No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD C. MARRO, PETITIONER

vs.

NEW YORK STATE TEACHER'S RETIREMENT SYSTEM,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Donald C. Marro, pro se
3318 Bust Head Road
The Plains, VA 20198
(540) 253-5309 Telephone
(540) 905-8241 Facsimile
dcmarro@gmail.com
Petitioner

Attorneys

Bernstein Litowitz LLP	Kirkland & Ellis LLP
Salvatore J. Graziano, Esq.	Robert J. Kopecky, Esq.
1251 Sixth Avenue, 44th Fl	300 North LaSalle
New York, NY 10020	Chicago, IL 60654
Tel: 212-554-1400	312- 862-2084 (direct)
Fax: 212-554-1444	312- 862-2200 (FAX)
Salvatore@blbglaw.com	rkopecky@kirkland.com
Respondent, NYSTRS	Defendant, GM et al

I. QUESTIONS PRESENTED

1. Amendments V and XIV provide equal access to courts, equal protection of law and sanctity of property, including bankruptcy distributions, for all litigants. Is a pro se party to be characterized with impugnity and impertinently, scurrilously and inaccurately as vexatious, and deprived of or otherwise to forfeit these protections.

Petitioner also questions whether:

2. adversarial evidentiary hearings were necessary on Class when warrantholders were excluded from the Class and settlement funds, and are now time barred.
3. class representation was adequate given Respondents excluded warrantholders as Class Members and warrants as covered securities.
4. expert review of FRCP 23 notice was necessary given warrantholders exclusion.
5. negotiations were arm's length and settlement adequate when evidence suggests collusion in reaching a settlement and disproportionate Lead Counsel benefit.
6. FRCP 23(e) reasonableness, fairness and adequacy tests were fully satisfied by the settlement agreement, and public policy compromised or unsatisfied.
7. the claims process set a proper cost basis for stock and warrants distributed from the GM bankruptcy estate.
8. courts below awarded excessive fees and expense reimbursement.

II. TABLE OF CONTENTS

III. LIST OF PARTIES

All Parties appear on the cover page.

IV. OPINIONS BELOW

Petitioner seeks certiorari to review judgments upholding Class Action settlement.

V. JURISDICTION

A. District Court Jurisdictional Statement
28 USC 1331 and 1332 gave jurisdiction (E.D. Mich) of a Class Action between Lead Plaintiff New York State Teachers Retirement System ("NYSTRS") and General Motors ("GM") et al, case no. 4:14-cv-11191.

B. Appellate Jurisdictional Statement
This Appeal was taken pursuant to 28 USC 1291 and 2072.

C. Filing Dates
On 5/23/16, the District Court entered its Final Order.

On 6/13/16, Marro filed and served his Notice of Appeal and the matter removed to the U.S. Court of Appeals for the Sixth Circuit, docketed there as Case No. 16-1821

D. Appellate Legal Standard
District Court Orders as to class, notice, representation adequacy, fees, settlement fairness, adequacy and reasonableness are reviewed for abuse of discretion.

E. Supreme Court Jurisdiction
The Sixth Circuit denied Petitioner's Appeal on 11/27/17.

The Sixth Circuit denied Rehearing on January 24, 2018.

The jurisdiction of this Court is invoked under 28 USC 1254.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendments
Amendment V: "nor be deprived of life, liberty, or property, without due process of law;"

Amendment XIV: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of laws.

Statutes: 15 USC 78(c)(11), 78(c)(47), 28 USC 1658, 42 USC 1982.

Rules: FRCP 23 et seq

VII. AUTHORITIES

Appendix

Opinion and Order: Eastern District of Michigan

Opinion and Order: 6th Circuit

Exhibits:

I: Hevesi v. Citigroup, 366 F.3d 70 (2d Cir. 2004); In re: Worldcom, Inc., 2004 U.S. Dist. LEXIS 22992; In re: Bk of Am. Lit., 2010 U.S. Dist. LEXIS 37799; 2010 WL 1438980

II: In re Cardizem, 218 F.R.D. 508 (E.D. Mich.. 2003)

III: Granada v. DWG., 962 F.2d 1203 (6th Cir. 1992)

IV: Sheick v. ACC, 201 WL 4136958 (E.D. Mich)

V: Carson v. Amer. Brands, Inc., 450 U.S. 79 (1981)

VI: In Re Dry Max, 724 F.3d 713 (6th Cir. 2013)

VII: Thompson Hine Fall 2015 Newsletter: Bollin and Cole, "Intense Scrutiny of Class Counsel Fees"

VIII: Settlement (Fairness Hearing) 4/20/16 Transcript

IX: 05/19/16 Order

X: Range of Reasonableness

XI: So. Calif. Law Review Postscript, Vol. 88: PS 55 Simard, Fair, Reasonable and Adequate According to Who?

VIII. STATEMENT OF THE CASE

A. The Underlying District Court Case

This case began with a putative class action by George Pio alleging securities law violations against GM. Four challengers to Pio as Lead Plaintiff came forward and competed over the next year until NYSTRS was appointed Lead Plaintiff and the Bernstein firm ("BLBG") was appointed Lead Plaintiff's Counsel.

Over Thanksgiving, major holidays and New Year's, BLBG prepared a 543-page Complaint drawing on public records and GM's internal report ("Valukas Report").

BLBG knew that Complaint wouldn't survive a Motion to Dismiss, and even quoted the frequency of success of such Motions when justifying settlement approval.

BLBG also claims it knew of and researched ignition switch suits but ignored them for its damages timing purposes.

Even before fully briefing the Motion to Dismiss, any ruling thereon, and before delivery of all MDL litigation documentation and software needed for its evaluation, BLBG and GM's counsel discussed mediation to resolve the action.

Thereupon, BLBG claimed an epiphany on Complaint inadequacy and, for reasons not in the record, GM counsel asked BLBG to put a settlement offer directly to GM's board.

GM approved settlement 1 day after it was proposed but this was not seen as an indicia of collusion, notwithstanding *In re: Dry Max*, (6th Cir. 2013), 724 F.3d 713

B. The Appeal

Appeal raised 6th Circuit first impression questions on whether: (a) due process is denied warrantholders excluded from the Class but injured by the same facts and law as Lead Plaintiff and now subject to a limitations bar;[1, 2] (b) exclusion with no evidentiary hearing weakens, defeats or usurps the Court's discretion and power to approve or fashion Classes to avoid multiple actions and ensure due process; and (c) judicial economy is wiser public policy than private securities laws enforcement.

Further, FRCP 23 tests were unsatisfied as Class counsel and settling parties were accorded excessive deference given the absence of evidentiary hearings.

Given the foregoing, excluding warrants is wrong as a matter of law, and class action settlements should resolve all controversy, not close one and open another.

---

1) Lead Plaintiff excluded warrantholders from the Class and settlement funds, and warrantholders ***are now subject to a limitations bar.***

2) BLBG gave differing explanations for warrant and warrantholder exclusion, first, admitting to forgetting them, then claiming an exercise of discretion, then claiming warrantholders suffered no damages.

IX. REASONS TO GRANT THIS PETITION

A. Public Policy

To refine public policy encouraging settling of securities actions since tests to approve settlement are not bright line and meaningful, and evidentiary hearings are mostly dispensed with, neither required nor held.

It follows that this serves to encourage, engender, augment and legitimize excessive Court deference to class counsel and settling parties.

In cases like this one, FRCP 23 tests are tilted toward approval even when the factors governing approval militate against it. *Olden v. Gardner* (6th Cir. 2008), 294 FedAppx. 210, 217

There can be no fully objective reasonableness test when every settlement, by virtue of being a settlement, is considered reasonable. As to collusion, parties are always assumed to negotiate in good faith and at arm's length if they say so.

Here, we have BLBG, immediately following what settling parties and the Trial Court called a persuasive and even dispositive Motion to Dismiss, purportedly (and oddly) being invited to make a settlement offer directly to GM's Board, an offer approved by the full GM Board on the very next day. Not only are these logistics remarkable but no decisional law encourages or endorses such direct negotiations.

On damages, we have no careful Trial Court scrutiny though the parties and Trial Court admit the damages measure would call for competing experts at

trial, and avoiding that was a large part of BLBG's petition to approve settlement as reasonable. But without greater scrutiny, settlement approved in one day by GM's full Board should not be considered per se reasonable.

B. And other public policy benefits

These include guidance on whether and how impertinence is countenanced, access is rationed or denied to frequent and pro se litigants; and on when, if ever, enumerated constitutional protections may be adulterated or ignored.

Authorities restrict frequent, frivolous litigants, pro se or no, but no authority exists for demonizing or tainting with a view toward restricting, adulterating or ignoring constitutional protections on the facts, circumstances or law premises here.

C. Petitioner warrants/
is entitled constitutionally to Relief

Absent Certiorari, NYSTRS derogatory, impertinent characterization of Marro stands and serves its nefarious purpose, its characterization of facts and arguments are memorialized, and a perfunctory assessment of a pro se's reasoning, excessive deference to settling parties and errors of reasoning are validated and legitimized.

D. Constitutional deprivations must be remedied

Existence of a right implies existence of all necessary and appropriate remedies. 42 USC 1982. *Sullivan v. Little Hntg Pk.,* 90 S.Ct. 400, 396 U.S. 229 (1969)

And with a limitations bar precluding warrantholder relief, letting the rulings below stand deprives warrantholders of their rights to damages from the same body of facts and law which provided Class damages and a sizeable counsel fee.

E. FRCP 23 Clarity and Consistency:
Circuits Divided [3]

The Circuits are divided on how to guard their prerogatives as to Class and fees.

And with Trial Courts not required or given thresholds to conduct evidentiary hearings, a fairness hearing is little more than a recitation by settling parties of their agreement and assertions that it comports with FRCP 23(e) tests, with objectors regarded skeptically absent special credentials and numerosity.

Because Petitioner has no such special credentials, was a lone Appellant, pro se and speaking for a subclass otherwise ignored, Petitioner takes the positions that (1) Courts are too mindful of public policy approving settlements and less so of constitutional equities and public policy favoring private efforts to redress securities law violations, and (2) without evidentiary hearings, Courts are too likely to accord excessive deference to class counsel and settling parties, fairness hearings becoming pro forma exercises showcasing public policy favoring settlement.

---

3) See Appendix Exhibits I-XI for a fuller discussion.

F. The Circuit's Ruling Illustrates Errors and Circuit Divide

The following is included verbatim from Petitioner's 6th Circuit Motion for Panel Rehearing.

1. ***"Assuming Marro could raise the issue of Class certification"***
The Court held Marro had no FRCP 23(e) standing to challenge Class certification (at all or on grounds warrantholders were excluded), then examined if the Class was properly certified. The Court found Marro offered no authority for abuse of discretion in certifying the Class. That finding meets the Rehearing standard for overlooking or misapprehending facts or law.

Marro's Opening Brief ("OpBrief") examined the cases cited by the district court to support exclusion of warrantholders and showed that these cases supported ***inclusion*** instead (f/n 15, 16, Exh. I); there is no Sixth Circuit authority holding that excluding securities holders generally or warrantholders specifically **isn't** an abuse of discretion (quite the contrary) [1]; FRCP 23(c)(1)(C) allows alteration or amendment and FRCP 23(f) allows appeal of Class certification [2].

---

1) *Young v. N'wide Mut. Ins.*, 693 F.3d 532 (6th Cir. 2012) "Rule 23 does not set forth a mere pleading standard.... party seeking class certification must affirmatively demonstrate compliance and the court must resolve whether class members are included or excluded by objective criteria"
2) But with 14 days to do so, that right is virtually meaningless to those not already aware of the action, or is lost contrary to waiver law and though there is no due process means to exercise.

Further, common stockholders and warrantholders are defined by 15 USC 78(c)(11) as one and the same under applicable securities laws (15 USC 78(c)(47)) **and** FRCP

23(a)(3), (b)(1) and (3) require a Class to include all those to whom the same body of operative facts and law apply.

Whether Marro can challenge and appeal Class certification on exclusion or any grounds are first impression questions and the Order should be published consequently.

2. ***"warrant claims more difficult to prove than common stock"***
This Court accepted Lead Plaintiff's claim of "greater difficulty" in proving warrantholders damages as a settlement roadblock and dispositive of excluding warrantholders from the Class.

This misapprehends facts and law: (a) the same facts and law apply to common stock and warrant holders' damages; (b) Lead Plaintiff never proved damages therefore can't assert or know this (Lead Plaintiff also claimed warrantholders had **no** damages, OpBrief, Exh.VIII); (c) no facts were presented or cases cited to support Lead Plaintiff's "difficulty" or no damages claims; and (d) courts have an independent duty to examine class makeup and certification propriety, not limited to parties' argument. *Daniels v. NYC* (S.D.N.Y. 2001), 198 FRD 409; citing *Anderson v. Cornejo,* 2000 WL 286902, at *3 (N.D.Ill. Mar. 10, 2000).

3. ***warrantholder claims not released; Marro can pursue claims***
The Court found no harm in excluding warrantholders since they can bring their own action.

This overlooks and misapplies the 2-year limitations period of 28 USC 1658 which ran for warrantholders shortly after Class certification and wasn't tolled by the settlement. Further, it is contrary to Rule 23 providing a single action for a Class of those affected by the same body of facts and law.

And FRCP 23(c)(vii) requires disclosure but Notice did not provide limitations or res judicata warnings whereas the Releases here arguably apply to warrants. *Blank v. Talley.* (S.D. N.Y 1974), 64 FRD 125; *Makor Issues & Rights. v.Tellabs,* (N.D. Ill 2009), 256 FRD 586

4. *Marro re-litigates GM's bankruptcy with his basis contention*
The court concluded Marro's basis argument was an effort to relitigate GM's bankruptcy.

This is Lead Plaintiff's argument, entirely without authority and which misapprehends facts.

Lead Plaintiff uses GM common stock purchase price paid as the basis for calculating what a Class member might receive from settlement proceeds. Class members who received common stock or warrants from the GM bankruptcy distribution have no purchase price acquisition cost because their basis is their bankruptcy losses.

Accordingly, this has nothing to do with re-litigating the bankruptcy and everything to do with an equitable treatment of securities received through the bankruptcy proceeding.

This is a first impression question and the Order should be published consequently.

5. ***Marro submitted no witnesses or evidence to prove collusion***
The Court found no collusion, requiring witnesses or evidence of Marro not Lead Plaintiff [3]

---

3) *In re: DryMax* (6th Cir. 2013), 724 F.3d 713 (and OpBrief at Exh. VI) makes it plain that this burden rests with Lead Plaintiff not Marro. "The burden of proving the fairness of the settlement is on the proponents." 4 Newberg on Class Actions § 11:42 (4th ed.); *see also,e.g, Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196 (5th Cir. 2010). Thus, to the extent the parties here argue that the settlement was fair, it was the parties' burden to prove the fact, [not] Greenberg's burden to disprove it."

The district court allowed Lead Plaintiff's counsel, Mr. Graziano, to give evidence, against law and reason [4]. This Court then overlooked or misapprehended Marro's evidence.

---

4) OpBrief Exh. IX, XI. **Exh. IX** shows the district court relied entirely on Mr. Graziano. **Exh. XI**: "The fairness conclusion in *Lane v.Facebook*, (9th Cir. 2012), 696 F.3d 811 illustrates the problem. The district court noted the proposed settlement was "achieved after intense and protracted arm's-length negotiations conducted in good faith and free from collusion," but recited no facts to ground the conclusion and identified no source of supporting evidence. The court cited a declaration of Class Counsel, Scott A. Kamber, but failed to explain how, if at all, the declaration satisfied the rules of evidence. Particularly troubling is the fact that the court allowed Mr. Kamber to offer an opinion on the fairness of the proposed settlement without analyzing whether his testimony satisfied Federal Rule of Evidence 702."

This Court relied on *Moulton v. U.S. Steel* (6th Cir. 2009), 581 F.3d 344, 351 to hold Marro must submit (but failed to submit) evidence of collusion, as if the contentions Marro raised were not fact based, in the record and therefore evidentiary [5, 6].

---

5) In *Moulton,* the specter of collusion was overcome by four years of litigation, considerable depositions and formal discovery, supervised negotiations and two mediations, none of which elements are present here. Here there was only the "pleasant surprise" of an immediate GM settlement acceptance (Graziano Declaration, p. 10, OpBrief Exh VIII) and another red flag of simultaneously negotiating attorney's fees. (see, *In re: Cmty of N. Va* (3d Cir. 2005), 418 F.3d 217; *Reynolds v.Beneficial Nat'l Bank* (7th Cir. 2002), 288 F.3d 277; *Weinberger v.Great N. Nekoosa* (1st Cir. 1991), 925 F.2d 516

6) The district court stated that "Courts presume the absence of collusion or fraud in class action settlements unless there is evidence to the contrary", citing *Sheick v. Auto.Component Carrier LLC*, 2010 WL 4136958 (E.D. Mich 10/18/10). In *Sheick*, "the negotiations were conducted at arm's-length by adversarial parties and experienced counsel and there are no obvious deficiencies or inequities. *Specifically, the UAW and ACC began discussing the Retiree Benefits over a year ago. Shortly after this action was filed, Class Counseljoined the discussions between ACC and the UAW. It was only after another seven months of additional marathon, hard-fought discussions and negotiations that the parties were able to forge a compromise".* (emphasis added)

No leading Sixth Circuit case (*Olden v. Gardner* (6th Cir. 2008), 294 Fed Appx 210; *Moulton, supra*; *Williams v. Vukovitch* (6th Cir. 1983), 720 F.2d 909) requires novel and/or smoking gun evidence; all allow a contention of collusion from facts in the record already.

6. ***Marro states in conclusory fashion counsel fees were excessive***
The Court found the fee award not excessive based on criteria which are challenged as a matter of the facts following and as a matter of law by the OpBrief Exhibits, as follows:

Facts
1. Eliminate time (12 months) promoting and protecting status and lodestar is doubled.
2. For several months, 22 attorneys were purportedly examining documents (Graziano Decl. ¶55) that the software purchased(?) for some $500,000 could have done better and more quickly.
3. There is virtually no significant work other than Complaint preparation and Motion to Dismiss Opposition. The software (¶2) should have done the grunt work but was late arriving.
4. 25,000+ hours of time claimed include every station and skill level who touched this. Eliminate status protection (¶1) and the award is approximately $1,600/hr for everyone.

Exh. VI: ***In Re Dry Max Pampers,*** **724 F.3d 713 (6th Cir. 2013)**
"In class-action settlements, the adversarial process - or what the parties here refer to as their "hard-fought" negotiations - extends only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, unnamed class members.

For "the economic reality [is] that a settling defendant is concerned only with its total liability[,]" *Strong v. BellSouth Telecomms, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998); and thus a settlement's "allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *In re Gen. Motors Corp. Pick-Up Truck FuelTank Prods. Liab. Litig.* 55 F.3d 768, 820 (3d Cir. 1995) (internal quotation marks omitted).

Hence - unlike in virtually every other kind of case - in class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation - namely, the class. Instead, the law relies upon the "fiduciary obligations[s]" of the class representatives and, especially, class counsel to protect those interests. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). And that means the courts must carefully scrutinize whether those fiduciary obligations have been met.

[I]n evaluating fairness of a settlement," therefore, we look in part "to whether the settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013) (internal quotation marks omitted). "[S]uch inequities in treatment make settlement unfair." *Id.* "

Exh. IV: *Sheick v. ACCarrier*, WL 4136958 (E.D. MI 10/18/10)
Attorney's Fees: "In addition, the Settlement Agreement does not provide for excessive compensation for the attorneys. The agreement provides that Class Counsel may apply to the Court for reimbursement by ACC of reasonable attorneys; fees, based upon the hours actually worked and a reasonable hourly rate, with no upward adjustments (such as any lodestar multipliers, risk enhancements, success fee, completion bonus or rate premiums). ***The compensation is reasonable on its face, particularly given that the reasonableness of compensation is ultimately in the control of the Court and will not decrease the fund or benefits available to the Class Members."*** (emphasis added)

Exh. III: *Granada Inv. v. DWG.*, 962 F.2d 1203 (6th Cir. 1992)
"The objecting shareholders also...object to the absence of evidence relating to rates per hour. In *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), the Supreme Court observed: 'The most useful

starting point for determining...a reasonable fee is. ..hours reasonably expended... multiplied by a reasonable hourly rate [to] provide an objective basis on which to make initial estimate of the value of lawyer services. The party seeking...fees should submit evidence [of] hours worked and rates claimed. ***Where documentation of hours is inadequate, the district court may reduce the award accordingly.'***." (emphasis added)

Exh. II: ***In re Cardizem CD.*****, 218 F.R.D. 508 (E.D. Mich. 2003)** At p. 525, "In approving a proposed settlement, the Court considers the opinion of experienced counsel as to the merits of the settlement.

As the Sixth Circuit observed, "the court should defer to judgment of experienced counsel who has competently evaluated the strength of his proofs. ***Significantly, however, deference afforded counsel should correspond to amount of discovery completed and the character of evidence uncovered.***" *Williams v. Vukovich*, 720 F.2d at 922-23. *Accord, Manual for Complex Litigation (Third)* § 30.42 at 249 (1995)." (emphasis added)

7. ***Marro did not object to expenses below and waived that issue***
The Court concluded the $500,000 expense reimbursement for software issue was waived as Marro didn't raise this below.

But he did, perhaps not forcefully, by Supplemental Objection. Arguably, Marro's level of forcefulness comports with and was engendered by the lack of expense specifics in the Notice. Further, Marro joined in the objections of other objectors who likewise noted expressly they, too, had no specifics on expenses for their objections.

Even if not forceful enough, appellate courts can entertain issues on appeal not raised below when in the interests of

justice. Here, Lead Plaintiff could use the software for other litigation, therefore it isn't properly reimbursed from settlement proceeds in this litigation.

III. Conclusion

There is a fundamental tension between deference, expedition and the heightened scrutiny required when the safeguards of the adversarial process are missing or substantially diluted. Here, there were few objective, confirmed facts and excessive deference, and a loose thread, i.e., allowing warrantholders exclusion out of deference but for no sound factual or legal reason, even with sound factual and legal reasons for inclusion.

Pulling on this thread made other threads emerge.

The foregoing facts and law demonstrate the importance of heightened scrutiny and the dangers of excessive deference, and support relief for Marro.

Dated: April 20, 2018 By: _____
Donald C. Marro, pro se

<u>Attorneys</u>

Bernstein Litowitz LLP	Kirkland & Ellis LLP
Salvatore J. Graziano, Esq.	Robert J. Kopecky, Esq.
1251 Sixth Avenue, 44th Fl.	300 North LaSalle
New York, NY 10020	Chicago, IL 60654
Tel: 212-554-1400	312-862-2084
Fax: 212-554-1444	312-862-2200
Salvatore@blbglaw.com	rkopecky@kirkland.com
Respondent, NYSTRS	Defendant, GM et al