

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ALAN B. MARCUS, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

J.C. PENNEY COMPANY, INC., et al.,

Defendants.

§ Civil Action No. 6:13-cv-00736-RWS-KNM
§ (Consolidated)

§ CLASS ACTION

**DECLARATION OF ROBERT R. HENSSLER JR. IN SUPPORT OF FINAL
APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION,
AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARDS TO
PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4)**

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I, ROBERT R. HENSSLER JR., declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California, and I have been admitted *pro hac vice*, to appear before this Court in the above-captioned action (the “Action”).¹ I am a member of the firm of Robbins Geller Rudman & Dowd LLP (“Robbins Geller” or “Lead Counsel”), counsel for Lead Plaintiff National Shopmen Pension Fund (“NSPF” or “Lead Plaintiff”), and the Class. I have been actively involved in the prosecution and resolution of this Action, am familiar with its proceedings, and have personal knowledge of the matters set forth herein based on my active participation and supervision of all material aspects of the Action.

2. I submit this declaration in support of Plaintiffs’ motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for final approval of the Settlement, which provides for a cash settlement of \$97,500,000 (the “Settlement Amount”), and for approval of the proposed Plan of Allocation. I also submit this declaration in support of Lead Counsel’s motion for an award of attorneys’ fees and expenses and awards to Lead Plaintiff and plaintiff David O’Connell (collectively, “Plaintiffs”) for their time incurred in representing the Class.

I. PRELIMINARY STATEMENT

3. Plaintiffs and Lead Counsel have zealously and diligently litigated the claims asserted in this lawsuit from its commencement in October 2013 through settlement, the basic terms of which were not finalized until April 2017, shortly before the close of fact discovery. At every stage of this Action, Plaintiffs and Lead Counsel have tirelessly and aggressively litigated this case on behalf of the Class, including challenging Defendants’ arguments and defenses.

¹ Unless otherwise defined, all defined terms used herein have the same meanings as set forth in the Settlement Agreement (Dkt. No. 160) (the “Stipulation” or the “Settlement Agreement”).

4. Plaintiffs have consistently refused to settle this Action for anything less than a very good recovery for the Class and decidedly continued to strengthen their case even after the Settlement Amount had already been negotiated. In fact, the Settlement was only achieved after Lead Counsel, *inter alia*: (i) successfully opposed seven movants for Lead Plaintiff; (ii) investigated and prepared a detailed and comprehensive amended complaint; (iii) successfully opposed Defendants' Motion to Dismiss; (iv) conducted extensive discovery, including the careful review and analysis of over 850,000 pages of documents produced by Defendants and non-parties; (v) prepared for and conducted 20 depositions of witnesses including current and former employees of J.C. Penney Company, Inc. ("JCPenney" or the "Company"), JCPenney's consultants and factors, and certain non-party fact witnesses; (vi) defended Lead Plaintiff's expert witness's deposition in connection with class certification; (vii) defended Lead Plaintiff's deposition pursuant to Rule 30(b)(6) in connection with class certification; (viii) obtained class certification over Defendants' aggressive opposition; (ix) fully briefed Defendants' Notice of Appeal Pursuant to Rule 23(f); (x) retained multiple experts and consultants on non-duplicative work concerning the Revised Consolidated Complaint for Violation of the Federal Securities Laws (the "Complaint") (Dkt. No. 94), deposition preparations, and Defendants' loss causation, market efficiency and damages challenges; and (xi) engaged in numerous and extensive telephonic and written meet and confers with Defendants and non-parties regarding the production of documents and scheduling of depositions. Notably, Lead Counsel accomplished the Settlement in the face of very strong opposition from Defendants' counsel, who are well-respected, highly experienced attorneys from Gibson, Dunn & Crutcher LLP.

5. This Settlement is the product of hard-fought litigation and was reached at an advanced stage of the case. The parties fully appreciated the strengths and weaknesses of their respective cases and understood the significant risks of continued litigation. The negotiations were

arm's length and contentious, and the Settlement was reached with the assistance of the Honorable Daniel Weinstein (Ret.), a nationally recognized mediator with extensive experience with complex litigation. The parties agreed to settle the Action only after they had participated in two formal, in-person mediation sessions and numerous telephonic and written negotiations thereafter.

6. As a result of Lead Counsel's tireless litigation efforts, and the parties' numerous settlement negotiations, Lead Counsel had a deep appreciation for the issues critical to the outcome of this Action. Although Plaintiffs strongly believe their claims are supported by both the documentary evidence and deposition testimony produced and developed through discovery, Plaintiffs understand the risks in proving the claims at trial. As discussed in more detail below, Defendants have strenuously argued that Plaintiffs would be unable to prove Defendants' liability as well as loss causation and damages. Given those significant risks, Plaintiffs and Lead Counsel are confident that the \$97,500,000 Settlement is a very good result for the Class.

7. The Complaint alleges that in violation of §§10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder Defendants engaged in a fraudulent scheme to artificially inflate the price of the Company's stock by making materially false and misleading statements and omissions. More specifically, the Complaint alleges that from August 20, 2013 to September 26, 2013 (the "Class Period"), Defendants made several false and misleading statements to investors concerning JCPenney's liquidity, need for additional capital, sufficiency of inventory, and solid supplier relationships. The Complaint further alleges that, at the same time, Defendants failed to disclose that the Company was desperate for outside capital due to its worsening liquidity crisis, which crisis was deteriorating its relationships with factors and suppliers.

8. The Complaint further alleges that Defendants' materially false and misleading statements and omissions were revealed to the public through a series of partial disclosures beginning on September 24, 2013, when a Goldman Sachs' analyst issued a report revealing in part

the extent of the Company's liquidity crisis, and ending on September 26, 2013, when the Company announced the need to conduct a nearly \$800 million equity raise. Each partial disclosure resulted in a significant decline in JCPenney stock, according to the Complaint.

9. In response to the Complaint's allegations, Defendants have argued that they did not make any actionable, material, false or misleading statements during the Class Period. Defendants have further argued that even if they made any false or misleading statements, Plaintiffs would be unable to prove scienter because Defendants did not know their alleged statements were false or misleading when made. Defendants have consistently maintained that they lacked any motive to mischaracterize the Company's capital needs.

10. In addition, the parties have vigorously battled over the issues of loss causation and damages. Defendants have argued, and would have continued to argue, that any false or misleading statements and omissions concealing the necessity of the upcoming equity raise were disclosed to the market prior to the September 24, 2013 Goldman Sachs' report, and thus Defendants' alleged fraud could not have impacted the stock price. No doubt Defendants and their experts would have continued to dispute loss causation and damages at summary judgment and trial.

11. The Settlement avoids the significant additional costs and risks of further litigating liability and damages if the case were to continue. As such, Lead Counsel believes that the Settlement is in the best interests of Plaintiffs and the Class.

12. Lead Counsel has prosecuted this Action on a wholly contingent basis, and therefore has advanced or incurred all the litigation expenses to date. As such, Lead Counsel has assumed the significant risk of an unfavorable outcome. Lead Counsel has not yet received any compensation for its efforts or this risk.

13. Lead Counsel's fee request for 30% of the Settlement Amount is fair and reasonable and is within the range of fee percentages frequently awarded in this type of action. Moreover, it is

fully justified by the particular facts of this case, including the substantial benefits conferred on the Class, the risks undertaken, the quality of representation, the nature and extent of legal services performed, and the fact that the \$97.5 million Settlement Amount was not likely at the outset of the case.

14. Both the Settlement and Lead Counsel's fee request have been approved by the Lead Plaintiff. This is the type of result envisioned by Congress in enacting the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4, *et seq.* (the "PSLRA") and is entitled to significant weight by the Court in awarding fees to Lead Counsel. In addition, two nationally recognized attorneys' fee award experts submitted declarations concluding that the fee award requested is reasonable and supported by the *Johnson* factors. Justice Craig T. Enoch (Ret.) analyzed the requested fee using the *Johnson* factors and concluded that "the 30% fee requested by Lead Counsel in this matter is reasonable, and I believe such a fee would be proper for the court to approve." *See* Declaration of Craig T. Enoch, Justice (Ret.), in Support of Proposed Award of Class Counsel's Attorneys' Fees ("Enoch Decl."), at 14, filed herewith. Likewise, Professor Geoffrey P. Miller examined the requested fee and concluded that "the requested attorneys' fee is supported by the *Johnson* factors and consistent with awards in similar cases." *See* Declaration of Professor Geoffrey P. Miller ("Miller Decl."), at 26, filed herewith.

15. Lead Counsel also seeks an award of \$868,760.57 in expenses reasonably and necessarily incurred in the prosecution of this Action over four years. These expenses include: (i) the costs associated with taking or defending fact and expert witness depositions, such as court reporter and videographer fees and travel expenses; (ii) hosting and managing the database of over 850,000 pages of documents; (iii) online factual and legal research; and (iv) the fees and expenses of Lead Plaintiff's consultants and experts whose services were necessary for the successful prosecution of this Action. As will be evident from the discussion below on the efforts required by

Lead Counsel in order to achieve this outstanding result, these expenses were reasonable and necessary.

16. In addition, as allowed under the PSLRA, Lead Plaintiff seeks an award for its time expended in representing the Class in the amount of \$10,200.00. Lead Plaintiff's investment of time and effort significantly contributed to the recovery for the Class.

17. Also, additional named Plaintiff David O'Connell seeks an award for his time incurred in representing the Class in the amount of \$1,500.00. Mr. O'Connell's time and effort also contributed to the Class' recovery.

18. The following summarizes the primary events that occurred during the course of the litigation and the legal services provided by Lead Counsel.

II. The Litigation

A. Commencement of the Action

19. On October 1, 2013, plaintiff Alan B. Marcus filed this Action against JCPenney and two of its executive officers, Myron E. Ullman, III and Kenneth H. Hannah (collectively, "Defendants"), alleging violations of the federal securities laws, namely §§10(b) and 20(a) of the Exchange Act. The lawsuit was styled, *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736. Dkt. No. 1.

20. On December 2, 2013, NSPF made a motion to: (i) consolidate related actions pursuant to Rule 42(a); (ii) appoint NSPF as Lead Plaintiff; and (iii) approve NSPF's selection of Robbins Geller to serve as Lead Counsel and Ward & Smith Law Firm as Liaison Counsel. Dkt. No. 29.

21. On February 28, 2014, Magistrate Judge Mitchell, United States Magistrate Judge for the Eastern District of Texas, issued an Order to consolidate the following three related securities class actions:

- *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736, filed October 1, 2013
- *Erdem v. J.C. Penney Co., Inc.*, No. 6:13-cv-00750, filed October 7, 2013
- *Gilbert v. J.C. Penney Co., Inc.*, No. 6:13-cv-00810, filed October 24, 2013

Dkt. No. 62.

22. In addition, the Court appointed NSPF as Lead Plaintiff, Robbins Geller as Lead Counsel, and Ward & Smith Law Firm as Liaison Counsel. *Id.*

23. These appointments were significant as Lead Plaintiff and Lead Counsel faced many hurdles in seeking appointment to serve in these roles. This is because eight different movants initially sought to be appointed lead plaintiff and lead counsel. *Id.* Although four movants eventually withdrew their motions before the Court ruled, each of the remaining four movants submitted opening motions, oppositions to other movant's opening motions, reply briefs, and sur-replies in further support of their own motions. *See, e.g.*, Dkt. Nos. 23, 26-29, 37, 39-41, 45, 47-49, 50-52. Moreover, even after the Court appointed the NSPF as Lead Plaintiff, one of the unsuccessful movants, Aletti Gestielle SGR S.p.A. ("Aletti"), moved the Court on March 14, 2014, to reconsider Lead Plaintiff's and Lead Counsel's appointments. Dkt. No. 63.

24. Lead Plaintiff filed a Response in Opposition to the Motion for Reconsideration on March 24, 2014. Dkt. No. 64.

25. On May 8, 2014, the Honorable Judge Leonard Davis, United States District Judge for the Eastern District of Texas, issued an Order adopting Magistrate Judge Mitchell's Opinion denying Aletti's Motion for Reconsideration to Lead Plaintiff's and Lead Counsel's appointments. Dkt. No. 65.

26. Following the Court's May 8, 2014 Order, Lead Counsel continued its extensive investigation into its claims, which included: (a) conducting interviews of former JCPenney employees through outside private investigators; (b) a thorough review and analysis of Defendants' public disclosures, including: (i) transcripts of JCPenney's quarterly conference calls held to discuss

the Company's financial results and other presentations made by top JCPenney management at investor conferences; (ii) the Company's periodic filings with the SEC, including reports on Forms 10-K, filed annually, and Forms 10-Q, filed quarterly; and (iii) JCPenney press releases and media reports; (c) thorough review and analysis of relevant third-parties' public disclosures; (d) records reflecting the Individual Defendants' and other Company insiders' trades involving JCPenney shares in Form 4s filed with the SEC; (e) an examination and analysis of industry and Company stock price reactions to Defendants' alleged misstatements and corrective disclosures, including detailed reports discussing JCPenney and its public disclosures issued by industry analysts on a regular basis; and (f) consultation with an industry expert.

27. With respect to Lead Counsel's use of outside investigators, they assisted in gathering detailed and specific information critical to pleading facts sufficient to meet the heightened pleading standards mandated by the PSLRA. This included retaining experienced outside investigators from L.R. Hodges & Associates, Ltd. ("LRH") to perform investigative services relating to the Action. LRH has significant experience in investigations involving federal and state securities, derivative, antitrust, and consumer class action cases.

28. At the direction of Lead Counsel, LRH helped identify, locate and interview former JCPenney employees and other knowledgeable percipient witnesses likely to have information pertinent to the claims alleged. Under the direction and supervision of Lead Counsel, LRH interviewed several potential witnesses and discussed their findings and research with Lead Counsel.

29. On July 18, 2014, after extensive research, investigation and analysis, Lead Plaintiff filed a Consolidated Complaint. Dkt. No. 72.

B. Defendants' Motion to Dismiss the Consolidated Complaint

30. On September 10, 2014, Defendants moved to dismiss the Consolidated Complaint for failure to state a claim. Dkt. No. 73. In addition to attaching the Declaration of Olivia A.

Adendorff, which included 13 exhibits and spanned over 100 pages, Defendants raised numerous legal challenges to the adequacy of the Consolidated Complaint's allegations. *Id.* More specifically, Defendants argued that the Consolidated Complaint: (i) failed to adequately allege that Defendants' statements and omissions were actionable on the basis that they were neither false nor misleading; (ii) failed to adequately plead scienter as Defendants lacked any motive to artificially inflate the stock; (iii) failed to show Defendants knew the alleged misstatements and omissions were false at the time because the PSLRA safe harbor provision for forward-looking statements applied, and Defendants used cautionary language that provided ample protection; and (iv) failed to adequately plead loss causation because the market was already aware of the Company's capital needs on September 24, 2013, and thus the Goldman Sachs' report could not, as the Consolidated Complaint alleged, partially reveal the truth of Defendants' alleged fraud to the market. *Id.*

31. On October 14, 2014, pursuant to Rule 12(d), Lead Plaintiff filed an Objection to Defendants' numerous exhibits filed in support of the Motion to Dismiss. Dkt. No. 78. In the Objection, Lead Plaintiff opposed Defendants' exhibits to the extent Defendants employed them to "recast the Complaint and refute its factual allegations through their legal arguments in the Motion." *Id.*

32. On October 15, 2014, Lead Plaintiff filed its Response in Opposition to Defendants' Motion to Dismiss. Dkt. No. 79. In its 30-page Response, Lead Plaintiff challenged each of Defendants' arguments. For instance, Lead Plaintiff argued that: (i) the Consolidated Complaint clearly and adequately pled facts demonstrating why each alleged misstatement or omission was false or misleading; (ii) the PSLRA safe harbor provision did not apply in this Action as Lead Plaintiff adequately pled facts sufficient to show Defendants knew the alleged misstatements or omissions were false when made; (iii) the Consolidated Complaint pled facts with sufficient particularity to demonstrate scienter; and (iv) the September 24, 2013 Goldman Sachs' report was a

corrective disclosure because it contained information previously not known to the market, and thus the Consolidated Complaint sufficiently pled loss causation. *Id.* Lead Counsel spent a significant amount of time and resources researching and analyzing applicable case law² in order to prepare the most effective opposition to Defendants' arguments, demonstrating how the Consolidated Complaint satisfied the pleading requirements under the PSLRA and Fifth Circuit precedent.

33. On October 15, 2014, Lead Plaintiff also moved for judicial notice of two SEC filings relevant to its Response. Dkt. No. 80.

34. On November 10, 2014, Defendants filed a Reply in Support of their Motion to Dismiss Lead Plaintiff's Consolidated Complaint. Dkt. No. 83. Defendants also filed Responses to Lead Plaintiff's Rule 12(d) Objection and Request for Judicial Notice. Dkt. Nos. 84-85.

35. On November 20, 2014, Lead Plaintiff filed a Sur-Reply in Response to Defendants' Reply in Support of their Motion to Dismiss. Dkt. No. 87. In addition, Lead Plaintiff filed Replies to Defendants' Responses to Lead Plaintiff's Request for Judicial Notice and Rule 12(d) Objection. Dkt. Nos. 88-89.

36. On May 6, 2015, Lead Plaintiff filed a Motion for Leave to File a Revised Consolidated Complaint. Dkt. No. 92. This was because Lead Plaintiff sought to add David O'Connell, who transacted in JCPenney option contracts during the Class Period and was allegedly damaged thereby, as a named plaintiff to address the Court's concerns that those who transacted in options be included in the Class during the April 7, 2015 hearing in a related action (*Johnson v. J.C. Penney Co., Inc.*, No. 14-cv-722). *Id.*

² For example, Lead Plaintiff analyzed nearly 50 cases in presenting insightful and powerful arguments in support of the Consolidated Complaint. *Id.*

37. Thereafter, on June 4, 2015, the Court granted Lead Plaintiff's Motion for Leave to File a Revised Consolidated Complaint. Dkt. No. 93. Consequently, on June 8, 2015, Lead Plaintiff filed the Complaint. Dkt. No. 94.

38. On September 11, 2015, the Action was reassigned to the Honorable Judge Michael H. Schneider, United States District Judge for the Eastern District of Texas.

39. On September 11, 2015, Magistrate Judge Mitchell, "[h]aving considered the motions, responses, reply briefs, and sur-reply briefs," recommended that Defendants' Motion to Dismiss be denied in its entirety, and that Lead Plaintiff's Request for Judicial Notice be granted. Dkt. No. 98 at 1.

40. On September 25, 2015, Defendants filed Objections to Magistrate Judge Mitchell's Report and Recommendation. Dkt. No. 101. Defendants argued that the Report and Recommendation: (i) misapplied applicable law in concluding that three alleged statements were actionable; (ii) improperly attributed an alleged misstatement to Defendants because it came from CNBC; (iii) erred in failing to apply the PSLRA safe harbor for forward-looking statements; and (iv) dismissed Defendants' causation arguments without addressing them. *Id.* In addition, Defendants argued that the Magistrate Judge improperly ignored Defendants' request for an oral hearing on the issue. *Id.*

41. Thereafter, on September 29, 2015, the Honorable Judge Schneider issued an Order: (i) adopting Magistrate Judge Mitchell's Report and Recommendation; (ii) denying Defendants' request for an oral hearing on the issue; and (iii) granting Lead Plaintiff's Request for Judicial Notice. Dkt. No. 102.

42. Following the Court's Order denying Defendants' Motion to Dismiss, the parties filed a Joint Motion for Scheduling Order, which the Court adopted on October 26, 2015. Dkt. Nos. 106-107. The parties then began to meet and confer regarding a pre-trial and class certification schedule,

as well as on the scope of discovery. On December 22, 2015, the parties submitted a Report of the parties' Scheduling Conference, pursuant to Rule 26(f). Dkt. No. 113. Thereafter, on January 26, 2016, the parties submitted a Joint Motion for Entry of Discovery Plan, pursuant to Rule 26. Dkt. No. 117.

43. After submitting a Joint Motion for Amended Scheduling Order (Dkt. No. 121), the Court issued a Discovery Order regarding discovery procedures, as well as deadlines for discovery, dispositive motions, and pre-trial procedures. Dkt. No. 124.

C. Defendants' Answer to the Revised Consolidated Complaint

44. On November 12, 2015, Defendants filed their Answer to the Complaint. Dkt. No. 109. Defendants' 55-page Answer vigorously denied all of the material allegations in the Complaint and included 19 different affirmative defenses. *Id.*

D. Lead Plaintiff's Motion for Class Certification

45. On January 25, 2016, Lead Plaintiff filed a Sealed Motion for Class Certification and Memorandum of Law in Support Thereof. Dkt. No. 116. Lead Plaintiff's motion sought the Court's certification of a class comprised of all persons who purchased or otherwise acquired the publicly-traded securities of JCPenney during the Class Period of August 20, 2013 through September 26, 2013, and who were damaged thereby. *Id.* Lead Plaintiff also requested that the following persons be excluded from the Class: current and former defendants, members of the immediate family of any current or former defendants, directors, officers, subsidiaries and affiliates of JCPenney, any person, firm, trust, corporation, officer, director or other individual or entity in which any current or former defendant has a controlling interest, and the legal representatives, affiliates, heirs, successors-in-interest or assigns of any such excluded party. *Id.* In addition, Lead Plaintiff requested that the Court appoint NSPF as the representative of the proposed Class, as well as appoint Robbins Geller as Lead Counsel and Ward, Smith & Hill, PLLC as Class Counsel. *Id.*

46. Moreover, Lead Plaintiff's January 25, 2016 Motion for Class Certification was supplemented by the following attachments submitted in support of its motion: (i) the Declaration of the NSPF's Management Co-Chairman, Tim O'Connell; (ii) the Declaration of Robert R. Henssler Jr., which included documentary evidence and Robbins Geller's firm resume as exhibits; and (iii) the Expert Report of Bjorn I. Steinholt, CFA, which was over 400 pages in length, including exhibits. *Id.*

47. On March 4, 2016, Lead Plaintiff, through Lead Counsel, defended the deposition of Mr. Steinholt, which focused primarily on his report submitted in support of class certification.

48. On March 10, 2016, Lead Plaintiff, through Lead Counsel, defended the deposition of Mr. Tim O'Connell, the 30(b)(6) representative for Lead Plaintiff NSPF, which also focused on issues relating to class certification.

49. On April 15, 2016, Defendants filed a Sealed Response in Opposition to Lead Plaintiff's Motion for Class Certification. Dkt. Nos. 128-130. Defendants also filed a Declaration in Support of their Opposition, which included 10 exhibits, one of which was a nearly 50-page expert report of Dr. Daniel M. Garrett that purported to rebut Mr. Steinholt's expert report. Dkt. No. 128.

50. On May 4, 2016, Lead Plaintiff, through Lead Counsel, took the deposition of Dr. Garrett, focusing on his expert report submitted in opposition to class certification.

51. On May 27, 2016, Lead Plaintiff filed a Sealed Reply in further support of its Motion for Class Certification. Dkt. Nos. 131-132. Lead Plaintiff attached the Declaration of Jonah H. Goldstein to its Reply, which was comprised of 13 exhibits. Dkt. No. 131. Lead Plaintiff also attached a 47-page Rebuttal Expert Report of Mr. Steinholt to its Reply. *Id.*

52. On June 20, 2016, Defendants filed a Sealed Surreply in Opposition to Lead Plaintiff's Motion for Class Certification. Dkt. No. 133. Defendants attached the Declaration of

Olivia A. Adendorff to the Surreply. *Id.* The Declaration was nearly 150 pages and incorporated 39 exhibits, including Dr. Garrett's nearly 60-page rebuttal expert report. *Id.*

53. On June 29, 2016, Magistrate Judge Mitchell held a three and a half hour hearing regarding Lead Plaintiff's Motion for Class Certification. *See* Minute Entry of June 29, 2016, Class Certification Hearing (Dkt. No. 135). Following the hearing, on June 30, 2016, Defendants and Lead Plaintiff submitted their respective hearing exhibits to the Court. Dkt. Nos. 136, 137.

54. Thereafter, on August 29, 2016, Magistrate Judge Mitchell issued a Report and Recommendation that concluded Lead Plaintiff's Motion for Class Certification should be granted. Dkt. No. 143.

55. Before the District Court could rule on the class certification matter, however, the Court issued an Order reassigning the case to Judge Robert W. Schroeder III for all further proceedings. Dkt. No. 144.

56. On September 12, 2016, Defendants filed Objections to the Report and Recommendation regarding class certification. Dkt. No. 145. Defendants asserted that the Magistrate Judge erred by failing to examine whether Lead Plaintiff had proven loss causation by showing there was a price decrease following an alleged corrective disclosure. *Id.* In addition, Defendants argued that the District Court should wait to rule on the Motion until the Fifth Circuit had rendered a decision in *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-11096 (5th Cir.) on the issue of determining price impact and whether a corrective disclosure, is in fact corrective, at the class certification stage. Lastly, Defendants argued that they had presented sufficient evidence to rebut the Lead Plaintiff's fraud-on-the-market presumption. *Id.*

57. On September 26, 2016, Lead Plaintiff filed a Memorandum of Law in Opposition to Defendants' Objections to the Report and Recommendation of the United States Magistrate Judge Regarding Class Certification. Dkt. No. 146. Lead Plaintiff explained that Magistrate Judge

Mitchell had conducted the requisite analysis under Rule 23, and that the Court need not await a decision from the Fifth Circuit in *Halliburton* because the Supreme Court had already plainly held that “securities fraud plaintiffs [need not] prove loss causation at the class certification stage.” *Halliburton Co. v. Erica P. John Fund, Inc.*, ___ U.S. ___, 134 S. Ct. 2398, 2406 (2014) (citing *Erica P. John Fund, Inc. v. Halliburton Co.* (“*Halliburton I*”), 563 U.S. 804, 811-12 (2011)). Moreover, Lead Plaintiff noted that the Fifth Circuit has followed that precedent by holding that “[a]ddressing the corrective events question at the class certification stage” is improper under *Halliburton I* and *Amgen. Ludlow v. BP, P.L.C.*, 800 F.3d 674, 686-88 (5th Cir. 2015) (citing *Halliburton I*, 563 U.S. at 812-13; *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, ___ U.S. ___, 133 S. Ct. 1184, 1197 (2013)). Dkt. No. 146.

58. On January 6, 2017, Lead Plaintiff filed a Notice of Recent Developments Regarding Lead Plaintiff’s Motion for Class Certification. Dkt. No. 151. In the notice, Lead Plaintiff explained that the parties in *Halliburton* had recently submitted a joint motion to the Fifth Circuit notifying the court that they had reached a settlement, and requesting that the court abstain from ruling on the appeal, pending the district court’s final approval of the proposed settlement. *Id.* (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-11096, Joint Motion to Hold Case in Abeyance Pending District Court Approval of Settlement at 3, ¶5 (5th Cir. Dec. 23, 2016)). Lead Plaintiff noted further that on December 28, 2016, the Fifth Circuit granted the motion and stayed any further proceedings. Dkt. No. 151. In sum, Lead Plaintiff asserted that the District Court need not delay its decision in this Action any further on the basis of awaiting the Fifth Circuit’s decision. *Id.*

59. On March 8, 2017, the Court issued an Order: (i) adopting the Report and Recommendation of Magistrate Judge Mitchell; (ii) certifying a class “consisting of: All persons who, between August 20, 2013 and September 26, 2013 . . . purchased or otherwise acquired J.C.

Penney Company, Inc. securities, and were damaged thereby;”³ (iii) appointing NSPF as Class Representative; and (iv) appointing Lead Counsel Robbins Geller and Liaison Counsel Ward, Smith & Hill, PLLC as Class Counsel. Dkt. No. 152.

60. On March 23, 2017, Defendants filed a Petition for Permission to Appeal the District Court’s Order granting class certification pursuant to Fed. R. Civ. P. 23(f). *See* Case No. 17-90008, Doc. 00513924274 (5th Cir. Mar. 23, 2017). In their Petition, Defendants argued that the District Court had erred by failing to determine whether Lead Plaintiff’s alleged disclosures were in fact corrective, and whether Lead Plaintiff bears the ultimate burden of persuasion concerning reliance if the Defendants had initially rebutted the fraud-on-the-market presumption. *Id.*

61. On April 3, 2017, Lead Plaintiff filed its Answer in Opposition to Defendants’ Petition for Permission to Appeal, pursuant to Fed. R. Civ. P. 23(f), with the United States Court of Appeals for the Fifth Circuit. *See* Case No. 17-90008, Doc. 00513936986 (5th Cir. Apr. 3, 2017). Lead Plaintiff’s Answer asserted that both questions Defendants had presented for interlocutory appeal were moot as the District Court had correctly determined that the alleged disclosures were in fact corrective, and Defendants’ evidence offered to rebut Lead Plaintiff’s presumption of reliance satisfied neither their burden of production nor a burden of persuasion. *Id.*

62. On April 7, 2017, Defendants filed their Reply in Support of their Petition for Permission to Appeal. Case No. 17-90008, Doc. 00513944884 (5th Cir. Apr. 7, 2017).

³ The Court also held the following persons are excluded from the Class: “current and former defendants, members of the immediate family of any current or former defendants, directors, officers, subsidiaries and affiliates of J.C. Penney Company, Inc., any person, firm, trust, corporation, officer, director or other individual or entity in which any current or former defendant has a controlling interest, and the legal representatives, affiliates, heirs, successors-in-interest or assigns of any such excluded party.” Dkt. No. 152.

63. On April 24, 2017, the Fifth Circuit granted Defendants' Motion for Leave to Appeal under Rule 23(f). Case No. 17-40422, Doc. 00513964729 (5th Cir. Apr. 24, 2017); *see also* Dkt. Nos. 153-154.

64. On May 12, 2017, pursuant to Federal Rule of Appellate Procedure 42(b), Defendants filed a motion to voluntarily withdraw their appeal. Case No. 17-40422, Doc. 00513991936 (5th Cir. May 12, 2017).

65. On May 15, 2017, the Fifth Circuit granted Defendants' motion to voluntarily withdraw their appeal. Case No. 17-40422, Doc. 00513992524 (5th Cir. May 15, 2017); *see also* Dkt. No. 157.

E. Fact Discovery

1. Written Discovery and Requests for Documents

66. The parties made numerous requests for documents in this Action. Lead Counsel spent a significant amount of time preparing and responding to these document requests. Lead Counsel engaged in dozens of meet and confers with Defendants' counsel to address their objections to the document requests, requests for admission and interrogatories.

67. In addition, although Lead Plaintiff requested that the SEC produce documents pursuant to The Freedom of Information Act ("FOIA") that JCPenney had produced in connection with the SEC's own investigation into JCPenney's alleged wrongdoing, the Defendants agreed to produce those documents, in the same manner that they produced them to the SEC. Thus, while documents were requested from the SEC, the documents were produced by Defendants.

a. Document Requests

68. Pursuant to the Local Rules and practices of the Court, the parties agreed to request and produce documents absent formal requests pursuant to Rule 34. Accordingly, the parties proposed, and hotly debated, designated "Topics for Discovery." In addition, Lead Counsel

dedicated substantial time and effort meeting and conferring on these Topics, as well as on the proposed relevant time period, search terms, custodians and discovery sources to be searched.

(1) Document Requests Directed at Defendants

69. On November 30, 2015, Lead Plaintiff, through Lead Counsel, sent the First Set of Topics Identified by Lead Plaintiff for Defendants' Discovery. In total, Lead Plaintiff identified 39 discrete Topics for Discovery.

70. On February 3, 2016, Defendants provided their responses and objections to Lead Plaintiff's proposed (i) Topics for Discovery; (ii) discovery sources to be searched; (iii) relevant time period; (iv) search terms; and (v) custodians. Thereafter, the parties continued to have numerous meet and confers and to exchange counterproposals through detailed written correspondence and telephonic conferences. Over the course of many conferences the parties agreed to a set of search terms and custodians that would be reviewed by Defendants for responsive documents. Beginning on December 2, 2015, Defendants made rolling productions of responsive documents.

71. In addition, as the case developed through Lead Counsel conducting depositions and reviewing and analyzing responsive documents produced by Defendants, Lead Plaintiff continued to make additional requests for relevant documents. For example, on August 12, 2016, based on the ongoing review and analysis of documents produced, Lead Plaintiff requested that Defendants enlarge the time period Defendants used when searching for responsive documents. In addition, Lead Plaintiff identified five additional search terms relevant to the previously identified Topics for Discovery, and requested that those terms be added to Defendants' current list of search terms. Defendants responded with a counterproposal on September 2, 2016.

72. On November 15, 2016, Lead Plaintiff, through written correspondence, identified certain weekly reports that were missing from Defendants' productions and requested that those reports be produced. In addition, Lead Plaintiff requested an additional search term be added to the

current list of terms used to identify responsive documents. Lead Plaintiff served similar requests on Defendants on December 23, 2016, January 20, 2017, and March 22, 2017.

73. On March 31, 2017, after the parties' second mediation, Lead Plaintiff, through written correspondence, asserted that the review of Defendants' document production and recent deposition testimony of a former JCPenney employee demonstrated that five additional current or former JCPenney employees likely possessed unique documents relevant to Lead Plaintiff's claims, and therefore should be added as custodians. Lead Plaintiff also requested that Defendants run nearly 125 additional search terms related to JCPenney's vendors or suppliers across the files of all custodians and other agreed-upon discovery sources for the relevant time period.

74. In total, Lead Plaintiff served nearly 50 discrete requests for documents on Defendants.

(2) Document Requests Directed at Lead Plaintiff

75. On November 30, 2015, Defendants provided their First Set of Topics for Discovery from Lead Plaintiff. On January 22, 2016, Lead Plaintiff responded to these Topics by producing certain responsive documents and objecting to certain Topics.

76. In addition, on March 31, 2017, Defendants identified their Second Set of Topics for Discovery from Lead Plaintiff when designating two additional Topics for Discovery through written correspondence.

(3) Confidentiality Order and Review and Analysis of Documents

77. Lead Counsel participated in numerous meet and confers with Defendants' counsel to discuss their objections to the designated Topics for Discovery, requests for admission and Electronically Stored Information ("ESI") protocol, to negotiate the scope of the discovery and to arrange for the production of documents. For example, from the outset, Defendants asserted the Court's Model Order Regarding E-Discovery in Patent Cases should dictate the scope of e-discovery

in this case. Lead Plaintiff, on the other hand, argued that the Order should not govern Defendants' discovery obligations in this Action because discovery in patent cases is generally narrower. Indeed, patent cases are less complex than securities actions and involve fewer individuals and questions of fact to be determined. Given the differing views on the scope of discovery sought and the disputes regarding relevancy, burden and privilege, this process required extensive coordinated efforts and expenditures of time and money on Lead Counsel's part.

78. Prior to producing the requested discovery, the parties engaged in substantial negotiations over the terms of the confidential treatment of documents. On November 16, 2015, Magistrate Judge Mitchell approved the Stipulated Confidentiality and Protective Order. Dkt. No. 112.

79. Prior to producing the requested discovery, the parties engaged in substantial negotiations over the terms of the production of ESI. On February 23, 2016, Magistrate Judge Mitchell approved, and issued the Discovery Order which provided the discovery plan. Dkt. No. 124.

80. The discovery requests set forth above, culminated in the production by JCPenney of over 375,000 pages of documents. The careful examination and analysis of these documents required a massive undertaking by teams of attorneys that analyzed and organized the documents, selected those that proved or could undermine the Complaint's allegations, identified relevant witnesses and issues and established procedures to identify additional documents and information that had not been produced. Lead Counsel reviewed and analyzed the documents to determine what information the documents conveyed and how they were relevant to Plaintiffs' claims. Lead Counsel then applied that understanding to other documents that had been produced. Many of the documents were complex, technical documents regarding JCPenney's liquidity, inventory and other accounting issues that were generated by the Company's own specialized expert consultants. Lead

Counsel along with its in-house forensic accounting team painstakingly reviewed and analyzed these numerous, dense communications and spreadsheets. In addition, to adequately understand the material it was necessary for Lead Counsel to consult with its own experts retained in this case. In total, this document review process was conducted over the course of nearly one and a half years.

b. Interrogatories

81. Lead Plaintiff propounded one set of interrogatories to Defendant JCPenney on January 20, 2017. In addition, Lead Plaintiff began preparing detailed responses to interrogatories propounded by Defendants on March 31, 2017. Lead Plaintiff expended considerable time and effort drafting the interrogatories, as well as drafting detailed responses and objections to Defendants' requests.

(1) Interrogatories Directed at Defendants

82. On January 20, 2017, Lead Plaintiff served its First Set of Interrogatories on Defendant JCPenney. Defendants served their Responses and Objections to Lead Plaintiff's First Set of Interrogatories on February 21, 2017.

83. Defendants also produced documents pursuant to Rule 33(d) in response to Lead Plaintiff's First Set of Interrogatories on February 21, 2017.

(2) Interrogatories Directed at Lead Plaintiff

84. On March 31, 2017, Defendants served their First Set of Interrogatories on Lead Plaintiff. Lead Plaintiff, through Lead Counsel, began preparing responses and objections to these requests prior to April 21, 2017, when then parties agreed to settle the litigation and stay discovery.

2. Requests for Admission

(1) Requests for Admission Directed at Defendants

85. On February 18, 2016, Lead Plaintiff served its First Request for Admissions to All Defendants. Defendants served their Responses and Objections to Lead Plaintiff's First Request for Admissions on April 22, 2016.

86. On February 18, 2016, Lead Plaintiff served its First Request for Admissions to Defendant Myron E. Ullman, III. Defendant Ullman served his Responses and Objections to Lead Plaintiff's First Request for Admissions on April 22, 2016.

(2) Requests for Admission Directed at Lead Plaintiff

87. On March 31, 2017, Defendants served their First Set of Requests for Admission on Lead Plaintiff. Lead Plaintiff, through Lead Counsel, began preparing its responses and objections to these Requests prior to April 21, 2017, when the parties agreed to settle the litigation and stay discovery.

3. Depositions

88. In preparation for trial, Lead Plaintiff, through Lead Counsel, conducted the depositions of nine current and former JCPenney employees in various locations throughout the United States. Information regarding those depositions is set forth below:

DEPONENT	DATE	LOCATION	RELATIONSHIP
Jay L. Foster	12/13/2016	Dallas, Texas	Employee
Kristin Hays	2/3/2017	Dallas, Texas	Employee
Trent Kruse	12/15/2016	Dallas, Texas	Employee
Dennis Miller	3/30/2017	Dallas, Texas	Employee
Michael Porter	3/23/2017	Dallas, Texas	Employee
Kristine Powers	3/21/2017	Dallas, Texas	Employee

Mark Sweeney	4/13/2017	Milwaukee, Wisconsin	Employee
Timothy Van Saders	2/17/2017	Dallas, Texas	Employee
Salil Virkar	3/29/2017	Dallas, Texas	Employee

89. These depositions, in conjunction with the depositions of non-party fact witnesses, were essential in developing evidence concerning Defendants' liquidity crisis, and establishing Defendants' knowledge of material, non-public facts. In addition, these depositions were critical in providing the foundational admissibility of documentary evidence. In sum, Lead Plaintiff marked over 235 exhibits. Moreover, as previously noted, Lead Counsel continually assessed the sufficiency of Defendants' document production through the deposition testimony, and requested additional documents to prove Plaintiffs' case.

90. Lead Counsel was also required to defend the following depositions:

DEPONENT	DATE	LOCATION
Bjorn Steinholt	3/4/2016	San Diego, California
Timothy O'Connell	3/10/2016	New York, New York

4. Discovery Directed at Non-Parties

91. Commencing on November 24, 2014, Lead Counsel began making requests pursuant to FOIA to the SEC. In addition, starting on October 27, 2015, Lead Plaintiff began issuing subpoenas for documents to numerous other relevant non-parties, including the Company's former employees, directors, auditors, vendors, factors, consultants and securities analysts. As with Defendants' production, Lead Counsel expended significant resources obtaining, reviewing and analyzing these documents. In total, the document requests and subsequent negotiations resulted in the production of over 461,000 pages of responsive documents.

92. Set forth below is a list of the 69 non-parties that Lead Plaintiff subpoenaed in this Action:

PERSON/ENTITY	SUBPOENA DATE	RELATIONSHIP
William A. Ackman	10/28/2015	Former JCPenney Director
AllianceBernstein, L.P. (U.S.)	2/4/2016	Analyst
Anchorage Capital Group, LLC	2/4/2016	Analyst
Antipodean Advisors GP, LLC	2/4/2016	Analyst
Simon Baker	8/4/2016	Analyst/Financial Commentator
Balyasny Asset Management, L.P. (U.S.)	2/4/2016	Analyst
Barclays Capital, Inc.	10/27/2015	Analyst
Renato Basanta	2/4/2016 3/4/2016	Analyst
BBT Capital Management Advisors, LLC	2/4/2016	Analyst
BlackRock Advisors, LLC	2/4/2016	Financial Consultant
Blue Arrow Capital Management, LLC	2/4/2016	Analyst
Blue Ridge Capital, LLC	2/17/2016	Analyst
Monica L. Brady	3/24/2016	Former JCPenney Employee
Sean Butkus	1/19/2016	Analyst
Centerview Partners LLC	2/4/2016	Consultant
CIT Group, Inc./Commercial Services Inc.	10/27/2015 & 1/5/2016	Vendor/Financial Lender to Suppliers
Citigroup Global Markets, Inc.	10/27/2015	Consultant/Financial Institution
CNBC LLC	10/27/2015	Media
CRT Capital Group LLC	11/18/2015	Analyst
Deutsche Bank Securities, Inc.	10/27/2015	Analyst
Teresa Donahue	1/19/2016	Analyst
Dow Jones & Company, Inc.	10/28/2015	Financial Media

PERSON/ENTITY	SUBPOENA DATE	RELATIONSHIP
Fidelity Management & Research Company	2/4/2016	Analyst
GLG, Inc.	2/4/2016	Analyst
Greenlight Capital, Inc.	2/4/2016	Analyst
Charles Grom	2/4/2016	Analyst
Vasco Ivanov	1/19/2016	Analyst
J. Goldman & Co., L.P.	2/4/2016	Analyst
J.P. Morgan Investment Management, Inc.	2/4/2016	Analyst
Joele Frank, Wilkinson Brimmer Katcher	10/24/2016	Consultant
Ronald B. Johnson	10/30/2015	Former JCPenney Employee
Kekst and Company, Incorporated	3/8/2016	Consultant
KPMG LLC	10/27/2015	Auditor/Consultant
Leon Goldfeld	1/19/2016	Analyst
Levin Capital Strategies, L.P.	2/4/2016	Analyst
Bob Lupo	1/19/2016	Analyst
Macellum Advisors, L.P.	2/4/2016	Analyst
John Mackin	1/19/2016	Analyst
Macquarie Capital (USA) Inc.	10/27/2015	Analyst
Magnetar Financial, LLC	2/4/2016 8/18/2016	Analyst
Marathon Asset Management, L.P.	2/4/2016	Analyst
Jamie Michaelson	1/19/2016	Analyst
Moore Capital Management, L.P.	2/4/2016	Analyst
Morgan Stanley & Co. LLC	2/4/2016	Financial Institution

PERSON/ENTITY	SUBPOENA DATE	RELATIONSHIP
Neuberger Berman Management, LLC	2/4/2016	Analyst
John Parke	2/4/2016	Analyst
Christopher Pelinsky	1/19/2016	Analyst
Jeremy Perelman	1/19/2016	Analyst
Pershing Square Capital Management LP	10/27/2015	Investor
Primecap Management Company	2/4/2016	Analyst
Robert W. Baird & Co., Inc.	10/27/2015	Analyst
Robert Rosenson	1/19/2016	Analyst
Rosenthal & Rosenthal, Inc.	10/27/2015	Vendor/Financial Lender to Suppliers
Steven Roth	10/28/2015	Former JCPenney Director
Roystone Capital Management LP	8/04/2016	Analyst
Darren Schlanger	1/19/2016	Analyst
Scopus Asset Management, L.P.	2/4/2016	Analyst
Sterne Agee & Leach Inc.	10/27/2015	Analyst
Kenneth Stumphauzer	1/19/2016	Analyst
Jay Suchotliff	1/19/2016	Analyst
Talpion Fund Management, L.P.	2/4/2016	Analyst
The Buckingham Research Group, Inc.	10/27/2015	Analyst
The Goldman Sachs Group, Inc.	10/27/2015	Analyst/Financial Advisor
Third Avenue Management, LLC	2/4/2016	Analyst
Third Point, LLC	3/7/2016	Analyst
Vornado Realty Trust	10/28/2015	Investor

PERSON/ENTITY	SUBPOENA DATE	RELATIONSHIP
Wells Fargo Securities LLC	10/27/2015	Analyst/Financial Advisor
William Wyatt	1/19/2016	Analyst
Zweig-DiMenna Associates, LLC	2/4/2016	Analyst

93. Lead Counsel engaged in numerous meet and confers with nearly all of the 69 subpoenaed parties to discuss their objections to the subpoenas, to negotiate the scope of the document requests, and/or to arrange for the production of responsive documents. These negotiations were hard-fought and required hundreds of meet-and-confers. As with Defendants' document production, Lead Counsel continuously assessed the non-parties' document productions and Lead Plaintiff's discovery needs as the litigation progressed and made additional document requests as needed.

94. Lead Counsel also sought, and received, the written declarations of four fact non-party witnesses. These declarations were critical in developing evidence concerning Defendants' false and misleading statements and establishing the admissibility of critical e-mail.

DECLARANT	DATE	RELATIONSHIP
Robert Johnson	9/30/2016	Former JCPenney Employee
Fred Rosenfeld	8/5/2016	Consultant & Analyst
Wendy Silverstein	11/22/2016	Analyst & Investment Banker
Scott Wapner	12/9/2016	Financial Media Correspondent

95. Lead Plaintiff, through Lead Counsel, also conducted the depositions of 10 non-party fact witnesses. These depositions were essential to developing evidence concerning Defendants' liquidity crisis and supplier relationships, and establishing Defendants' knowledge of material, non-

public facts. Also, these depositions were critical to developing evidence regarding Defendants' allegedly misleading statements at the Sterne Agee & Leach Inc. Conference ("Sterne Agee Conference") held on September 25, 2013. Lastly, these depositions were essential in providing the foundational admissibility of certain documentary evidence. In sum, Lead Plaintiff marked over 135 exhibits. Information regarding those depositions is set forth below:

DEPONENT	DATE	LOCATION	DESCRIPTION
Renato Basanta	2/10/2017	New York, New York	Sterne Agee Conference attendee
Timothy Evan Cropper	11/30/2016	Charlotte, North Carolina	Employee of CIT Group Inc. (Vendor/Lender to JCPenney Suppliers)
Teresa Donahue	11/10/2016	New York, New York	Sterne Agee Conference attendee
Charles Grom	11/18/2016	New York, New York	Sterne Agee Conference attendee and host
Vassil Ivanov	11/10/2016	New York, New York	Sterne Agee Conference attendee
Alexandra Jenkins	9/29/2016	New York, New York	Sterne Agee Conference attendee
Jeremy Perelman	9/20/2016	New York, New York	Sterne Agee Conference attendee
Marc D. Puntus	2/28/2017	New York, New York	Employee of JCPenney Financial Consultant, Centerview Partners LLC
Jordan Rubin	04/20/2017	New York, New York	Employee of former JCPenney Investor, Pershing Square Capital Management LP
William Wyatt	10/19/2016	New York, New York	Sterne Agee Conference attendee

F. Expert Discovery

1. Lead Plaintiff's Expert Witnesses and Consultants

96. As discussed above, Plaintiffs' claims in the Complaint concerned complex, technical issues. As such, the services of certain experts and consultants were required to assist Lead Counsel in investigating, pleading and proving Plaintiffs' claims, as well as navigating the intricate issues involved in this Action.

a. Mark A. Cohen

97. Lead Plaintiff utilized the services of Professor Mark A. Cohen to evaluate and opine on JCPenney's statements on the state of its retail operations. Professor Cohen is the Director of Retail Studies and an adjunct Professor of Retail at Columbia University, Graduate School of Business, and has extensive experience as a CEO in the retail industry. For example, he was formerly the Chairman and CEO of Sears Canada; Chief Marketing Officer and President of Softlines of Sears Roebuck & Co.; Chairman and CEO of Bradlees Inc.; Chairman and CEO of Lazarus Department Stores; and Senior Executive Vice President of Mervyn's Stores. Professor Cohen also served in a number of other retail positions at Goldsmith's Department Stores, Lord & Taylor, Gap Stores Inc. and Abraham & Straus. He received an MBA and B.S. degree in electrical engineering from Columbia University. Also, he serves as a consultant to the retail and consumer products industries.

98. Professor Cohen consulted with Lead Plaintiff, through Lead Counsel, from the commencement of this Action. Professor Cohen assisted Lead Plaintiff in drafting the Complaint; analyzing the documents produced in discovery that dealt with retail specific terms and issues; and in preparing for the depositions of JCPenney employees and consultants. Moreover, given the timing of the Settlement in relation to the June 1, 2017 due date of expert disclosures, Professor Cohen had already begun drafting and preparing his expert report.

b. Mitchell S. Hoffman, CPA/ABV

99. Lead Plaintiff retained Mitchell S. Hoffman, CPA/ABV to evaluate and provide an expert report and testimony on JCPenney's financial condition. A critical component of Lead Plaintiff's evidence at summary judgement and trial would have concerned JCPenney's need to raise capital prior to the Class Period. Thus, Lead Plaintiff utilized Mr. Hoffman's expertise to evaluate JCPenney's financial reports and projections to opine on the Company's capital needs.

100. Mr. Hoffman has more than 25 years of experience in the areas of business valuation and commercial damages. He is a certified public accountant and is accredited in business evaluation. Mr. Hoffman's expertise lies primarily in providing independent valuation opinions with respect to businesses, business ownership interests, securities, and intangible assets in a variety of litigation and non-litigation contexts. Currently, Mr. Hoffman is a member of Harper Hofer & Associates, LLC, which focuses on litigation, business valuation and taxing scenarios. Previously, Mr. Hoffman was a partner at Hein & Associates LLP, and focused on litigation, valuation and bankruptcy consulting services. He is also a member of American Institute of Certified Public Accountants and the Colorado Society of Certified Public Accountants. Mr. Hoffman received a Master's degree in Business Administration from National University, and a B.S. degree from the United States Naval Academy.

101. Mr. Hoffman expended a substantial amount of time studying JCPenney's financial reports, income statements, cash forecasts and board materials in order to accurately opine as to JCPenney's need to raise capital. Given the timing of the Settlement in relation to the date of expert disclosures, Mr. Hoffman had already reviewed dozens of JCPenney financial documents, internal JCPenney communications and begun drafting and preparing his expert report.

c. J.T. Atkins

102. Lead Plaintiff retained J.T. Atkins to evaluate and provide an expert report and testimony on JCPenney's nearly \$800 million public offering, and complex lock-up agreements between the Company and the Company's insiders during the Class Period. Understanding the nuances of these agreements was essential to Lead Plaintiff's case as it highlighted Defendants' alleged knowledge of the equity raise when simultaneously making allegedly misleading statements and omissions.

103. J.T. Atkins has served as an investment banker for over 30 years, and specializes in leveraged finance transactions, restructurings and bankruptcies, and mergers and acquisitions. Mr. Atkins founded and is the Managing Director of Cypress Associates LLC, an advisory firm specializing in mergers and acquisitions, corporate restructurings and recapitalizations, private placements of debt and equity and litigation consulting services/expert witness representations. He received his B.A. from the University of Virginia and his J.D. from Harvard Law School in 1982. He also holds the General Securities Registration Series 7 and Series 63 as well as the Principal Registration Series 24 with the Financial Industry Regulatory Authority, Inc. ("FINRA").

104. Mr. Atkins dedicated a significant amount of time to studying certain of the documents in this Action to understand the issues and the facts of JCPenney's public offering underwritten by Goldman Sachs, as well as JCPenney's lock-up agreement with its corporate insiders. In addition, Mr. Atkins dedicated a substantial amount of time advising and consulting with Lead Counsel on these issues to ensure Lead Counsel understood them and was sufficiently prepared for depositions. Given the timing of the Settlement in relation to the date of expert disclosures, J.T. Atkins had already begun drafting and preparing his expert report.

d. Bjorn Steinholt, CFA

105. An essential component of Lead Plaintiff's claims involves establishing market efficiency, and rebutting Defendants' claims that the alleged false statements had no price impact. To establish market efficiency, provide evidence on class-wide damages at class certification, and rebut Defendants' price impact arguments, Lead Plaintiff retained and designated Bjorn Steinholt, CFA, to offer expert opinions and testimony on these issues.

106. Mr. Steinholt has more than 25 years of experience in providing capital markets consulting. He has been retained on numerous occasions in the last ten years to provide expert opinions relating to market efficiency, loss causation and damages in large and complex securities class actions, such as this Action. Mr. Steinholt earned the professional designation Chartered Financial Analyst ("CFA") awarded by the CFA Institute. In addition, he received his Master's degree in International Business from the University of San Diego, and a B.S. degree in Computer Science and Engineering from California State University, Long Beach.

107. In order to adequately address the issues of market efficiency, price impact and damages at class certification, Mr. Steinholt spent a significant amount of time reviewing the record and all publicly-available information relating to JCPenney. Against this back-drop, he analyzed Defendants' statements regarding JCPenney's liquidity, plans to raise capital, sufficiency of inventory, and supplier relationships. He also analyzed any related stock price movement during and after the Class Period.

108. On January 25, 2016, Mr. Steinholt submitted his Expert Report in support of Lead Plaintiff's Motion for Class Certification, which was over 400 pages in length, including exhibits. Dkt. No. 116. On May 27, 2016, Lead Plaintiff filed a Sealed Reply in further support of its Motion for Class Certification, which attached Mr. Steinholt's 47-page Rebuttal Expert Report. Dkt. No. 131.

e. Steven P. Feinstein, Ph.D./CFA

109. Given the importance of proving market efficiency, loss causation and damages at summary judgement and trial, Lead Plaintiff utilized the services of a second economic expert, Steven P. Feinstein, Ph.D., to provide an expert report and testimony regarding these complex matters. Unlike the analysis by Mr. Steinholt at class certification, Dr. Feinstein's analysis included loss causation and was to include a full evidentiary record after the completion of fact discovery.

110. Dr. Feinstein is an Associate Professor of Finance at Babson College, and the President of Crowninshield Financial Research, Inc. ("CFR"), a well-regarded financial economics consulting firm. In addition to his work at Babson College and CFR, Dr. Feinstein has published numerous works regarding corporate valuation, derivatives and investments. He has provided analysis and testimony in numerous class action securities lawsuits, ERISA cases, derivatives, valuations and complex business litigation. Prior to his career in academia Dr. Feinstein was an economist at the Federal Reserve Bank of Atlanta. Dr. Feinstein earned a Ph.D. in Economics from Yale University, Master of Philosophy and Arts degrees in Economics from Yale University, and a B.A. in Economics from Pomona College. He also earned the professional designation of CFA granted by the CFA Institute.

111. Dr. Feinstein's economic analysis would have been essential at summary judgment and trial to prove that Lead Plaintiff could establish loss causation and to quantify the damages suffered by the Class. Given the timing of the Settlement in relation to the date of expert disclosures, Dr. Feinstein had already reviewed relevant materials and had begun drafting and preparing his expert report.

2. Depositions of Lead Plaintiff's Expert Witnesses

112. On March 4, 2016, Defendants took, and Lead Counsel defended, the deposition of Bjorn Steinholt in San Diego, California.

3. Costs Associated with Lead Plaintiff's Expert Witnesses

113. In sum, Lead Plaintiff's expert witnesses spent over 800 hours assisting Lead Plaintiff and Lead Counsel throughout the litigation and preparing for trial. The total cost of these expert witnesses is \$428,337.67.

114. Absent these experts' advice, reports and critical deposition testimony, Lead Plaintiff would have lacked substantial evidence regarding key factual elements of its case, and would not have been able to adequately address Defendants' Opposition to Lead Plaintiff's Motion for Class Certification and other important and hotly-disputed issues raised by Defendants. Also, Lead Plaintiff would not have been successful with its Opposition to Defendants' Motion to Dismiss.

4. Defendants' Expert Witnesses and Their Reports

115. To support their arguments, particularly at the class certification stage, Defendants retained and utilized Dr. Daniel Garrett as an expert witness.

116. Lead Counsel spent a significant amount of time on its own, and in conjunction with its own experts and consultants, analyzing Dr. Garrett's reports and arguments to develop counter arguments.

117. Lead Plaintiff, through Lead Counsel, scheduled, prepared for, and deposed Dr. Garrett on May 4, 2016, in Palo Alto, California.

118. Lead Plaintiff was able to mount serious challenges to Defendants' arguments at the class certification stage based on the information developed from the deposition of Defendants' expert.

G. Mediation

119. Lead Counsel participated in two mediation sessions with Judge Daniel Weinstein (Ret.). Only after the second mediation were the parties able to agree on a proposal from Judge

Weinstein. Lead Counsel believes that its continued diligent work following both mediations strengthened Lead Plaintiff's position and eventually led to the Settlement.

120. On June 2, 2016, the parties participated in the first mediation session with Judge Weinstein in Los Angeles. Lead Counsel prepared and submitted a thorough and confidential mediation statement to Judge Weinstein prior to the session. Lead Plaintiff's first mediation statement included 53 exhibits totaling 508 pages. Moreover, Lead Counsel attended the mediation session and vigorously argued Lead Plaintiff's position to ensure the best settlement possible for the Lead Plaintiff and the Class. Nevertheless, the case did not settle during that first mediation.

121. In the interim and throughout discovery, Lead Plaintiff submitted several informal updates to Judge Weinstein regarding the development of Lead Plaintiff's case, including for instance, the outcome of certain depositions and the discovery of certain particularly helpful documents.

122. The second mediation was held on March 9, 2017, in San Francisco, again with Judge Weinstein as the mediator. On March 3, 2017, Lead Counsel submitted a second confidential mediation statement which included 97 exhibits and spanned 588 pages. Defendants also filed a mediation statement, and Defendants' insurance carriers filed their own separate statement. The case did not settle during this second mediation. As such, Lead Counsel continued developing Lead Plaintiff's case, taking and defending several additional merits depositions.

123. After the mediation, Judge Weinstein continued to assist the parties' negotiations. On April 17, 2017, Judge Weinstein issued a mediator's proposal for \$97.5 million. The parties agreed to Judge Weinstein's proposal in principal on April 17, 2017, subject to their ability to reach an agreement on several non-monetary terms. Because the Term Sheet had not yet been entered into on April 20, 2017, Lead Counsel continued to pursue discovery, including by deposing a non-party witness. On April 21, 2017, the parties finalized the written Term Sheet memorializing their

agreement. Accordingly, on April 21, 2017, the parties also agreed to cancel any further depositions and to stay further litigation activity. The parties then advised the Court of the proposed tentative settlement agreement. Dkt. No. 155.

124. Thereafter, Lead Counsel worked diligently preparing preliminary approval papers, while continuing to negotiate a complex Stipulation with Defendants' counsel.

125. On June 14, 2017, Lead Plaintiff filed the Motion for Preliminary Approval of the proposed Settlement. Dkt. No. 159.

126. On June 20, 2017, Magistrate Judge Mitchell issued a Report and Recommendation that recommended the Court preliminarily approve the Settlement. Dkt. No. 161.

127. On July 24, 2017, the Court issued an Order preliminarily approving the Settlement and the form and manner of notice to the Class. Dkt. No. 164.

III. THE PLAN OF ALLOCATION

128. The Plan of Allocation is set forth in the Notice of Pendency and Proposed Settlement of Class Action (attached as Exhibit A-1 to the Settlement Agreement) and provides that the Net Settlement Fund will be distributed to Class Members who submit valid, timely Proof of Claim and Release forms and whose claims for recovery have been allowed under the terms of the Stipulation, including the Plan of Allocation described below ("Authorized Claimants"). The Plan of Allocation provides that Class Members will be eligible to participate in the distribution of the Net Settlement Fund only if they transacted in JCPenney Securities during the Class Period, August 20, 2013 to September 26, 2013. No distributions will be made to Authorized Claimants who would otherwise receive a distribution of less than \$10.00.

129. For purposes of determining the amount an Authorized Claimant may recover under the Plan of Allocation, Lead Counsel conferred with its damages consultant, and the Plan of Allocation reflects an assessment of the damages that it believes could have been recovered had the

Plaintiffs prevailed at trial. Defendants have had, and shall have, no involvement or responsibility for the terms or application of the Plan of Allocation described herein. The Court may approve the Settlement, even if it does not approve the Plan of Allocation.

A. Eligible Securities

130. The JCPenney Securities for which an Authorized Claimant may be entitled to receive a distribution from the Net Settlement Fund consist of the common stock and exchange-traded call and put options⁴ on JCPenney common stock. Exchange-traded options are traded in units called “contracts.” Each option contract entitles the holder to 100 shares of the underlying stock upon exercise or expiration, in this case JCPenney common stock. If an option was exercised for JCPenney common stock, the amount paid, or proceeds received, upon settlement of the option contract equals the intrinsic value of the option using JCPenney common stock’s closing price on the date the option was exercised. At least 95% of the Net Settlement Fund will be allocated to JCPenney common stock and no more than 5% will be allocated to JCPenney options on the common stock.

B. Recognized Loss

131. To the extent there are sufficient funds in the Net Settlement Fund, each Authorized Claimant will receive an amount equal to the Authorized Claimant’s “Recognized Loss,” as described below. If, however, as expected, the amount in the Net Settlement Fund is not sufficient to permit payment of the total Recognized Loss of each Authorized Claimant, then each Authorized Claimant shall be paid the percentage of the Net Settlement Fund that each Authorized Claimant’s Recognized Loss bears to the total of the Recognized Losses of all Authorized Claimants – *i.e.*, the Authorized Claimant’s *pro rata* share of the Net Settlement Fund. Payment in this manner shall be deemed conclusive against all Authorized Claimants.

⁴ The Plan of Allocation excludes those options that expired prior to September 25, 2013, the date of the price reaction to the first alleged corrective disclosure.

132. The proposed Plan of Allocation reflects the Plaintiffs' allegations that over the course of the Class Period, the trading prices of JCPenney Securities were artificially inflated as a result of Defendants' misrepresentations and omissions.

133. Estimated damages and the Plan of Allocation were developed based on an event study analysis, which determines how much artificial inflation was in the stock price on each day during the Class Period by measuring how much the stock price was inflated as a result of the alleged misrepresentations and omissions and how much it declined as a result of alleged disclosures that corrected the alleged misrepresentations and omissions. Because the alleged corrective disclosures reduced the artificial inflation in stages over the course of the Class Period, the damages suffered by any particular Authorized Claimant depends on when that Authorized Claimant purchased and sold shares, or retained shares beyond the end of the Class Period.

C. Calculation of Recognized Loss

134. Based on the foregoing, and for purposes of this Settlement only, Recognized Loss will be calculated as follows:

1. Publicly Traded Common Stock

135. For each share of JCPenney publicly traded common stock purchased or otherwise acquired during any of the periods shown in the left column of Table 1 (below), and:

- a. sold within the same period, the Recognized Loss per share is zero.
- b. sold in a subsequent period, the Recognized Loss per share is the lesser of:
 - i. the artificial inflation per share shown in Table 1; or
 - ii. the difference between the purchase price and the sales price.
- c. retained beyond September 26, 2013 but sold on/or before December 24, 2013, the Recognized Loss per share is the least of:
 - i. the artificial inflation per share shown in Table 1; or
 - ii. the difference between the purchase price and the sales price; or

- iii. the purchase price per share less the average closing price per share identified in Table 2 (below) for the date the share(s) were sold.⁵
- d. retained as of the close of trading on December 24, 2013, the Recognized Loss per share is the lesser of:
 - i. the artificial inflation per share shown in Table 1; or
 - ii. the difference between the purchase price per share and \$8.31 per share.

2. Exchange-Traded Call Options

136. For exchange-traded call options on JCPenney common stock purchased or otherwise acquired from August 20, 2013 to September 24, 2013, inclusive, and:

- a. closed (through sale, exercise or expiration) before September 24, 2013, the Recognized Loss per call option is zero; or
- b. held at the end of September 24, 2013, the claim per call option is the difference between the price paid for the call option less the proceeds received upon the settlement of the call option contract.

For exchange-traded call options on JCPenney common stock purchased or otherwise acquired from September 25, 2013 to September 26, 2013, inclusive, and:

- c. closed (through sale, exercise or expiration) before the close of trading on September 26, 2013, the Recognized Loss per call option is zero; or
- d. held at the end of September 26, 2013, the claim per call option is the difference between the price paid for the call option less the proceeds received upon the settlement of the call option contract.

137. For exchange-traded call options on JCPenney common stock written from August 20, 2013 to September 26, 2013, inclusive, the claim per call option is zero.

⁵ Pursuant to Section 21D(e)(1) of the PSLRA, “in any private action arising under this chapter 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.” \$8.31 was the mean (average) daily closing trading price of JCPenney common stock during the 90-day period beginning on September 27, 2013 and ending on December 24, 2013.

3. Exchange-Traded Put Options

138. For exchange-traded put options on JCPenney common stock written from August 20, 2013 to September 24, 2013, inclusive, and:

- a. closed (through purchase, assignment, or expiration) before the close of trading on September 24, 2013, the Recognized Loss per put option is zero; or
- b. held at the end of September 24, 2013, the claim per put option is the difference between the price paid upon settlement of the put option contract less the initial proceeds received upon the sale of the put option contract.

For exchange-traded put options on JCPenney common stock written from September 25, 2013 to September 26, 2013, inclusive, and:

- c. closed (through purchase, assignment, or expiration) prior to the close of trading on September 26, 2013, the Recognized Loss per put option is zero; or
- d. held at the end of September 26, 2013, the claim per put option is the difference between the price paid upon settlement of the put option contract less the initial proceeds received upon the sale of the put option contract.

139. For exchange-traded put options on JCPenney common stock purchased or otherwise acquired from August 20, 2013 to September 26, 2013, inclusive, the claim per put option is zero.

Table 1: Decline in Artificial Inflation per Share of JCPenney Common Stock

Purchase Date	Sale Date		Retained Beyond 9/26/2013
	8/20/2013-9/24/2013	9/25/2013-9/26/2013	
8/20/2013-9/24/2013	\$0.00	\$1.58	\$2.79
9/25/2013-9/26/2013		\$0.00	\$1.21

**Table 2
JCPenney Common Stock Closing Price and Average Closing Price
September 27, 2013 – December 24, 2013**

Date	Closing Price	Average Closing Price Between September 27, 2013 and Date Shown
9/27/2013	\$9.05	\$9.05
9/30/2013	\$8.81	\$8.93
10/1/2013	\$8.75	\$8.87
10/2/2013	\$8.72	\$8.83
10/3/2013	\$8.41	\$8.75

Date	Closing Price	Average Closing Price Between September 27, 2013 and Date Shown
11/11/2013	\$8.56	\$7.77
11/12/2013	\$8.37	\$7.79
11/13/2013	\$8.67	\$7.81
11/14/2013	\$8.69	\$7.84
11/15/2013	\$9.03	\$7.87

Date	Closing Price	Average Closing Price Between September 27, 2013 and Date Shown
10/4/2013	\$7.86	\$8.60
10/7/2013	\$7.71	\$8.47
10/8/2013	\$7.77	\$8.38
10/9/2013	\$7.89	\$8.33
10/10/2013	\$7.97	\$8.29
10/11/2013	\$8.00	\$8.27
10/14/2013	\$7.87	\$8.23
10/15/2013	\$7.17	\$8.15
10/16/2013	\$7.47	\$8.10
10/17/2013	\$7.35	\$8.05
10/18/2013	\$7.00	\$7.99
10/21/2013	\$6.42	\$7.90
10/22/2013	\$6.55	\$7.82
10/23/2013	\$7.04	\$7.78
10/24/2013	\$6.75	\$7.73
10/25/2013	\$6.79	\$7.68
10/28/2013	\$7.39	\$7.67
10/29/2013	\$7.38	\$7.66
10/30/2013	\$7.60	\$7.65
10/31/2013	\$7.50	\$7.65
11/1/2013	\$8.14	\$7.67
11/4/2013	\$8.36	\$7.69
11/5/2013	\$8.31	\$7.72
11/6/2013	\$7.70	\$7.71
11/7/2013	\$8.13	\$7.73
11/8/2013	\$8.23	\$7.74

Date	Closing Price	Average Closing Price Between September 27, 2013 and Date Shown
11/18/2013	\$8.71	\$7.90
11/19/2013	\$8.71	\$7.92
11/20/2013	\$9.44	\$7.96
11/21/2013	\$9.17	\$7.99
11/22/2013	\$8.87	\$8.01
11/25/2013	\$9.19	\$8.04
11/26/2013	\$9.36	\$8.07
11/27/2013	\$10.08	\$8.11
11/29/2013	\$10.19	\$8.16
12/2/2013	\$10.01	\$8.20
12/3/2013	\$10.11	\$8.24
12/4/2013	\$9.66	\$8.27
12/5/2013	\$8.85	\$8.28
12/6/2013	\$8.08	\$8.28
12/9/2013	\$8.43	\$8.28
12/10/2013	\$8.73	\$8.29
12/11/2013	\$8.48	\$8.29
12/12/2013	\$8.55	\$8.30
12/13/2013	\$8.57	\$8.30
12/16/2013	\$8.48	\$8.30
12/17/2013	\$8.20	\$8.30
12/18/2013	\$8.26	\$8.30
12/19/2013	\$7.96	\$8.30
12/20/2013	\$8.32	\$8.30
12/23/2013	\$8.78	\$8.30
12/24/2013	\$8.75	\$8.31

140. If a Class Member held JCPenney Securities at the beginning of the Class Period or made multiple purchases, acquisitions or sales of JCPenney Securities during or after the Class Period, the starting point for calculating an Authorized Claimant's Recognized Loss is to match the Authorized Claimant's holdings, purchases and acquisitions to their sales using the FIFO (*i.e.*, first-in-first-out) method. Under the FIFO method, JCPenney Securities sold during the Class Period will be matched, in chronological order first against JCPenney Securities held at the beginning of the Class Period. The remaining sales of JCPenney Securities during the Class Period will then be matched, in chronological order against JCPenney Securities purchased or acquired during the Class Period.

141. Purchases or acquisitions and sales of JCPenney Securities shall be deemed to have occurred on the “contract” or “trade” date as opposed to the “settlement” or “payment” date. The receipt or grant by gift, inheritance or operation of law of JCPenney Securities during the Class Period shall not be deemed a purchase, acquisition or sale of JCPenney Securities for the calculation of Recognized Loss, unless (i) the donor or decedent purchased or otherwise acquired such shares of JCPenney Securities during the Class Period; (ii) no Proof of Claim and Release was submitted by or on behalf of the donor, on behalf of the decedent, or by anyone else with respect to such shares of JCPenney Securities; and (iii) it is specifically so provided in the instrument of gift or assignment.

142. The parties ask that the Court reserve jurisdiction to allow, disallow, or adjust the claim of any Claim Member on equitable grounds.

IV. THE FACTORS AFFECTING SETTLEMENT

143. In the Fifth Circuit, the following factors are cited as the relevant criteria when evaluating the fairness of a proposed settlement: “(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs’ success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.” *Reed v. GMC*, 703 F.2d 170, 172 (5th Cir. 1983) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). The following analysis of these six factors with respect to the terms of the proposed Settlement and the Plan of Allocation demonstrates that the proposed Settlement is fair, reasonable and adequate, and in the best interest of the Class.

A. The Lack of Fraud or Collusion Behind the Settlement

144. The lack of fraud or collusion supports the fairness of the Settlement. The Settlement Agreement was reached as a result of the parties’ adversarial, arm’s-length negotiations conducted in good faith. Indeed, settlement on the terms proposed would not have been achieved absent the

significant participation and assistance of a nationally-renowned mediator, who had extensive experience negotiating the resolution of similar complex actions.

145. The Settlement was reached only after the parties participated in two in-person mediation sessions with Judge Weinstein and engaged in additional informal follow up negotiations through Judge Weinstein. Furthermore, the case was not only vigorously litigated prior to the Settlement, but also while the negotiations concerning the Settlement's non-monetary terms were ongoing. For example, Lead Counsel took a deposition of a fact witness after the parties agreed in principal to the Settlement Amount but before the Term Sheet was signed. The parties' contentious settlement negotiations and hard-fought legal battles throughout this case highlights the lack of fraud or collusion behind the Settlement.

B. The Complexity, Expense and Likely Duration of the Action

146. A review of the complexity, expense and likely duration of the litigation further supports the fairness of the Settlement.

147. Plaintiffs understand that Defendants' counsel is experienced in complex securities class actions, and would continue to challenge Plaintiffs' allegations just as Defendants have adamantly denied liability throughout the litigation. Continued litigation would require months and even years of additional effort as well as involve: (i) Defendants' 23(f) Appeal to the certification of the Class; (ii) summary judgment; (iii) vigorously contested evidentiary motions; (iv) a trial involving the introduction of hundreds of exhibits with dry financial matters; and (v) a battle of the experts regarding causation and damages.

148. If Defendants were then successful at trial, the Class would recover nothing after the additional expenditure of time and money from the continued litigation. And, even if the Class won on the merits at trial and recovered a judgment that was larger than the Settlement Amount, given the time value of money, such a future recovery might not be more beneficial than the recovery available

now. Moreover, Defendants would likely appeal any judgment in favor of Plaintiffs following a trial further delaying any potential recovery. As such, after considering the risks of continued litigation, Lead Counsel and Plaintiffs are confident the proposed Settlement represents an exceptional result for the Class.

C. The Stage of the Proceedings and the Amount of Discovery Completed

149. The significant amount of discovery completed and the stage of proceedings also support the Court's approval of the Settlement.

150. Lead Counsel has become well versed on the strengths and possible weaknesses of Plaintiffs' case. Lead Counsel's knowledge was gained through its extensive investigation of the case's merits during the prosecution of the Action, including, but not limited to: (i) reviewing and analyzing over 850,000 pages of documents produced by Defendants and non-parties; (ii) taking 20 depositions of current and former JCPenney employees and non-parties; (iii) defending two depositions; (iv) researching the relevant legal precedent with respect to the facts uncovered in discovery; (v) briefing Defendants' Motion to Dismiss and Lead Plaintiff's Motion for Class Certification; (vi) briefing Lead Plaintiff's Response to Defendants' 23(f) Appeal; and (vii) preparing for and participating in two formal, in-person mediation sessions.

151. The knowledge and insight gained by Lead Counsel during the four years this case has been ongoing has provided more than sufficient information to determine the strengths and weaknesses of the Class' claims and Defendants' defenses, and enabled Lead Counsel to engage in effective, well informed settlement negotiations. As such, Lead Counsel is confident the Settlement fairly reflects the strengths and weaknesses of Plaintiffs' case.

D. The Probability of Plaintiffs' Success on the Merits

152. Although Lead Counsel believes that Plaintiffs would have ultimately prevailed on the merits at trial, Lead Counsel understands that a number of risks made the outcome of this

litigation uncertain. For example, Defendants have prepared aggressive objections to the Fifth Circuit regarding the certification of the Class. If, for example, the Circuit Court agreed that Lead Plaintiff failed to show price impact with regard to the alleged misstatements prior to September 25, 2013, the potential Class recovery would be severely, if not completely, diminished. Although Plaintiffs firmly believe that the documentary and testimonial evidence they would offer on appeal, summary judgement and trial fully substantiates their claims, there is no way of predicting with absolute certainty which testimony, inferences or interpretations the Court or jury would accept. Furthermore, Defendants have adamantly denied any liability and were prepared to challenge numerous key elements of Plaintiffs' case alleging violations of the federal securities laws, including the elements of falsity, scienter, loss causation and damages.

1. Liability Risks

153. Defendants were prepared to aggressively argue and present evidence at trial that the alleged misstatements and omissions concerning JCPenney's liquidity, inventory, supplier relationships and need for outside capital were not actionable. More specifically, Defendants have alleged that one of the misstatements was mere "puffery," and adamantly denied that Defendant Ullman even made the alleged misleading statement at the September 25, 2013 Sterne Agee Conference. Although Plaintiffs disputed these points and believe that the documentary evidence and deposition testimony would support their claims at summary judgement or trial, if Defendants succeeded in all or even some of these arguments, certain alleged misstatements would have been excluded. This result would have drastically hindered or even eliminated the Class' recovery.

154. Moreover, even if Plaintiffs successfully swayed the Court or jury as to the falsity of the alleged statements, Defendants were prepared to put forth evidence negating Plaintiffs' allegations of Defendants' scienter. For example, Defendants would have challenged Plaintiffs' assertions that they Defendants knew the Company was on the verge of bankruptcy when the alleged

misstatements were made. In addition, Defendants would have offered evidence that they lacked any motive to make the alleged misstatements and omissions. Although Plaintiffs strongly believe that they would have been able to substantiate their claims with persuasive testimony from fact witnesses and experts, it is impossible to predict a Judge or jury's reactions, interpretations and inferences gleaned from the evidence and testimony.

2. Loss Causation and Damages Risks

155. Even if Plaintiffs succeeded in establishing liability, a significant risk of further litigation was Defendants' arguments and defenses relating to loss causation and damages.

156. Defendants have vigorously contended that Plaintiffs cannot establish loss causation. Plaintiffs believe that they would bring forth sufficient evidence to support the finding of loss causation and damages for the 23(f) Appeal, summary judgement and trial. However, Defendants – as they already have on multiple occasions in connection with the motion to dismiss, motion for class certification, and 23(f) Appeal to the Fifth Circuit – would argue (with the help of reputable experts) that Plaintiffs cannot demonstrate the Company's stock price declines during the Class Period were due to the partial revelation of the alleged fraud on September 24, 2013. At trial the elements of loss causation and damages would have likely come down to an inherently unpredictable and hotly disputed "battle of the experts." Indeed, there is a very real risk that the Class would have recovered significantly less than the Settlement Amount – or even nothing at all.

157. In deciding to settle, Plaintiffs and Lead Counsel considered the foregoing, and evaluated Defendants' defenses. Based on all the proceedings to date, it is the informed opinion of Lead Counsel that the recovery of \$97.5 million, particularly when viewed in the context of the risks and the uncertainties involved in proving loss causation and damages, is significant and warrants approval of the Settlement.

E. The Range of Possible Recovery

158. The Settlement Amount was a critical consideration in Lead Plaintiff and Lead Counsel's decision to settle this Action. Although Lead Plaintiff's damages expert estimates the damages in this case are much greater than \$97.5 million, Defendants and their insurance carriers asserted that the Class suffered no actionable damages.

159. The Settlement provides \$97.5 million in cash in exchange for the release of all claims against Defendants. Therefore, Lead Counsel obtained between 21% and 100% of the Class' recoverable damages, without exposing the Class to the risks of further litigation as described above. Compared to the median recovery as a percentage of estimated recoverable damages in shareholder class actions in 2016 of only 2.5%, the Settlement Amount represents an extraordinary recovery. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis*, at 7 (Cornerstone Research 2017).

160. Throughout the case, Defendants have argued repeatedly that the alleged misrepresentations and omissions prior to September 25, 2013, concerning JCPenney's liquidity, need for additional capital, sufficiency of inventory, and supplier relationships were not actionable. Accordingly, Lead Plaintiff faced a substantial risk that these claims would have been narrowed or lost at or before trial, limiting the maximum recoverable damages to as low as \$83.5 million, according to Lead Plaintiff's damages expert. Under this scenario, the \$97.5 million Settlement constitutes more than 100% of the maximum recoverable damages for the Class, which is clearly an exceptional result.

161. The Class faced a real risk that the jury or Court might reject Lead Plaintiff's theory of loss causation and damages and this risk has now been avoided. Moreover, any judgment after trial would still be subject to the continuing vicissitudes of litigation, through likely appeals.

Experience shows that even very large judgments, recovered after lengthy litigation and trial, can be completely lost on appeal. As such, this factor supports the fairness of the proposed Settlement.

F. The Opinions of Class Counsel, Class Representatives and Absent Class Members

162. Lead Counsel's experience and positive view of the Settlement favors its approval. As noted in the accompanying Motion for an Award of Attorneys' Fees and Expenses ("Fee Motion"), Lead Counsel is an extremely accomplished plaintiffs' class action firm, well respected by federal and state courts around the Country, as well as in this Circuit. Furthermore, as detailed above, Lead Counsel has zealously prosecuted this Action, and conducted an extensive investigation into its merits. Upon a careful evaluation of the risks of further litigation and the Settlement, Lead Counsel believes that the Settlement is in the best interests of the Class.

163. As detailed in the accompanying Declaration of Timothy O'Connell, Management Co-Chairman for NSPF, Lead Plaintiff also carefully considered the strengths and weaknesses of this case and concluded that the Settlement represents a very good outcome for the Class.

164. The deadline for objecting to the Settlement or requesting exclusion from the Class, November 8, 2017, has not yet passed. *See* Order Preliminarily Approving Settlement and Providing for Notice (Dkt. No. 164). Pursuant to the Court's Order, Lead Counsel will respond to any objections or requests for exclusion by November 22, 2017. In sum, this factor supports final approval of the proposed Settlement.

V. CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES IS REASONABLE

165. Plaintiffs' Counsel have zealously litigated this case on behalf of the Class for four years. Plaintiffs' Counsel undertook this effort on a contingency basis, and expended over 18,500 hours of professional and paraprofessional time litigating this Action. In addition, Plaintiffs' Counsel incurred \$868,760.57 in litigation expenses.

166. Plaintiffs' Counsel respectfully request an award of 30% of the Settlement Amount and \$868,760.57 in expenses, plus interest earned on such amounts at the same rate as earned on the Settlement Fund.

167. Lead Plaintiff has submitted declarations of Plaintiffs' Counsel supporting the requested fees and expenses.

168. In the Fifth Circuit, courts may "use the percentage method, in which the court awards fee as a reasonable percentage of the common fund . . . so long as the *Johnson* framework is utilized to ensure that the fee awarded is reasonable." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012). In fact, "district courts in [the Fifth] Circuit regularly use the percentage method blended with a *Johnson* reasonableness check, and for some it is the 'preferred method.'" *Id.* at 643. The *Johnson* factors are:

(1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Dell, 669 F.3d at 642 n.25 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

169. On balance, an analysis of the *Johnson* factors below supports the reasonableness of Lead Counsel's requested fee.

A. The Time and Labor Required

170. Lead Counsel has devoted a substantial amount of time and energy diligently prosecuting this case. Throughout the entirety of this Action, Defendants have adamantly denied all of Plaintiffs' material allegations and aggressively fought Plaintiffs at each juncture. Lead Counsel

has aggressively responded to each of these attacks, while simultaneously strengthening the merits of Plaintiffs' case.

171. Consequently, the inordinate amount of time and effort Lead Counsel expended to litigate this case to a successful resolution for Plaintiffs and the Class is reflected in their lodestar, which amounts to over 18,000 hours of professional and paraprofessional time spent on this case.

B. The Novelty and Difficulty of the Issues

172. The prosecution of this case has undoubtedly been highly complex. For instance, the issues surrounding the adequacy of class certification and the question of loss causation have required repeated rounds of briefing, expensive work with expert witnesses, depositions of parties and non-parties and difficult and time consuming factual discovery. In sum, given the novelty and difficulty of the issues presented in this Action, the Settlement is an exceptional recovery for the Class that reflects the sophistication and diligence of Lead Counsel's work.

C. The Skill Required to Perform the Legal Service Adequately

173. The skill required to adequately preform the legal services provided in this case strongly supports Lead Counsel's fee request. As noted above, given the complexity of the issues involved in this case and the presence of numerous complex contested issues, highly skilled counsel were essential to a successful representation of the Class. Lead Counsel's highly sophisticated and skilled work secured an extremely favorable recovery for the Class, and as such this factor strongly supports Lead Counsel's fee award request.

D. Whether the Fee Is Fixed or Contingent

174. Lead Counsel undertook this litigation on a wholly-contingent basis, which provides further support for the approval of Lead Counsel's fee request. Lead Counsel has borne all the expenses and risks of this complex and expensive litigation with no guarantee that this investment of money and time expended would ever be recovered.

175. Nevertheless, Lead Counsel undertook this responsibility and was obligated to ensure that sufficient attorney, expert and paraprofessional resources were allocated to the case to prosecute the Action, and that funds were available to compensate staff to pay for the expenses that a case such as this requires. Furthermore, because of the nature of a contingency fee practice where cases often last for several years, Robbins Geller, like other contingent-fee litigation firms, has had to pay regular overhead as well as advance the expenses of this litigation.

176. Moreover, in addition to advancing litigation expenses and paying overhead, Lead Counsel faced the very real possibility that it would receive no payment of its attorneys' fees and expenses. Given the real, and substantial risk that Lead Counsel's significant investment of time, effort and money would have resulted in \$0 in fees or expenses, this factor warrants approval of Lead Counsel's requested fee.

E. The Amount Involved and the Results Obtained

177. The amount involved and the solid results that Lead Counsel obtained for the Class also supports the reasonableness of the requested fee. The amount of the recovery, between 21% and 100% of the Class' recoverable damages, is significantly larger than the average recovery as a percentage of estimated damages in shareholder class actions, according to relevant studies. *See, e.g.,* Bulan, Ryan & Simmons, at 7. As noted in the discussion above, this Action involved complex legal and factual issues, and presented significant hurdles concerning liability as well as loss causation and damages. Given the risks of continued litigation, the \$97.5 million Settlement is a significant recovery for the Class.

F. The Experience, Reputation and Ability of the Attorneys

178. Lead Counsel is among the most experienced and skilled practitioners in the field of securities class actions. As detailed in Lead Counsel's firm biography submitted to the Court in its accompanying fee and expense submission, the experience and skill of Robbins Geller attorneys' has

resulted in an extremely successful record in securities class actions in both federal and state courts throughout the United States. Moreover, as noted in the Fee Motion, Lead Counsel's reputation as zealous advocates for its clients is well known in this Circuit. As such, the experience, skill and reputation of Lead Counsel supports the requested attorneys' fees.

G. Awards in Similar Cases

179. The attorneys' fee awards in similar cases in the Fifth Circuit strongly supports approval of Lead Counsel's requested fee. *See* Fee Motion, at 7-9. Accordingly, Lead Counsel respectfully requests the Court to approve its fee request.

H. Lead Counsel's Request for an Award of Expenses

180. Lead Counsel also requests an award of \$868,760.57 in expenses incurred in prosecuting this Action on behalf of the Class. These expenses include: (i) the costs of Lead Plaintiff's experts and consultants; (ii) the costs associated with taking depositions throughout the United States; (iii) the costs necessary to provide document management and review; and (iv) the costs associated with the parties' mediations. The following paragraphs provide a more detailed description of certain of counsel's expenses.

181. Lead Counsel retained five experts to provide expert consultation to assist Lead Counsel's understanding and development of the facts supporting the Complaint's allegations. In addition, Lead Counsel retained these experts to provide expert reports and expert testimony that would address both the complex factual issues in the case, and challenge Defendants' experts' own assertions regarding such matters.

182. In order to effectively litigate this case, Lead Counsel also retained an outside investigative firm to locate witnesses and to conduct interviews of such non-party witnesses to develop the facts and issues supporting Lead Plaintiff's claims.

183. In addition, it was necessary for Lead Counsel to incur travel costs related to taking and defending over 20 depositions. The depositions were essential to developing a sufficient factual record for summary judgment and trial.

184. Lastly, additional expenses arose from photocopying documents, database maintenance for the over 850,000 pages of documents, online factual and legal research, messenger services, postage, express mail and next day delivery, transportation, meals, travel and other incidental expenses directly related to the prosecution of this Action. In sum, these expenses were necessary to Lead Counsel's success in achieving the solid result for the Class.

VI. PLAINTIFFS' REQUESTS FOR AWARDS PURSUANT TO 15 U.S.C. §78u-4(a)(4)

185. Lead Plaintiff NSPF requests an award of \$10,200.00 to compensate it for its time in representing the Class.

186. NSPF represented the Class and worked closely with Lead Counsel to obtain a favorable result, which warrants approval of the requested award.

187. Plaintiff David O'Connell also requests an award of \$1,500.00 to compensate him for his expenditure of time in representing the interests of the Class.

188. This award is fair and reasonable as Mr. O'Connell worked with, and provided important information to, Lead Counsel to assist in the preparation and litigation of this Action.

VII. CONCLUSION

189. For all of the foregoing reasons, Lead Counsel respectfully requests the Court grant final approval of the Settlement, approve the Plan of Allocation, award Lead Counsel attorneys' fees in the amount of 30% of the Settlement Amount and \$868,760.57 in expenses, plus the interest earned thereon at the same rate and for the same period as the Settlement Fund, and award Lead Plaintiff NSPF and plaintiff David O'Connell \$10,200.00 and \$1,500.00, respectively, for their time incurred in representing the Class.

I declare under penalty of perjury under the laws of the United States of America and the State of Texas that the foregoing is true and correct. Executed this 25th day of October, 2017, at San Diego, California.

s/ Robert R. Henssler Jr.
ROBERT R. HENSSLER JR.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, 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 denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 25, 2017.

s/ Robert R. Henssler Jr.

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