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 <u>CLASS ACTION</u>

REPLY MEMORANDUM IN FURTHER 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. INTRODUCTION

Over 1.7 million individuals and entities received notice of this Settlement.[1] *The Wall Street Journal* twice published notice of the Settlement in its national edition and a summary notice was placed on an internet business newswire. The parties issued a joint press release months ago and the national media also covered the Settlement. The biggest benefit from so thoroughly getting the word out on this Settlement is the reality check such a wide audience provides. PGERS told the Court that this was a remarkable Settlement and this reality check has confirmed it: over 1.7 million notices and national publicity did not generate a single objection filed with the Court. Even among the hodgepodge of letters sent to Lead Counsel and the Court, only three purport to object to the Settlement, yet none of these three purported objectors suffered any damages, nor does any appear to be a Class Member. The lack of a single valid objection to this nationally publicized settlement involving our country's largest private employer resoundingly confirms that this is a fair and reasonable settlement. Accordingly, PGERS respectfully requests that the Court enter orders approving the Settlement and Lead Counsel's application for attorneys' fees and expenses, as well as PGERS' application for an award under 15 U.S.C. §78u-4(a)(4).

II. ARGUMENT

A. The Notice Provided to the Class Met All Due Process Requirements

Lead Counsel and the Claims Administrator, Gilardi & Co. LLC, conducted an extensive Court-approved notice program. In all, over 1.7 million notices were mailed to

[1] Unless otherwise defined, all capitalized terms have the meanings ascribed to them in the Stipulation of Settlement (ECF No. 433).

potential Class Members, and a summary version of the Notice was published twice in *The Wall Street Journal* and posted on an internet business website where it was picked up by additional news organizations. *See* Declaration of Carole K. Sylvester of Gilardi & Co. LLC, ¶¶4-12 (ECF No. 449) and the Supplemental Declaration of Carole K. Sylvester of Gilardi & Co. LLC, ¶3, submitted herewith. A case-specific website dedicated to this Litigation containing all pertinent information and a toll-free number for Class Members to call to ask questions were established and have been operational since January 4, 2019, and will remain so until the Net Settlement Fund is completely distributed. The Notice, Proof of Claim, and Stipulation of Settlement, among other relevant documents, were also posted to the website dedicated to the Litigation. Based on this evidence of execution of a fulsome notice program, there can be no question that the notice provided to the Class met all due process, Rule 23 and PSLRA requirements. *See Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140 (8th Cir. 1999).[2]

B. The Reaction of the Class Strongly Supports Final Approval

The March 14, 2019 deadline for objecting to all aspects of the Settlement, the Plan of Allocation, Lead Counsel's motion for attorneys' fees and expenses and/or Lead Plaintiff's reimbursement of costs and expenses has passed and no valid (*see* §II.C.-D., *supra*) objections have been received, and no actual Class Members (*i.e.*, non-defendants who purchased Walmart shares during the Class Period and suffered damages) requested exclusion from the Settlement.

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

Accordingly, the reaction of the Class to this comprehensive notice program overwhelmingly demonstrates widespread support of the Settlement, Plan of Allocation, Lead Counsel's attorneys' fee and expense request, and an award to PGERS, and thus weighs strongly in favor of approval. "'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). *See also In re Uponor, Inc.*, No. 11-MD-2247 ADM/JJK, 2012 U.S. Dist. LEXIS 90294, at *10 (D. Minn. June 29, 2012), *aff'd*, 716 F.3d 1057 (8th Cir. 2013) (the court approved the settlement, and held that "[c]lass member reaction has been positive" where three sets of objections and two exclusion requests were received out of 30,000 potential class members).

C. No Valid Objections

On December 6, 2018, the Court issued its Order preliminarily approving the Settlement. ECF No. 442. Paragraph 16 of the Order set forth in plain terms the procedure for any objections to the Settlement. The very first requirement was the following: "Any such objections and any supporting papers shall be filed with the Court on or before March 14, 2019 . . . ." *Id*. at 10. In the next paragraph, the Order warned that:

> Any Class Member who does not object to the Settlement and/or the Plan of Allocation, and ***any Class Member who does not object*** to Lead Counsel's application for an award of attorneys' fees and expenses ***in the manner prescribed herein and in the Notice***, ***shall be deemed to have waived such objection and his, her, or its right to object*** to the Settlement, this Order, the Judgment, the Plan of Allocation, and Lead Counsel's application for an award of attorneys' fees and expenses, shall be deemed a Class Member and shall forever be barred and foreclosed from making any objection to the fairness, adequacy or reasonableness of the proposed Settlement, this Order, the Final Judgment, the Plan of Allocation, and/or the application by Lead Counsel for

> an award of attorneys' fees and expenses, and from otherwise being heard concerning the Settlement, this Order, the Judgment, the Plan of Allocation, or Lead Counsel's application for an award of attorneys' fees and expenses in this or any other proceeding.

Id.

The Court-approved notice reiterated both the filing requirement and the waiver warning: "Any person who fails to comply with the requirements for objecting to the Settlement will be deemed to have waived all such objections and will be foreclosed from raising any objection to the proposed Settlement or to any part thereof." Notice at 7. Tens of thousands of individuals and entities have submitted claims, but the record is clear that not a single individual or entity filed an objection to any aspect of the Settlement, including Lead Counsel's application for attorneys' fees and expenses, as well as PGERS' application for an award under 15 U.S.C. §78u-4(a)(4).

D. No Class-Member Concerns

Whenever hundreds of thousands of individuals and entities are informed of anything, comments are inevitable. Here the number of comments was negligible. Among them were three that purport to object to a Settlement that does not involve them. Three out of nearly 1,700,000 is less than .00018%. If even one-tenth of one percent of those who were mailed notice were to have objected that would have been 1,700 objectors. It would take 17,000 objections to reach a one-percent level. The failure to file a valid objection is likely due to the fact that none of these letters was sent by an actual Class Member. None of the three purported objectors appears to have suffered any damages. Nor do any of the letters dispute any aspect of PGERS' and Lead Counsel's accomplishment or demonstrate any awareness of the specific facts of this case, its procedural history, or the applicability and consequences of the PSLRA's 90-day lookback here.

For example, the New York State Comptroller, Trustee of the New York State Common Retirement Fund (NYSCRF), wrote to claim that its one-size-fits-all "fee grid" is superior to the fact-specific fee determinations that most courts make.[3] The NYSCRF urges the Court to apply its attorneys' fee grid, which does not account for the individual facts or damages in any case, but rather sets fee percentages based on threshold recovery amounts without any regard as to the percentage of recoverable damages that these amounts represent or the specific risks each case presented. PGERS and Lead Counsel respectfully disagree with the NYSCRF, which does ***not*** appear to be a Class Member.

The Class here is defined as:

> ***all Persons who purchased or otherwise acquired Walmart publicly traded common stock during the period from December 8, 2011, through and including 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***, except those Persons and entities that are excluded.

Notice at ¶4 (emphasis in original). The NYSCRF does not claim to be a Class Member, does not appear to be a Class Member, and does not assert that it suffered any damages due to the alleged securities fraud here. It did nothing to assist the Class in this case over the past six-plus years, nor did it ever offer to assist the Class in this case.

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[3] For example, the grid requires that a $110 million recovery yield a ***lower*** fee percentage than does a $50 million recovery, even if the $110 million recovery represents 50% of recoverable damages, whereas the $50 million recovery represents 5% of recoverable damages. This fee grid has ***never*** yielded a recovery percentage that is close to the 80%-100% of recoverable damages that PGERS achieved here.

A brief review of the unique nature of this case will demonstrate why the NYSCRF is not a Class Member and why its purported objection is misplaced. On April 21, 2012, *The New York Times* published its article exposing many of the facts Defendants had allegedly misconstrued on December 8, 2011. On this news, Walmart's stock declined. But a few weeks later, Walmart had an earnings surprise and its stock price increased – and it kept increasing. By the end of the statutory 90-day lookback period, the average trading price for Walmart's stock was $65.52. To put this number in perspective, the ***high*** trading price during the Class Period (December 8, 2011-April 20, 2012) was $63.17 (which was below the average trading price by June 25, 2012 and stayed below every remaining day of the 90-day lookback period). In other words, the market-price methodology, which is the only accepted methodology used in every reported case brought under the PSLRA, meant that there are no recoverable damages for any shares purchased during the Class Period and retained through at least June 25, 2012. Due to the bounce back in Walmart's stock price, it appears that the NYSCRF did not suffer any damages here.

PGERS and Robbins Geller succeeded in establishing an unprecedented threat to avoid the lookback limitation to the market-price methodology that is written into the PSLRA, but this battle was far from won at the time the parties reached their agreement. *See* accompanying Declaration of Layn R. Phillips in Support of Lead Plaintiff's Motion for Final Approval of Settlement and for an Award of Attorneys' Fees ("Hon. Phillips Decl."), ¶20 ("Lead Plaintiff faced many ongoing risks in connection with its untested 'build up' damages methodology, which sought to measure damages without reference to the market price of Walmart's stock. At the time this case was filed, no court had ever endorsed the 'build up' damages methodology in a securities fraud class action. While the Court agreed that the securities laws do not prohibit recovery under the "build up" damages method, it never explicitly endorsed its use."). The bottom line remains that every case brought under the PSLRA before and after this one has applied the statutory market-price methodology, under which the only ***potentially*** "recoverable damages" would be for shares purchased during the Class Period and sold prior to June 25, 2012 (the NYSCRF has not claimed that it sold any shares during this window). The total of these sales damages was estimated to be approximately $130-$190 million. Applying the median recovery for all other class-action securities fraud cases (2.6%) (*see* n.8, *infra*) would mean an expected recovery in this case of $3.38-$4.94 million. Although the NYSCRF has exceeded this median recovery, when it has served as a class representative in other cases, its average recovery is approximately 4% of recoverable damages,[4] which would yield an expected recovery of $5.2-$7.6 million in this

[4] The two representative cases that the NYSCRF cites to establish its expertise confirm the remarkable recovery here. Based on publicly available information, *In re Countrywide Fin. Corp. Sec. Litig.*, 07-05295 (C.D. Cal.), involved a four-year class period, $29.70 in per share damages, and about 500 million damaged shares for approximately $15 billion in damages. The evidence of the fraud was overwhelming, and there were no unique legal issues regarding damages. The *Countrywide* case settled for only 4% of damages, which was better than average, but less than what the *Countrywide* defendants had allegedly made from their inside sales.

Similarly, *In re BP p.l.c. Securities Litigation*, No. 4:10-md-02185 (S.D. Tex.), involved a 25-day class period, approximately $20 in per share damages, and about 250 million damaged shares for approximately $5 billion in damages. Once again, the evidence of fraud was overwhelming, the damages were clean, and the NYSCRF obtained a better-than-average recovery of 3.5% of damages.

Applying the NYSCRF's standards to this case would have meant a settlement for the Class of about $6.4 to $8 million, a tiny fraction of the $160 million PGERS obtained. Even though the NYSCRF has exceeded the average recovery, the Class here will receive over $100 million ***more*** than it would have received with an NYSCRF-level recovery. PGERS has proved the reliability of its judgment regarding selection and compensation of counsel by maximizing the recovery for the Class, which received an outstanding return on the fees it paid for counsel with extensive trial experience.

case. Understandably, not one plaintiff or law firm other than PGERS and Robbins Geller sought to take on Walmart for such a small expected recovery. The NYSCRF simply does not have any experience in such a case. Because of its massive size, it has enjoyed the luxury of participating in only those cases where the evidence of fraud is overwhelming, there are no significant unique legal issues regarding damages, and as a result, multiple plaintiffs and law firms vie for the opportunity to represent the class. Here, the challenge PGERS and Robbins Geller faced was so daunting, 15 other cases in multiple state and federal jurisdictions were brought, pursuing recoveries based on the same underlying facts, but different legal claims. ***Walmart defeated every one of those cases***.[5]

Robbins Geller invested hundreds of thousands of out-of-pocket dollars and millions of dollars of time, enlisting a half-dozen experts, to develop an unprecedented damages theory that could pose at least a plausible threat of avoiding the lookback limitation on damages. While waging that battle in both the District Court and the Eighth Circuit Court of Appeals, Robbins Geller fought for PGERS and the Class in every way imaginable, defeating three motions to dismiss, raising discovery disputes in five different judicial districts, and litigating a FOIA complaint against the SEC. In the end, what we accomplished is without precedent: a $160 million settlement from Walmart, representing 80%-100+% of recoverable damages. Again, the NYSCRF's average recovery of approximately 4% of damages is well above average, but it is not in the universe of what PGERS and Robbins Geller accomplished here. Depending on the claims submitted, this

[5] The NYSCRF's co-lead plaintiff in *Countrywide*, the NYC Pension Funds, was one of the 15 plaintiffs that were unsuccessful in recovering from Walmart based upon the facts at issue in this case. *New York City Employees' Retirement System, et al. v. Aida M. Alvarez, et al.*, C.A. No. 7612-CS (Del. Ch.).

case could very well result in a 100% ***net*** recovery for Class Members. We understand the NYSCRF prefers its fee grid, but it is not a party to this case and its purported objection is not well taken. *See, e.g., In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir. 2014) ("[B]ecause the BCA Objectors did not substantiate their membership in this class, the district court did not abuse its discretion under Rule 23(d)(1)(A) and Rule 23(d)(1)(C) in finding that the BCA Objectors "forfeited and waived" their objections to the class certification and settlement approval. We therefore will not consider the merits of their objections.");[6] *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1533-34 (8th Cir. 1996) ("Standing under § 10(b) and Rule 10b-5 requires a showing of . . . damages . . . .").

As the Supreme Court has stated:

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan*, 504 U.S., at 560, 112 S. Ct. 2130. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.

Spokeo, Inc. v. Robins, __ U.S. __, 136 S. Ct. 1540, 1547 (2016). The NYSCRF's unfiled letter does not assert that it suffered an injury in fact due to the alleged securities fraud here. More specifically, it does not allege that it suffered any damages due to any of its Class Period purchases of Walmart stock. Indeed, the NYSCRF's letter fails to acknowledge that by the end of the 90-day lookback period, the mean trading price for Walmart's stock was $65.52, a higher price than the NYSCRF had ever paid for Walmart's stock – before or during the Class Period. To date, there is also no record of NYSCRF submitting a valid

[6] The trial court discretion in rejecting the merits of an objection made by a litigant that has not demonstrated its standing is not subject to review. *See, e.g., Deepwater Horizon*, 739 F.3d at 809; *Hill v. State St. Corp.*, 794 F.3d 227, 231 (1st Cir. 2015).

Proof of Claim.[7] Because the NYSCRF and the two individuals who sent letters purporting to object to the Settlement do not claim to be Class Members, do not appear to be Class Members, have not established that they are Class Members, and have failed to allege that they suffered any actual damages in light of the 90-day bounce back, the Court should not treat their unfiled letters as objections and should disregard them (they likewise lack standing to appeal this Court's final-approval decision).

E. NYSCRF's Invalid Objection to Lead Counsel's Fee Request Should Be Overruled

1. NYSCRF's Objection Is Blind to the Facts of This Case

NYSCRF's one-size-fits-all fee grid conflicts with the well-developed law requiring courts to perform a ***case-specific*** assessment of a request for attorneys' fees based on the application of certain factors to the unique circumstances of the litigation at issue. 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.

[7] It is undisputed that the failure to submit a Proof of Claim is fatal to the objections to the Plan of Allocation or the proposed fee. *See Rodriguez v. Disner*, 688 F.3d 645, 660 n.11 (9th Cir. 2012) ("[O]bjectors who do not participate in a settlement lack standing to challenge class counsel's . . . fee award because, without a stake in the common fund pot, a favorable outcome would not redress their injury."); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (concluding that an objector who did not file a claim "lack[ed] any interest in the amount of fees, since he would not receive a penny from the fund even if counsel's take should be reduced to zero").

Khoday v. Symantec Corp., No. 11-cv-180 (JRT/TNL), 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016) (quoting *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) (citing *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 993 (D. Minn. 2005)); *see also Larey v. Allstate Prop. & Cas. Ins. Co.*, No. 4:14-cv-4008, 2018 WL 811103, at *5 (W.D. Ark. Feb. 9, 2018) (Hickey, J.) (citing *In re Xcel*, 364 F. Supp. 2d at 993 and performing a similar case-specific multi-factor test).

NYSCRF instead urges this Court to impose what amounts to a systemic ceiling on attorneys' fees in class actions based solely upon its misunderstanding of the prevailing market rate for contingency cases, and without any objective assessment of the quality and success of the attorneys in the case. NYSCRF does not contest Lead Counsel's fee request based upon any case-specific facts or relevant factors (except for its purported market rate) that courts in this Circuit consider when determining the appropriate attorneys' fee.

While an extensive discussion of the appropriateness of Lead Counsel's fee request considering relevant factors is set forth in PGERS' previously-filed final approval brief and the previously-filed Forge Declaration, the following case-specific facts render NYSCRF's purported objection misplaced here:

- ***Benefit conferred on the Class***: NYSCRF does not dispute that the benefit conferred on the Class in ***this case*** 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.[8] In other words, the Class

[8] *See* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review*, at 34-36 (NERA Jan. 29, 2019) (ECF No. 447-1) (finding a median recovery of 2.6% of NERA-defined investor losses in similar securities class actions settled in 2018); *see also* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements – 2016 Review and Analysis* at 8 (Cornerstone Research 2017) (concluding that, from 2006 to 2016, the median settlement amount in securities class actions was approximately 2.5% of the class members' total estimated losses).

recovery here is at least ***3000%*** greater than the average securities class action. *See also* Hon. Phillips Decl., ¶¶17, 19 ("Having mediated hundreds of securities class actions over the past twenty years, I believe the monetary relief obtained by the Lead Plaintiff and Lead Counsel in this case is an excellent result for the benefit of the Class certified by the Court. . . . [T]he proposed settlement represents an exceptional result for the class members . . . ."). Every settlement cited in NYSCRF's objection represented a far inferior recovery and serves to highlight the exceptional nature of the recovery achieved in this case. *In re Countrywide Fin. Corp. Sec. Litig*., 07-05295 (C.D. Cal.) (recovering 4% of recoverable damages); *In re BP p.l.c. Securities Litigation*, No. 4:10-md-02185 (S.D. Tex.) (recovering 3.5% of recoverable damages). Disconnecting attorneys' fees from the success of the recovery, as NYSCRF's "fee grid" does, is contrary to both common sense and the law. *See generally Manual for Complex Litigation* §21.71 (4th ed. 2004) ("Compensating counsel for the actual benefits conferred on the class members ***is the basis*** for awarding attorney fees."). *Id*. at 336.

- ***Difficulty and novelty of the legal and factual issues of this case***: NYSCRF does not dispute that the relevant legal and factual issues in this case were both novel and difficult. There was no admission of fraud. No roadmap was provided by any governmental investigation and discovery was significantly hampered by the Eighth Circuit's precedent in *Diversified Industries*, forcing Lead Plaintiff and Lead Counsel to: (1) file a wholly independent lawsuit against the Securities and Exchange Commission in the Middle District of Tennessee pursuant to the Freedom of Information Act; (2) file a miscellaneous case in the District of Columbia to enforce a third-party subpoena; and (3) challenge the same doctrine in this Court. To date, neither the DOJ nor the SEC has brought a single charge, let alone collected a single dollar in penalties.[9] Most importantly, after an initial price decline, Walmart's stock recovered – reaching all-time highs, all within the PSLRA's 90-day lookback period. In response, Lead Plaintiff and Lead Counsel (with the help of experts) developed the "build up" damages methodology, an untested approach that faced numerous challenges, but ultimately was a substantial factor in securing the remarkable recovery in this case. *See* Hon. Phillips

[9] In rather stark contrast, four years before the settlement in *BP* was reached, the corporate defendant: (1) signed a guilty plea with the government admitting to its criminal conduct at issue, and agreeing to pay $4 billion in criminal fines and penalties – the largest criminal resolution in United States history; and (2) agreed to pay $525 million to settle SEC charges of securities fraud caused by the conduct at issue (the third-largest penalty in SEC history). Even with a guilty plea and government investigatory materials (and defendants' waiver of the PSLRA discovery stay) – *i.e.*, where scienter, liability and damages were foregone conclusions – NYSCRF's $175 million recovery amounted to 3.5% of recoverable damages. This is an above-average recovery, which highlights the achievement of Lead Plaintiff in this (much more difficult) securities case.

Decl., ¶20 ("[T]here was a possibility that Lead Plaintiff ultimately would not be entitled to use the "build up" method to calculate damages, particularly in light of the high hurdle that it faced under *Daubert* and the likelihood of post-trial challenges regarding that method. Despite this fact, many risks associated with the "build up" methodology were overcome by Lead Counsel in the course of this litigation, and Lead Counsel's ability to pursue the "build up" methodology played an important role in securing a substantial recovery on behalf of the class.").

- ***The risk to which plaintiffs' counsel was exposed***: NYSCRF does not dispute that the risk to which plaintiffs' counsel was exposed in ***this case*** was significantly higher than other cases based upon the fact that defendants defeated at least 15 other cases filed in four different jurisdictions based on the same underlying facts, ***without a single penny being recovered*** for investors. While shareholder derivative cases involving Walmart may have been viewed by plaintiffs' lawyers as strong, desirable cases, securities fraud cases on behalf of purchasers of Walmart common stock were not. In fact, PGERS was the only class member to either file an initial complaint or seek lead plaintiff status (PGERS did both). Moreover, even after this suit got under way, no other law firm was willing to serve as lead counsel. *See Silverman*, 739 F.3d at 958 ("Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices. The district judge did not abuse her discretion in concluding that the risks of this suit justified a substantial award, even though compensation in most other suits has been lower.").[10]

[10] The lower-risk *Countrywide* and *BP* cases were so desirable at the time they were filed that there was significant competition among plaintiffs (and their attorneys) to lead those cases. In *Countrywide*, five public securities cases were filed and at least seven class-members other than NYSCRF, represented by at least five law firms, sought to lead the case. NYSCRF and the NYC Pension Funds, as the movant asserting the largest loss on its investment in Countrywide securities ($42 million – NYSCRF's letter does reveal how much of those $42 million in losses it recovered (likely less than $2 million)), was appointed lead plaintiff. Similarly, in *BP*, seven securities cases were filed and consolidated, and at least eight other class members, represented by at least five law firms, sought to lead the consolidated *BP* action. NYSCRF and its co-movant were appointed lead plaintiff, as their loss of over $200 million demonstrated that they had the largest financial interest out of all the movants (again, NYSCRF's letter does not reveal how much of those $200 million in losses it recovered (likely less than $10 million)). The riskiness and complexity of this case is illustrated by the complete lack of competition among plaintiffs and plaintiffs' counsel to lead it: only one complaint was filed (PGERS'), and only one class-member – PGERS – sought to lead this case. These facts suggest that while *Countrywide* and *BP* would have been litigated whether or not NYSCRF won the fight to lead them, there would have been no *Walmart* case (and no recovery for the Class) if PGERS or Lead Counsel had not accepted this challenge.

- ***The skill of the lawyers, and the time and labor involved***: NYSCRF does not dispute that ***in this case*** Lead Counsel's prosecution team faced some of the best defense lawyers in the country, hired by one of the largest and most feared companies in the world, whose in-house legal team is also among the world's best. *See* Hon. Phillips Decl., ¶18 ("Walmart's in-house counsel, litigation counsel and settlement counsel are among the most capable and most respected lawyers in the country."); *see also* accompanying Expert Report of Professor Charles Silver 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) ("Professor Silver Decl."), at 8-9 ("Why did no other lead plaintiff or law firm compete for control of this case? They probably wanted no part of the case because Wal-Mart was the defendant. . . . Wal-Mart is a famously aggressive defendant."). With respect to the time and labor expended in this Litigation, NYSCRF readily admits that "[c]learly, Robbins Geller has put in a great deal of work in this case, which has gone on for some six years." This Court also observed that the ongoing discovery stage of the Litigation was particularly contentious and resource-intensive. *See* ECF No. 420 (stating that moving the Litigation past the discovery phase has required "seemingly Sisyphean efforts" by the Court).

Even with respect to the sole factor on which it bases its objection, NYSCRF incorrectly assumes that Lead Counsel's fee request is outside of the range of the prevailing market rate. As explained in PGERS' previously-filed settlement brief, Lead Counsel's fee request is squarely within that range:

> 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.

ECF No. 446 at 29-30 (emphasis in original).[11]

These cases are not outliers. Comprehensive studies confirm that Lead Counsel's fee request is completely reasonable. An analysis of fee awards in class actions conducted by National Economic Research Associates ("NERA"), a conservative economic consulting firm, confirm that "'***[r]egardless of case size,*** fees average approximately 32 percent of the settlement.'" *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *14 (E.D. Mo. June 30, 2005) (quoting NERA study). Similarly, a Federal Judicial Center study which examined all class actions in four selected federal district courts found that "[m]edian rates [for attorneys' fees] ranged from 27% to 30%." Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at 69

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[11] *See also Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006) (awarding 31.33% of $1.06 billion settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 34.06% of $365 million settlement).

(Federal Judicial Center 1996); *see also In re Xcel*, 364 F. Supp. 2d at 998-99 (citing Professor John C. Coffee's statistical data analysis which concluded that "25–30% recoveries were 'fairly standard' in 'mega fund' class actions involving settlements between $100 and $200 million").[12]

As explained by Professor Silver, NYSCRF misunderstands and misapplies the statistics and thrust of the study that he and his colleagues published, Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 Columbia Law Review 1371 (2015) ("*Is the Price Right?*"): "the statistics we reported are wholly disconnected from the facts of this case . . . . ***[c]onsequently, our findings do not provide a reliable starting point for use in this case***." Professor Silver Decl. at 5.

Of course, there are securities class actions where the court has awarded less than the 30% that Lead Counsel had requested here. However, those cases may have involved acknowledged frauds with admissions of guilt, accounting restatements, giant stock declines from which the stock did not recover, bankruptcies or near bankruptcies, and/or criminal prosecutions – ***just like Countrywide and BP*** – and recoveries of less than 10% of recoverable damages. These are low-risk, low-return cases where satisfying the PSLRA's pleading barriers, establishing liability and establishing damages are all but foregone conclusions. Numerous plaintiffs, represented by multiple law firms, usually compete for

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[12] In the context of a motion to remand, this Court similarly found that it is reasonable to conclude that a court might award up to 40% as a fee in class litigation. *See Doss v. American Family Home Ins. Co.*, No. 4:14-cv-04007-SOH, ECF No. 57, at 11 (W.D. Ark. Sept. 19, 2014) (Hickey, J.) (stating that "[a] 40% rate of attorneys fees has been approved by the Court and others" and holding "it is reasonable to use a 40% multiplier to estimate attorneys fees for the amount in controversy") (collecting cases).

appointment as lead plaintiff in such cases. A lower fee percentage may make sense under those particular circumstances, but here, all the factors support Lead Counsel's fee request:

> I believe that the findings in *Is the Price Right?* cited by the NYSCRF do not support its contention that Class Counsel's fee should be reduced. . . . Fee percentages should reflect the risks that class actions present, and the facts, especially the absence of competition for the lead plaintiff and lead counsel positions, suggest quite strongly that the odds of winning were poor when this case began.

Professor Silver Decl. at 9-10. *See also* Hon. Phillips Decl., ¶24.

"The NYSCRF Objection also errs by encouraging the Court to perform a lodestar cross-check," according to Professor Silver. *See* Professor Silver Decl. at 5. The NYSCRF's reliance on Professor Silver's study to support a lodestar cross-check is misguided because, as he explains, the study found that lodestar cross-checks are a "waste of time" because they have no significant effect on fee awards once lead attorneys' fee requests are controlled for. *See id*.; *see also Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362 ("[O]ne of the many problems with Objectors' argument that the Court should consider the lodestar of Class Counsel is that it encourages inefficiency. . . . The lodestar approach should not be imposed through the back door via a 'cross-check.'"). "The lodestar method is a terrible way of setting class counsel's fees. It should be tossed onto the trash-heap of discredited doctrines, not used as a cross-check on percentage-based awards." *See* Professor Silver Decl. at 5.

The NYSCRF's "fee grid" features a fee rate that declines as the recovery increases. While this approach may result in lower attorneys' fees, it could also result in much lower ***net*** class recoveries because it dis-incentivizes counsel to assume the higher risk of pursuing higher settlements, misaligning the interests of class counsel and the class.[13] *See* n.3, *supra*. The fact that the NYSCRF did not seek to be appointed lead plaintiff in this case is consistent with both its lack of standing and the incompatibility of its "fee grid" to a case like this one. The NYSCRF writes that it has 20 top law firms from which to choose to bring these cases, yet not one of them dared take on this challenge under the NYSCRF's low-risk, low-return fee grid. Respectfully, it is not well taken for the NYSCRF to sit comfortably on the sidelines for over six years while all the hard work is being done and all the difficult battles are being won and then argue – in a vacuum (without reference to any case-specific factors) and with the benefit of 20/20 hindsight – that Lead Counsel should be awarded less because some courts have awarded less than the percentage requested here.[14]

[13] Both in *Countrywide* and in *BP*, many of the world's most respected institutional investors excluded themselves from the settlements, choosing instead to bring their own individual actions because they believed that the class-wide settlement – a product of NYSCRF's "fee grid" – was insufficient and/or that they could do better with their own counsel. These institutions included California Public Employees' Retirement System, T. Rowe Price Group Inc., BlackRock Financial Management Inc., SunAmerica Asset Management Corp., TIAA-CREF, Texas Teacher Retirement System, Maryland State Retirement and Pension System, Montana Board of Investments, Norges Bank Investment Management, Royal Mail Pension Plan, PGGM Vermogensbeheer B.V., Government of Guam Retirement Fund, American Century, Nuveen, and Thrivent Financial for Lutherans.

[14] The NYSCRF does not, and cannot, explain why its approach to retaining and compensating counsel, which has never yielded a recovery on the order of the recovery achieved here, should supersede the approach of Lead Plaintiff, which is also a sophisticated institutional investor with significant experience overseeing class actions. The NYSCRF overlooks the fact that Lead Counsel's fee request has been approved by the Lead Plaintiff who: (i) reviewed the fee request; (ii) is familiar with Class Counsel's work throughout this case; and (iii) found the request to be reasonable. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *8 (S.D.N.Y. Nov. 7, 2007) ("public policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request"); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("[s]ignificantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request"). PGERS' unreserved support for Lead Counsel's fee request supports approval.

Finally, important public policy considerations also support the requested fee. The federal securities laws are remedial in nature and, in order to effectuate their purpose of protecting investors' private lawsuits, are to be encouraged. *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). Indeed, because the ultimate effectiveness of the securities laws largely depends on the efficacy of the class action device, the Supreme Court recently characterized securities class actions as "indispensable." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007). Indeed, courts have long held that:

> Private lawsuits serve to further the objective of the federal securities laws which is to protect investors and consumers against fraudulent and other deceptive practices. As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. Competent counsel can be obtained if reasonable and adequate compensation for the services were awarded if a successful result is achieved. "***To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding***. The concept of a private attorney acting as a 'private attorney general' is vital to the continued enforcement and effectiveness of the Securities Acts."

Eltman v. Grandma Lee's, Inc., No. 82 Civ. 1912, 1986 U.S. Dist. LEXIS 24902, at *25 (E.D.N.Y. May 29, 1986). Judge Sofaer, a former District Judge of the Southern District of New York, succinctly stated the reasons for providing a substantial financial incentive for capable counsel in securities class actions:

> It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but ***the big difference in my experience is in the amount obtained and you don't get the highest recovery when you are paying at the low end of the scale of fee recovery in contingent actions***. It seems to me that I as the protector of the class can fairly say, and honestly say, that I believe it is in the class's best interests – of

> this class and of future classes yet unknown – to pay this kind of money for these kinds of benefits.

1 Alba Conte, *Attorney Fee Awards*, §1.04, at 6 n.33 (2d ed. 1993). Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from securities fraud. Accordingly, an award of the requested fee would be fully consistent with important public policy considerations.

F. The Remaining Objections Are Likewise Without Merit

The remaining objections lack standing, are without merit, and should be overruled.[15]

1. Philip R. Heckendorn

Mr. Heckendorn questions the proposed Plan of Allocation because he fails to acknowledge the applicability of the 90-day lookback period required by the PSLRA, §21D(e)(1),[16] which provides that "in any private action arising under this Act in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market."[17] The average closing price for Walmart common stock during

[15] The letters submitted by Dawn Johnson and Suzanne Goudreau raise issues completely unrelated to the subject matter of the Litigation, and the one improperly sent to Gilardi makes no valid legal argument.

[16] Class Members were informed of the presence and applicability of the lookback provision. The text of §21D(e)(1) is set out in the Notice at pages 9-10 in footnote 3.

[17] Although PGERS and Lead Counsel established that PSLRA plaintiffs are not necessarily limited to the market-price methodology, it remains the only methodology that

the 90-day lookback period was $65.52 per share. Mr. Heckendorn purchased his Walmart stock during the Class Period for $59.23 per share. Therefore, he has no recognized loss under the Plan of Allocation. Lead Counsel called Mr. Heckendorn upon receipt of his letter and explained the applicability of the lookback. Mr. Heckendorn submitted a supplemental letter to counsel and the Court reasserting his objection that the Plan of Allocation is unfair. The reality is, however, that there can be no result other than that provided in the Plan of Allocation proposed by Lead Counsel.[18] The 90-day lookback provision was written into the PSLRA by Congress to limit recoverable damages in certain situations, such as the one presented here, where the price of the corporate defendant's stock rises in the weeks and months after the initial drop following the release of corrective information.[19] Therefore, any disagreement Mr. Heckendorn has with damage calculations should be addressed to his congressional representative; Lead Counsel must abide by the statute.

has been accepted in this case and all other PSLRA cases. There would be no legal basis, therefore, to use a different, untested methodology for the Plan of Allocation.

18 What Mr. Heckendorn's objection also fails to acknowledge is that because Walmart stock increased substantially during the 90-day lookback, those Class Members who held their Walmart shares have made substantially more money than they would have had they sold and made a claim into the Settlement Fund. Mr. Heckendorn is a perfect example of this reality. He purchased 2,000 Walmart shares for $59.23 per share on January 13, 2012. On July 20, 2012, the end of the 90-day lookback period, Walmart's stock closed at $72.25, meaning that Mr. Heckendorn had made approximately $2,600 on his investment in just six months. It was Congress's decision to enact the lookback limitation to limit damages to investors who actually lose money on their investments versus investors who profit from their investments, such as Mr. Heckendorn. Respectfully, this distinction is neither arbitrary nor capricious.

19 In drafting the 90-day lookback (also called the bounce-back) provision, the PSLRA's drafting committee concluded, that calculating damages based on the date corrective information is disclosed may substantially overstate plaintiff's actual damages. Congress attempted to "rectify the uncertainty in calculating damages by providing a 'bounce back' period, thereby limiting damages to those losses caused by the fraud and not by other market conditions." *See* S. Rep. 104-98, 19-20, 1995 U.S.C.C.A.N. 679, 698-99.

2. Victor Moses

Mr. Moses' unfiled letter purports to object to the Settlement and Plan of Allocation, but does not make any substantive arguments as to why neither is fair, reasonable or adequate.

III. CONCLUSION

For the reasons set forth herein and in their previously submitted briefing, and following an extensive notice program in response to which no objections to the amount of the Settlement itself were filed, PGERS and Lead Counsel respectfully submit that the Settlement is an excellent result for the Class and the proposed Plan of Allocation is a fair and equitable method for distributing the Net Settlement Fund. Therefore, both should be approved as fair, reasonable, and adequate. In addition, the fees and expenses requested by Lead Counsel and PGERS are reasonable under the circumstances and should be approved.

Based on the foregoing and the entire record herein, PGERS and Lead Counsel respectfully request that the Court grant PGERS' motion for final approval of the Settlement and the Plan of Allocation and Lead Counsel's motion for an award of attorneys' fees and expenses and award to PGERS.

DATED: March 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 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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