:

> "(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, 2016 U.S. Dist. LEXIS 55543, at *25. Indeed, "[m]any of the factors overlap, and not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor." *Id*. at *25-*26. Consideration of these factors confirms the reasonableness of the fee requested.

1. The Benefit to the Class

It is hard to argue with the perspective that the result achieved is the most important factor in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

The $160 million Settlement here is truly exceptional and in many significant respects, unprecedented. *See, e.g.*, *Khoday*, 2016 U.S. Dist. LEXIS 55543, at *27 ("By itself, the cash settlement is beneficial to the class, but weighed against the inherent risks of

trial, this Court finds that the $60 million cash settlement provides a substantial and immediate benefit to the class.").

The $160 million Settlement Fund obtained for the benefit of the Class, the largest securities class action settlement ever in Arkansas federal courts, also represents a significant percentage of the Class's estimated maximum damages using a statutory analysis. Based on Lead Plaintiff's damages expert's estimate of the Class's maximum provable statutory damages, the Settlement represents approximately 80% to 100% of the Class's estimated damages of $186 million. This range of recovery is an order of magnitude far greater than in all securities class actions settled in 2018 (2.6%), and for cases settled from 1996 through 2018 where estimated investor losses were between $100 and $199 million (3.1%). *See* NERA Study at 34-36. Recovering 16-20 times more than average is clearly a very significant benefit to the Class, but this benefit is even greater relative to what the 15 other law firms and the federal government were able to recover for investors: 0% of damages. The Settlement is an unquestionably remarkable achievement against tremendous odds.

2. The Contingent Nature of the Case and the Risk to Which Lead Counsel Was Exposed

Lead Counsel undertook this Litigation on a contingent fee basis, assuming a significant risk that the Litigation would yield no recovery and leave it uncompensated. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expense since this case began in 2012. Lead Counsel knew that if its efforts were not successful, it would not generate a fee and its expenses would not be paid.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in awarding counsel's attorneys' fees in *In re Prudential-Bache Energy Income P'ship Sec. Litig.*, MDL No. 888, 1994 U.S. Dist. LEXIS 6621 (E.D. La. May 18, 1994), the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Id. at *16.

Similarly, the Seventh Circuit has acknowledged that the risk of loss is real and should be considered in a motion for attorneys' fees. It reversed a district court's order that had rejected counsel's contention that lawyers faced the risk of nonpayment. *See Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) ("Because the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated.").

The risk of no recovery in complex cases of this type is very real. There are numerous cases where plaintiffs' counsel in contingent cases such as this, after expending thousands of hours, have received no compensation despite their diligence and expertise. In fact, there are 15 such cases based on the same underlying facts alone. As the court in *Xcel* recognized: "The risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a class

have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." 364 F. Supp. 2d at 994.

For example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Lead Counsel prosecuted, the court granted summary judgment to defendants after eight years of litigation, and after plaintiffs' counsel incurred over $6 million in expenses, and worked over 100,000 hours. And, in a case against JDS Uniphase Corporation, after a lengthy trial involving securities claims, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Similarly, even the most promising case can be eviscerated by a sudden change in the law after years of litigation. In *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-73 (S.D.N.Y. 2010), 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of some 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Austral. Bank Ltd.*, 561 U.S. 247 (2010), after plaintiffs had completed extensive foreign discovery.

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a successful result would be realized only after considerable and difficult effort. Here, Lead Counsel committed significant resources of both time and money to vigorously and successfully prosecute this Litigation for the Class's benefit. Lead Counsel faced far more than a generic risk of no recovery here. Fifteen other law firms tried and failed to recover anything based on the same underlying facts. In terms of raw numbers, that means Lead Counsel had less than a 7% chance of success ***on these facts***. Accounting for the DOJ and SEC's failures, these odds

were even more daunting – no wonder not a single other party or law firm dared to even try to represent the Class in this case. Yet, Lead Counsel's efforts turned the same underlying facts into a complete (or nearly complete) $160 million recovery.

3. The Difficulty and Novelty of the Legal and Factual Issues of the Case and Risks Attendant to the Litigation

The difficulty and novelty of the issues involved in a case are significant factors to be considered in making a fee award. Courts have long recognized that securities class actions present inherently complex and novel issues. Retired Judge Finesilver noted in *Miller v. Woodmoor Corp.*, No. 74-F-988, 1978 U.S. Dist. LEXIS 15234 (D. Colo. Sept. 28, 1978):

> The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . .
>
> Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions. Courts are continually modifying and/or reversing prior decisions in an attempt to interpret the securities law in such a way as to follow the spirit of the law while adapting to new situations which arise. Indeed, many facets of securities law have taken drastically new directions during the pendency of this action.

Id. at *11-*12. Judge Finesilver's comments ring even more true today. The adoption of the PSLRA has made the successful prosecution of securities cases more complex and uncertain. *See Ikon*, 194 F.R.D. at 194 ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").[17] From the outset, this PSLRA action was a

[17] Even before Congress passed the PSLRA, courts had noted that a securities case "by its very nature, is a complex animal." *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980); *see also Miller*, 1978 U.S. Dist. LEXIS 15234, at *11-*12:

> The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . .
>
> Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions.

difficult and highly uncertain securities case that involved complex issues of law and fact. Indeed, "[t]he process and scope of discovery in this case is indicative of the issues' complexity." *Khoday*, 2016 U.S. Dist. LEXIS 55543, at *28. As discussed in the Forge Declaration (*see, e.g.*, ¶¶237-242) and in Section IV hereof, substantial risks and uncertainties in this Litigation made it far from certain that Lead Counsel would secure any recovery, let alone $160 million.

In the years since Congress passed the PSLRA, courts have routinely dismissed cases at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's heightened pleading standards, making it clear that the risk of no recovery (and hence no fee) has increased exponentially. *See Goldstein v. MCI Worldcom*, 340 F.3d 238, 241 (5th Cir. 2003) (affirming dismissal of securities fraud action against Bernard Ebbers and WorldCom even though Ebbers was later convicted criminally).

A study of securities class actions filed and resolved between January 2000 and December 2012 found that 55% of cases filed in the Eighth Circuit were dismissed in defendants' favor. *See* Dr. Renzo Comolli, Sukaina Klein, Dr. Ronald I. Miller & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* at 18, Fig. 16 (NERA Jan. 29, 2013). As one court has noted: "An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-circuited by the heightened pleading standard." *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1377 (M.D. Ga. 2000), *rev'd on other grounds sub nom. Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001).

Here, Defendants steadfastly maintained that they did not engage in any scheme to defraud or possess the requisite scienter. They also argued that PGERS could not establish

economic loss based on the application of the PSLRA's 90-day bounce back rule and could not utilize the build-up damages methodology. Regarding the novelty of legal issues, Defendants repeatedly argued that PGERS and Lead Counsel were the first party and counsel to develop and advocate the build-up damages methodology. Defendants were particularly relentless in challenging this novel approach, but every aspect of this Litigation was contested. Subpoenas, depositions, document requests, class certification, etc. were all met with motions for protective orders, objections, instructions not to answer, petitions to appeal, motions for interlocutory appeal, etc. Additional law firms and additional nationally renowned lawyers were enlisted. There was no end in sight, and any misstep by Lead Counsel could have led to the same fate as the other 15 law firms that faced Defendants on the same underlying facts: complete defeat. Even if Lead Counsel was successful against Defendants at trial and obtained a significant judgment for the Class, Lead Counsel's efforts would have continued for years. In cases such as this, even a victory at trial does not guarantee ultimate success. Both trial and judicial review are unpredictable and could seriously and adversely affect the scope of an ultimate recovery, if not eliminate it altogether. Indeed, as the court observed in *Warner Commc'ns*, 618 F. Supp. 735:

> Even a victory at trial is not a guarantee of ultimate success. If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.

Id. at 747-48 (citing numerous examples).

In sum, this highly complex case has been extensively litigated and vigorously contested over an extended period of time. Despite the novelty and difficulty of the issues raised, counsel secured a highly favorable result for the Class, and earned a 30% fee award.

4. The Skill of the Lawyers Involved

The quality of the representation by Lead Counsel and the standing of Lead Counsel are important factors that support the reasonableness of the requested fee. *See Khoday*, 2016 U.S. Dist. LEXIS 55543, at *28-*29 ("The skill and extensive experience of counsel in complex litigation is relevant in determining fair compensation."). This Settlement was achieved by Lead Counsel, one of the preeminent class action securities litigation firms in the country, with decades of experience in prosecuting and trying complex class actions.[18] But law ***firms*** do not prosecute cases. Lawyers do. For over six years, Lead Counsel's prosecution team, including local counsel, traded blows with the best defense lawyers in the country (*see infra*) hired by one of the biggest companies in the world. Lead Counsel's experience and skill were demonstrated by the unrelenting effective prosecution of this Litigation, culminating in the highly favorable settlement before the Court. In short, the result achieved against adversaries who had defeated all lawyers is the clearest reflection of counsel's skill and expertise. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002) (class counsel "showed their effectiveness in the case at bar through the favorable cash settlement they were able to obtain"), *aff'd*, 391 F.3d 516 (3d Cir. 2004). As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126 (D.S.C. 1987), the "prosecution and management of a complex national class action requires unique legal skills and abilities." *Id.* at 1137. In the

[18] *See* the firm resume of Lead Counsel, which is attached as Exhibit F to the Robbins Geller fee declaration ("Robbins Geller Decl."), submitted herewith.

instant matter, Lead Counsel achieved a highly favorable result for the Class, due in large part to a prosecution team with the experience and expertise to prepare and take cases to trial, as well as the creativity and ability to identify and support a new damages model.

The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work.[19] Defendants were represented by two of the best law firms (Latham & Watkins and Gibson Dunn) and two of the best defense lawyers in the country (Sean Berkowitz and Peter Wald of Latham & Watkins[20]). With the quality of lawyering on both sides of this case, the Court and the Class can rest assured that this was a well-earned resolution.

5. Time and Effort Required

Lead Counsel marshaled considerable resources and time in the research, investigation, prosecution, and settlement of the Litigation. The legal and factual obstacles to recovery in this case were significant, but did not deter Lead Counsel. A detailed discussion of the years-long litigation efforts, including the many obstacles overcome, are set forth in the Forge Declaration.

6. The Reaction of the Class to Date

In addition to Lead Plaintiff's approval of the requested attorneys' fees, the reaction of the Class to date also supports the requested fee. As discussed above, through February 28, 2019, the Court-appointed Claims Administrator, Gilardi & Co. LLC, has

[19] *See, e.g.*, *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (finding the fact that defendant's attorneys "consist[ing] of multiple well-respected and capable defense firms" that "consistently challenged Plaintiffs throughout the litigation" supported class counsel's fee request); *King Res.*, 420 F. Supp. at 634; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).

[20] https://www.lw.com/people/sean-berkowitz; https://www.lw.com/people/peter-wald.

disseminated over 1.7 million copies of the Notice and Claim Form to potential Class Members and nominees informing them, among other things, that Lead Counsel would apply to the Court for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Amount. While the deadline for objecting to Lead Counsel's fee request is not until March 14, 2019, to date, not a single objection to the maximum fee (and expenses) set forth in the Notice has been received.

7. The Fee Requested Is Within the Range Awarded in Similar Complex Contingent Litigation

The requested fee of 30% of the Settlement Fund is in line with attorneys' fees repeatedly awarded by district courts in other complex class action cases – with common funds that amount to a far ***lower*** percentage of damage recovered than here. In this Circuit, "courts 'have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in class actions.'" *Yarrington*, 697 F. Supp. 2d at 1064 (quoting *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)) (affirming a fee award representing 36% of the settlement fund as reasonable); *see also Schuh v. HCA Holdings, Inc.*, No. 3:11-cv-01033, 2016 U.S. Dist. LEXIS 140387 (M.D. Tenn. Apr. 14, 2016) (awarded 30% of $215 million recovery, plus expenses); *Dahl v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY (D. Mass. Feb. 2, 2015) (awarded 33% of $590.5 million recovery, plus expenses); *In re Se. Milk Antitrust Litig.*, No. 2:07-cv-208, 2013 U.S. Dist. LEXIS 70167 (E.D. Tenn. May 17, 2013) (awarding 33.33% fee on $158.6 million recovery); *In re Initial Pub. Offering Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarded fees of 33.3% of $586 million recovery); *In re Apollo Grp. Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at *9 (D. Ariz. Apr. 20, 2012) (awarding fee of 33% of $145 million recovery).

The requested fee is more than reasonable when compared to the private marketplace, a comparison encouraged by the courts. *See Cont'l Ill.*, 962 F.2d at 572. Supreme Court Justices Brennan and Marshall observed in their concurring opinion in *Blum*: "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum*, 465 U.S. at 903. Similarly, in the securities class action context, Judge Marvin Katz of the Eastern District of Pennsylvania noted that in private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery. *Ikon*, 194 F.R.D. at 194. These percentages are the prevailing market rates throughout the United States for contingent representation.

VII. COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED FOR THE CLASS

Lead Plaintiff's Counsel request payment for expenses incurred in prosecuting this Litigation on behalf of the Class in an aggregate amount of $616,964.66. These expenses are itemized in the declarations of counsel submitted herewith.

The appropriate analysis in making a determination whether particular costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"); *see also Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if normally billed to client).

In *Brown v. Pro Football*, 839 F. Supp. 905 (D.D.C. 1993), the court addressed whether plaintiffs who created a common fund were entitled to payment of expenses. Relying on *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), the court held that counsel's expenses were appropriately compensable:

> Plaintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, Westlaw research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorney's fee.

Brown, 839 F. Supp. at 916. The categories of expenses for which Lead Plaintiff's Counsel seek payment here are categories normally charged to hourly clients and, therefore, should be paid out of the common fund.

The largest component of counsel's expenses is the cost of consultants and experts, who provided valuable assistance in the areas of corporate bribery accusations and investigations, loss causation and damages. As discussed in the Forge Declaration, the retained experts worked a significant number of hours on the case analyzing the facts, producing initial reports, reviewing the reports of opposing experts and the documents on which they relied, responding to discovery requests, preparing and sitting for depositions, and preparing to provide testimony at trial. Forge Decl., ¶¶211-217. Consultants complemented the work of the retained experts. Robbins Geller Decl., ¶5(e).

In addition, the number of documents produced in the Litigation (well over 2.7 million pages) required a system called Relativity, which is a sophisticated database management program for the hosting of documents collected or produced in the litigation. The amount requested for this category reflects charges for the management of the database. Robbins Geller Decl., ¶5(h). As detailed therein, because of the number of components that

are part of a database management system (*i.e.*, hardware, software, license/access fees, etc.), and the difficulty of allocating a portion of the cost of each component, some of which are multi-year costs, the amount requested is a discounted market-rate estimate of what the database management services used in this action would have cost the Class if performed by a third party, an estimate based on a review by Lead Counsel of what vendors charge for these services. *Id.*

Plaintiffs' Counsel were also required to travel in connection with the Litigation and thus incurred the related costs of meals, lodging, and transportation. As detailed in the Robbins Geller Declaration (¶5(c)), the Barrett Johnston fee declaration ("Barrett Johnston Decl.") (¶6(b)), and the Patton Tidwell fee declaration ("Patton Tidwell Decl.") (¶5(a)), in connection with the prosecution of this case over the last six years, the firms paid for travel expenses to, among other things, attend court hearings, meet with mediators and opposing counsel, and take or defend depositions.

Plaintiffs' Counsel also incurred the costs of computerized research. Robbins Geller Decl., ¶5(g); Barrett Johnston Decl., ¶6(d); Patton Tidwell Decl., ¶5(b). It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These charges are for electronic research and data retrieval charges provided through vendors such as ALM Media Service, Courtlink, LexisNexis Products, PACER, Thomson Financial, and Westlaw. Other expenses that were necessarily incurred in the prosecution of this Litigation include mediation fees, photocopying, and filing and transcripts expenses. Because these were all necessary expenses incurred by Lead Plaintiff's Counsel, they should be paid from the Settlement Fund.

VIII. THE AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

Pursuant to the PSLRA, the Court may award "reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). Lead Plaintiff PGERS requests an award of $1,743.62. *See* accompanying Declaration of Walter Moore in Support of Settlement, ¶¶6-7. As set forth in its declaration, PGERS devoted time to the oversight of, and participation in, the Litigation, including reviewing pleadings, communicating regularly with counsel, preparing for and providing a deposition, complying with Defendants' discovery requests, and consulting with and directing Lead Counsel regarding all of the foregoing and in connection with settling the Litigation. *Id.*, ¶¶3-4, 6. (PGERS's request amounts to just a fraction of the time it dedicated to the Litigation).

These are precisely the types of activities that courts have found to support awards to lead plaintiffs. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 1000 (awarding $100,000 collectively to eight lead plaintiffs who "fully discharged their PSLRA obligations and have been actively involved throughout the litigation . . . [including] communicat[ing] with counsel . . . review[ing] counsels' submissions . . . [and keeping] informed of the settlement negotiations"); *In re Am. Int'l Grp., Inc.*, No. 04 Civ. 8141 (DAB), 2010 U.S. Dist. LEXIS 129196, at *19 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 U.S. Dist. LEXIS 120953, at *61 (S.D.N.Y. Dec. 23, 2009) (awarding $144,657.14 to the New Jersey Attorney General's Office and $70,000.00 to the Ohio Funds, which was requested to "compensate them for their

reasonable costs and expenses incurred in managing this litigation and representing the Class"). The award sought by Lead Plaintiff here is reasonable and fully justified under the PSLRA based on its extensive involvement in the Litigation and the amount of time it devoted for the benefit of the Class and, therefore, should be granted.

The Notice provided to Class Members informed them that the Lead Plaintiff would seek an award pursuant to 15 U.S.C. §78u-4(a)(4) in an amount not to exceed $15,000. There are no objections to this award.

IX. CONCLUSION

As detailed herein, this Settlement is an outstanding result for the Class, and the product of skilled counsel for all parties, extensive litigation efforts and settlement negotiations, and it avoids the considerable risk, expense, and delay if the Litigation were to continue. Relative to the average recovery for all securities fraud class actions and the lack of recovery for the 15 other lawsuits based on the same underlying facts, this result is all the more extraordinary. In addition, the Plan of Allocation will result in a fair and reasonable distribution of the proceeds. Finally, the requested attorneys' fees and expenses and award to PGERS are fair and reasonable under the circumstances of this Litigation, particularly relative to the outcomes achieved in the many other related cases and investigations. Therefore, Lead Plaintiff

respectfully requests that this Court approve the Settlement of this Litigation and the Plan of Allocation as fair, reasonable, and adequate, and award the requested fees and expenses.

DATED: February 28, 2019

Respectfully submitted,

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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.

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