No. _________

IN THE

Supreme Court of the United States

ISAACSON/WEAVER FAMILY TRUST,

Petitioner,

—v.—

FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
and BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court's decisions hold that whenever Congress has authorized the award of "a reasonable attorney's fee," this means "a fee sufficient to induce capable counsel to take a meritorious ... case," and that "the lodestar method yields a fee that is presumptively sufficient to achieve this objective," with enhancements of an attorney's lodestar fee permitted only in "rare" and "exceptional" circumstances. *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552 (2010). The federal securities laws contain several such fee provisions. *See, e.g.,* 15 U.S.C. §§77k(e), 77z-1(c), 78i(f), 78r(a), 78u-4(a)(8), 78u-4(c).

Upon the settlement of this federal securities class action, however, the district court awarded plaintiffs' counsel 25% of the settlement fund, amounting to nearly 40% more than the attorneys' claimed lodestar. The Second Circuit affirmed, holding that because they involve fee-shifting statutes, this Court's decisions defining "a reasonable attorney's fee," cannot constrain the award of an attorney's fee assessed against a class-action common-fund settlement.

The questions presented are:

1. Do this Court's decisions defining "a reasonable attorney's fee" in fee-shifting cases also constrain a district court's discretion in awarding "reasonable attorneys' fees" under Federal Rule of Civil Procedure 23(h) from a common-fund settlement?

2. Are the securities laws' provisions relating to the award of "a reasonable attorney's fee" subject to the rule of *Perdue* that a reasonable attorney's fee ordinarily will be limited to the lawyers' unenhanced lodestar?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Second Circuit are the Isaacson/Weaver Family Trust, a class member bound by the settlement of this matter that appeared as an objector before the district court, and the Fresno County Employees' Retirement Association, which was the court-appointed lead plaintiff before the district court.

As the fees awarded from a common fund belong to the counsel claiming the fees from the fund, *see Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 124-25 (1885), the lead plaintiff's counsel were the real parties in interest in proceedings before the Court of Appeals. Thus, the law firm of Bernstein Litowitz Berger & Grossmann LLP, also is named as a respondent before this Court.

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PETITION FOR A WRIT OF CERTIORARI

The Isaacson/Weaver Family Trust ("the Family Trust") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPORTS OF THE OPINIONS BELOW

The Second Circuit's opinion is published as *Fresno County Employees' Retirement Association v. Isaacson/Weaver Family Trust,* 925 F.3d 63 (2d Cir. 2019), and is reproduced in the Appendix hereto at Pet. App. 1a-18a.

The Second Circuit affirmed a district court opinion that is published as *In re BioScrip, Inc. Sec. Litig.,* 273 F.Supp.3d 474 (S.D.N.Y. 2017), and appears in the Appendix hereto at Pet. App. 21a-81a.

The district court's earlier decision approving the class-action settlement is not reported, but is reproduced in the Appendix hereto at Pet.App. 82a-92a.

The district court's order consolidating cases, and appointing the lead plaintiff and lead counsel for the class action is reported as *Faig v. BioScrip, Inc.,* 2013 WL 6705045 (S.D.N.Y. Dec. 19, 2013), and its order denying a motion to dismiss is published as *In re Bioscrip Inc. Sec. Litig.,* 95 F.Supp.3d 711 (S.D.N.Y. 2015).

JURISDICTION

The district court exercised jurisdiction over this federal securities-law class action under Securities Act of 1933 §22(a), 15 U.S.C. §77v(a), under Securities Exchange Act of 1934 §27(a), 15 U.S.C. §78aa(a), and under 28 U.S.C. §1331.

That court's order awarding common-fund attorney's fees is a final appealable order, supporting appellate jurisdiction in the Court of Appeals and before this Court. *Sprague v. Ticonic Nat. Bank,* 307 U.S. 161, 169 (1939); *Trustees v. Greenough,* 105 U.S. 527, 531 (1882).

The district court issued its order awarding attorney's fees on July 26, 2017, *see* Pet.App. 81a, and on August 24, 2017, the Isaacson/Weaver Family Trust timely filed a notice of appeal from that order. C.A.App. APP0429.

The Second Circuit exercised jurisdiction under 28 U.S.C. §1291, issuing a decision and judgment affirming the ruling below on May 23, 2019. *See* Pet.App. 1a-19a, 20a-21a.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review, by writ of certiorari, the decision of the Second Circuit.

STATUTES AND RULES INVOLVED[1]

Federal Rule of Civil Procedure 23(h) authorizes the district court in a certified class action, such as this, to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Rule 23(h); Pet.App. 93a.

The underlying claims are asserted under provisions of the federal Securities Act of 1933 ("Securities Act" or "1933 Act") and the Securities Exchange Act of 1934 ("Exchange Act" or "1934 Act"). Those acts contain several provisions concerning

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[1] Because of their length, the relevant statutes and rules are here cited, with excerpts and summaries of pertinent portions, while the full texts printed in the Appendix pursuant to Rule 14.1(f). *See* Pet.App. at 93a-104a.

authorizing the award of "a reasonable attorney's fee" in federal securities cases, which are set forth in the Appendix hereto. Pet.App. 93a-104a.

These include Securities Act of 1933 §11(e), 15 U.S.C. §77k(e), authorizes courts to award "reasonable attorney's fees" in any 1933 Act case if the suit or a defense is found to be "without merit." Pet.App. 95a-95a.

Originally designated as §9(e), what is currently codified as Securities Exchange Act 9(f), 15 U.S.C. §78i(f), authorizes private actions to redress manipulation of securities markets and further provides:

> In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. §78i(f).

Securities Exchange Act of 1934 §10(b), 15 U.S.C. §78j(b), makes it

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules

> and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. §78j(b).[2]

Securities Exchange Act §18, 15 U.S.C. §78r, which provides a private cause of action against persons who cause a false or misleading statement to be made in documents filed with the Securities and Exchange Commission, also provides: "In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." 15 U.S.C. §78r(a); *see* Pet.App. 99a-100a.

Securities Exchange Act §21D(a)(8), 15 U.S.C. §78u-4(a)(8), authorizes district courts to require security for the award of attorneys' fees in any 1934 Act case certified as a class action:

> **(8) Security for payment of costs in class actions** *In any private action arising under this chapter that is certified as a class action*

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[2] Although §10(b) contains no provisions relating to a private cause of action—no limitations period, no provision for awarding attorney's fees, or for contribution among defendants' jointly liability—this Court has long recognized an implied cause of action, incorporating appurtenant provisions from the federal securities laws' express causes of action. *See Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson,* 501 U.S. 350, 358-64 & n.9 (1991) (adopting limitations period from 1934 Act §9); *Musick, Peeler & Garret v. Employers Ins. of Wausau,* 508 U.S. 286, 294-97 (1993) (adopting contribution among jointly liable tortfeasors from 1934 Act §§9, 18); *see also infra* at 27-28.

> pursuant to the Federal Rules of Civil Procedure, *the court may require an undertaking* from the attorneys for the plaintiff class, the plaintiff class, or both, or from the attorneys for the defendant, the defendant, or both, in such proportions and at such times as the court determines are just and equitable, *for the payment of fees and expenses that may be awarded under this subsection*.

15 U.S.C. §78u-4(a)(8) (emphasis added).

Securities Act §27(c), 15 U.S.C. §77z-1(c), and Exchange Act §21D(c), 15 U.S.C. §78u-4(c), both mandate findings upon entry of final judgment in any private action under the 1933 Act or 1934 Act, respectively, concerning the parties' compliance with Rule 11, mandating a presumption that an award of reasonable attorney's fees is the appropriate sanction if violations of Rule 11 are found. *See* 15 U.S.C. §§77z-1(c), 78u-4(c).

STATEMENT OF THE CASE

As the Second Circuit's opinion below explains, this appeal arose following the settlement of a federal securities class action alleging claims under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act" or "1933 Act"), 15 U.S.C. §§77k, 77*l*(a)(2), 77*o,* as well as claims under sections 10(b) and 20(a), 15 U.S.C. §§78j(b), 78t(a), of the Securities Exchange Act of 1934 ("Exchange Act" or "1934 Act"). *See* Pet.App. 4a.

The plaintiffs asserted strict-liability and negligence-based claims under 1933 Act §11, 15 U.S.C. §77k, on behalf of class members (such as the Family Trust) who acquired registered securities issued pursuant to BioScrip securities' allegedly false and misleading registration statement. They asserted claims under 1933 Act §12(a)(2), 15 U.S.C. §77*l*(a)(2), on behalf of class members (such as the Family Trust) who acquired securities sold pursuant to an allegedly false or misleading prospectus. They also asserted vicarious "control person" claims under §15(a), 15 U.S.C. §77*o*(a).

Supplementing the 1933 Act claims, the plaintiffs asserted claims under the implied cause of action provided by 1934 Act §10(b), 15 U.S.C. §78j(b), for violations of S.E.C. Rule 10b-5, 17 CFR §240.10b-5, which proscribes false or misleading statements as well as any manipulative or deceptive device or contrivance employed in connection with the purchase or sale of any security. To these primary-liability claims they appended vicarious-liability "control person" claims under 1934 Act §20(a), 15 U.S.C. §78t(a).

After discovery had begun, but before a class was certified, the parties entered a settlement under which BioScrip agreed to pay $10.9 million to settle the class-action lawsuit. Lead Counsel asserted that the $10.9 million settlement "represents approximately 17%-28% of the Settlement Class's estimated maximum recoverable damages." C.A.App. APP0267 (fee brief).

The Settlement Agreement provided that Lead Counsel could apply for an award of attorney's fees from the $10.9 million Settlement Fund. *See* Pet.App. 4a.

Following preliminary approval of the proposed settlement and notice to the class, Lead Counsel applied for a fee award under Federal Rule of Civil Procedure 23(h), which provides: "In a certified class action, the court may award *reasonable attorney's fees* and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h) (emphasis added). Lead Counsel asked the district court to award an attorney's fee amounting to 25% of the $10.9 million settlement fund—*i.e.,* for an attorney's fee award of $2,725,000—plus interest. *See* Pet. App. 4a-5a; C.A.App. APP0242 (fee brief). Lead Counsel urged the district court to apply to calculate the attorney's fees as a percentage of the settlement fund, acknowledging that the requested 25% attorney's fee award of $2.725 million amounted to a 1.39 multiplier of Lead Counsel's lodestar—or nearly 40% more than the lawyers' regular hourly rates. C.A.App. APP0250-51, 0258 (fee brief).

The Isaacson/Weaver Family Trust—a member of the class with standing to assert both 1933 Act and 1934 Act claims based on its purchase of BioScrip common stock in BioScrip's April 18-19, 2013 registered stock offering—filed an objection, limited to the attorney's fee application, as authorized by Federal Rule of Civil Procedure 23(h)(2)) (a "class member, or a party from whom payment is sought, may object to the motion"). C.A.App. at APP0323-346 (objection); C.A.App. at APP0369-382 (supplemental. Brief).

The Family Trust's objection pointed out that this Court had addressed the meaning of "a reasonable attorney's fee" in *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546 (2010), a contingent-fee class action involving the settlement, by means of a mediated consent decree, of claims that were subject to statutory fee-shifting provisions.[3]

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[3] *See id.* at 547 ("The consent decree resolved all pending issues other than the fees that respondent's attorneys were

The Family Trust contended that an award of "reasonable attorney's fees" under Rule 23(h) in this case should be constrained this Court's decisions, such as *Perdue,* which specifically concern the meaning of "a reasonable attorney's fee." Those decisions hold that whenever Congress has authorized the award of "a reasonable attorney's fee," these words mean "a fee sufficient to induce capable counsel to take a meritorious ... case." *Perdue*, 559 U.S. at 552. They hold that "the lodestar method yields a fee that is presumptively sufficient to achieve this objective," and that attorney's fees exceeding the attorney's unenhanced lodestar thus are permitted only in "rare" and "exceptional" circumstances. *Perdue,* 559 U.S. at 552. Thus, this Court's decisions hold, "there is a strong presumption that the lodestar is sufficient" compensation for class-action attorneys. *Perdue,* 559 U.S. at 546; *see* C.A.App. at APP0323-33 (objection); APP0374-82 (supplemental brief).

The Family Trust's objection also pointed to the federal securities laws' overarching regime of fee shifting provisions, under which the sections creating the 1933 and 1934 Acts' primary rights of action authorize courts, in appropriate cases, to award "reasonable attorney's fees." *See, e.g.,* 1933 Act §11(e), 15 U.S.C. §77k(e), 1934 Act §9(f), 15 U.S.C. §78i(f), 1934 Act §18(a), 15 U.S.C. §78r(a). Congress has specified in 1934 Act §21D(a)(8), moreover, that district courts may shift fees in *any* 1934 Act case that is certified as a class action: "In any private action arising under this chapter that is certified as a

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entitled to receive under 42 U.S.C. §1988."); *see also id.* at 569 (Breyer, J., dissenting: "'[T]he settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage ....'") (citation omitted).

class action ... the court may require an undertaking ... for the payment of fees and expenses that may be awarded under this subsection." 15 U.S.C. §78u-4(a)(8). Pet.App. 101a.

Given the presence of numerous fee-shifting provisions in the federal securities laws, under which "a reasonable attorney's fee" would presumptively be limited to the attorney's unenhanced lodestar, the Family Trust argued that class counsel should not be able to obtain a larger-than-lodestar fee award by settling claims and seeking fees from the common-fund settlement. The Family Trust asserted that awarding more generous fees to counsel who settle claims than they would receive for winning the case and applying for fees to be awarded under statutory fee-shifting provisions produces perverse incentives to abandon the class's interest in favor of a more generous fee award.

The district court held a settlement-fairness hearing on June 13, 2016, at which counsel for the Settling Parties and the Family Trust appeared and were heard. C.A. App. at APP0394(DE125) (hearing transcript). The district court approved the proposed settlement with an order entered June 16, 2016. Pet.App. 82a-92a.

More than a year later, on July 26, 2017, the district court entered its Order overruling the Family Trust's objections and granting the challenged motion for attorney's fees. Pet.App. 21a-81a. The district court held that *Perdue*'s "presumption against a lodestar enhancement ... when a court awards a reasonable attorney's fee from a defendant pursuant to a fee-shifting provision does not apply to the award of fees in this case from a common fund created after a settlement." Pet.App. 27a. Acknowledging that "[t]he Objector's argument is not without force," the district court nonetheless held that the this Court's definition of "a reasonable attorney's fee" in fee-shifting cases such as *Perdue* "does not apply in the context of an award of fees from a settlement fund, even if a statute would permit a party to otherwise seek a statutory fee award directly from a defendant." Pet.App. 32a. The district court also held that "no claim settled in this case contains a fee-shifting provision analogous to that at issue in *Dague* and *Perdue*." Pet.App. 49a.

It then approved an attorney's fee award amounting to a 39% enhancement of the attorney's lodestar, noting that when settlements have produced a common fund, courts commonly award attorney's fees amounting to several times the lawyer's lodestar. As the district court put it:

> There is no question that Lead Counsel's lodestar multiplier of 1.39 is at the lower range of comparable awards in common fund cases. *See Sinotech Energy Ltd.,* 2013 WL 11310686, at *8 [(S.D.N.Y. Sept. 4, 2013)] (collecting examples of courts awarding lodestar multipliers of "between four and five"); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 590 (S.D.N.Y. 2008) ("[L]odestar multiples of over 4 are routinely awarded."); *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 369 (S.D.N.Y. 2002) (noting that multiplier of 4.65 was "well within the range awarded by courts in this Circuit and courts throughout the country"); *see also Wal-Mart Stores, Inc.* [*v. Visa U.S.A., Inc.*], 396 F.3d [96] at 123 [(2d Cir. 2005)] (noting that, although in a megafund case, the lodestar multiplier of 3.5 "ha[d] been deemed reasonable under analogous circumstances"); Pl. Mem. at 9-10 & n.8 (collecting numerous cases).

Pet.App. 66a.

On August 24, 2017, the Family Trust timely filed a notice of appeal from the district Court's July 26, 2017, Order awarding attorney's fees. C.A.App at APP0429.

The Second Circuit affirmed, holding that it does not matter whether the federal securities' laws' fee-shifting provisions are analogous to those involved this Court's fee-shifting decisions, such as *Perdue.* The Court of Appeals "hold[s] that, even if a case is brought pursuant to a fee-shifting statute, common-fund principles control fee awards authorized from a common fund, and a common-fund fee award may be calculated as the lodestar or as a percentage of the common fund." Pet.App. 3a-4a. Common-fund awards thus are not constrained by this Court's precedents defining "a reasonable attorney's fee." Pet.App. 3a-4a.

The Second Circuit held that "regardless of whether a case is brought pursuant to a statute with a fee-shifting provision, if the parties settle the case by creating a common fund, common-fund principles control class counsel's fee recovery," Pet.App. 6a, and "offer[ed] no opinion on whether the statutes pursuant to which the underlying case arose contain applicable fee-shifting provisions." Pet.App. 6a.

"Where a litigant acts as a private attorney general," the Second Circuit explained, this Court has held that "the goal of fee shifting is to provide 'a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious . . . case.'" Pet.App. 7a (quoting *Perdue*, 559 U.S. at 552. The Second Circuit acknowledged, moreover, that this Court holds an unenhanced lodestar award achieves that goal: "When a statute's fee-shifting provision authorizes a reasonable attorneys' fee, the Supreme Court has held that 'the lodestar method yields a fee that is presumptively sufficient.'" Pet.App. 7a (quoting *Perdue*, 559 U.S. at 552).

Yet it concluded that in class actions producing a common fund settlement, district courts are free to ward *substantially more* than what is, according to this Court's decisions, "sufficient to induce a capable attorney to undertake the representation." Pet.App. 7a (quoting *Perdue*, 559 U.S. at 552). For, it concluded, "the Supreme Court has placed greater restrictions on attorneys' fees recovered from statutory fee-shifting provisions than on fees recovered from common funds." Pet.App. 7a.

REASONS FOR GRANTING THE WRIT

I. When Claims are Asserted Under a Statutory Fee Shifting Regime the Meaning of "A Reasonable Attorney's Fee" Should Not Vary Radically Depending on Who Ultimately Pays the Fee

This case concerns the effect of this Court's decisions concerning what is "a reasonable attorney's fee" in cases arising under two exceptions to "the general 'American rule'" that a party bears its own attorney's fees, *Alyeska Pipeline Service Co v. Wilderness Society,* 421 U.S. 240, 245 (1975), and whether this Court's definition of "a reasonable attorney's fee" in fee-shifting cases bears on fee awards in class actions that settle for a common fund, as this one did. *See* Pet.App. 6a.

The first exception to the American rule relevant here is the "common-fund" or "equitable-fund" doctrine, under which a court may award a reasonable attorney's fee either to a party, or directly to its lawyers, because the lawyers' work produced a fund that benefits others. This Court has long allowed such awards, *provided* they are "made with moderation and a jealous regard to the rights of those who are interested in the fund," *Trustees v. Greenough*, 105 U.S. 527, 536-37 (1882), *and do not exceed* the "reasonable compensation for their professional services," *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (cutting common-fund fee award in half, to just 5% of the fund), with "special care ... taken to confine the fees to what was reasonable." *United States v. Equitable Trust Co.,* 283 U.S. 738, 746 (1931) (cutting equitable-fund fee award that the Second Circuit had approved in half, to roughly 8% of the fund in question). This is a common-fund case.

A second exception to the American rule, which has produced a series of decisions from this Court defining what is "a reasonable attorney's fee," arises where Congress has provided by statute that courts may (or must) order the payment of a prevailing litigant's attorney's fees by another party.[4] In fee-shifting cases this Court holds that "a reasonable attorney's fee" generally means (and ordinarily is limited to) the attorney's unenhanced lodestar, "i.e., the number of hours worked multiplied by the prevailing hourly rates," because the prospect of a

[4] *See Blum v. Stenson,* 465 U.S. 886, 895 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986) (*Delaware Valley I*); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*); *City of Burlington v. Dague,* 505 U.S. 557 (1992); *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546 & 552 (2010).

simple lodestar award ordinarily is "sufficient to induce a capable attorney to undertake the representation of a meritorious ... case." *Perdue,* 559 U.S. a7 546 & 552.

The Family Trust submits that this Court's decisions defining "a reasonable attorney's fee" in fee-shifting cases such as *Perdue* should constrain district courts' discretion in awarding fees from a common-fund settlement—particularly when the settled claims arise under a statutory regime fee-shifting provisions (as the federal securities laws do). Holding otherwise ignores the constraints of this Court's common-fund jurisprudence, requiring courts to act as "jealous" guardians, *Greenough,* 105 U.S. at 536-37, taking "special care ... to confine the fees to what was reasonable." *Equitable Trust,* 283 U.S. at 746.

If as this Court has held in fee-shifting cases, "a 'reasonable fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious ... case" and, as this Court has further held, the promise of a simple lodestar award "yields a fee that is sufficient to achieve this objective," *Perdue,* 559 F.3d at 552, then it should be clear that a district court breaches its duty by awarding a much larger fee merely because the case settled producing a common fund. Indeed, allowing more generous fee awards—amounting to substantial multipliers of their lodestar—produces perverse incentives for lawyers to settle their clients' claims cheaply in order to enhance their own incomes.

Asserting that "[f]ee-shifting principles and the common-fund doctrine occupy separate realms," however, the Second Circuit held in this case that judges awarding fees in a common-fund class action *are not* constrained by this Court's decisions defining "a reasonable attorney's fee" whenever those terms have been used by Congress. Pet.App. 9a. It joins several other circuits in so holding. *See* Pet.App. 11a ("Our sister circuits have persuasively supported ... rejection of the suggestion that statutory fee-shifting principles curtail a district court's discretion in common-fund cases"); *see id.* at 11a-13a (following *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003), and *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)); *accord Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1195 (11th Cir. 2019) ("*Perdue* addresses fee-shifting statutes and says nothing about the award of attorney's fees from a common fund.").

The consequences of this holding are dramatic. Under decisions such as *Perdue*, the lawyer's unenhanced lodestar provides the presumptively reasonable fee award when claims are subject to statutory fee shifting. Thus, lawyers taking a case with claims subject to fee-shifting provisions know that if they win at trial they will be obligated to apply for fees under the fee-shifting statute and can expect to receive only their lodestar without further enhancement. *See, e.g., Haggart v. Woodley,* 809 F.3d 1336, 1358-69 (D.C. Cir. 2016); *Pierce v. Visteon Corp.,* 791 F.3d 782, 787 (7th Cir. 2015); *Brytus v. Spang & Co.,* 203 F.3d 238, 242-47 (3d Cir. 2000).

But if they settle the claims, the Second Circuit now holds, they can expect much more from the common-fund settlement. In this case, the district court awarded a fee giving the "multiplier" of 1.39 times their lodestar—an enhancement of nearly 40% above the unenhanced lodestar amount that *Perdue* holds is "a reasonable attorney's fee." The district court aptly observed, moreover, that this was a relatively modest enhancement, compared to most common-fund fee awards these days, favorably citing decisions stating that "[l]odestar multipliers of over 4 are routinely awarded."[5]

The Third Circuit has said "that, in common fund cases ... '[m]ultiples ranging from one to four' are the norm." *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 774 (3d Cir. 2019) (citation omitted). In *Wal-Mart Stores, Inc. v. Visa USA, Inc.,* 396 F.3d 96, 1123 (2d Cir. 2005), for example, the Second Circuit blithely sustained a common-fund attorney's fee award, explaining that the attorney's "lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances." In *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 (9th Cir. 2002), the Ninth Circuit

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[5] Pet.App. 66a (quoting *In re Telik, Inc. Sec. Litig.,* 576 F.Supp. 2d 570, 590 (S.D.N.Y. 2008)). As the district court put it:

> There is no question that Lead Counsel's lodestar multiplier of 1.39 is at the lower range of comparable awards in common fund cases. *See Sinotech Energy Ltd.,* 2013 WL 11310686, at *8 [(S.D.N.Y. Sept. 4, 2013)] (collecting examples of courts awarding lodestar multipliers of "between four and five"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[L]odestar multiples of over 4 are routinely awarded."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (noting that multiplier of 4.65 was "well within the range awarded by courts in this Circuit and courts throughout the country"); *see also Wal-Mart Stores, Inc.* [*v. Visa U.S.A., Inc.*], 396 F.3d [96] at 123 [(2d Cir. 2005)] (noting that, although in a megafund case, the lodestar multiplier of 3.5 "ha[d] been deemed reasonable under analogous circumstances"); Pl. Mem. at 9-10 & n.8 (collecting numerous cases).

Pet.App. 66a.

affirmed a common-fund fee award "which resulted in a multiplier of 3.65" where the district court had "found this number reasonable by considering the factors in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69–70 (9th Cir.1975)"—which is to say, the so-called "*Johnson* factors" from in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–719 (5th Cir. 1974), that *Kerr* adopted. Following *Vizcaino* the Ninth Circuit sustained a multiplier of 6.85 in *Steiner v. American Broadcasting Co.,* 248 Fed. App'x 780, 783 (9th Cir. 2007), as "well within the range of multipliers that courts have allowed."

Just the other day the Eighth Circuit affirmed use of the *Johnson* factors to award 28% of a common fund as attorney's fees, holding that "while the 5.3 lodestar multiplier is high, it does not exceed the bounds of reasonableness." *Rawa v. Monsanto Co.,* ___F3d___, ___, 2019 WL 3916537, at *5 (8th Cir. Aug. 20, 2019)). It failed to note that this Court had expressly repudiated the *Johnson* factors in *Perdue,* because they give "'very little actual guidance to district courts,'" since "'[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.'" *Perdue,* 559 U.S. at 563 (quoting *Pennsylvania v. Delaware Valley Citizens Council for Clean Air,* 478 U.S. 546, 562 (1986) (*Delaware Valley I*)); *accord Murphy v. Smith,* 138 S.Ct. 784, 789-90 (2018) (again disparaging the *Johnson* factors).

Yet the lower courts continue to apply the *Johnson* factors to common-fund fee awards, as if they remained good law. In *Muransky v. Godiva Chocolatier,* 922 F.3d 1175, 1195 & n.8 (11th Cir. 2019), for example, the Eleventh Circuit "recognize[d] that the Supreme Court criticized the *Johnson* factors in *Perdue,* 559 U.S. at 550-51," yet it affirmed a 33 1/3% common-fund fee award based on the *Johnson* factors on the ground that "*Perdue* arose in a different context (fee-shifting statutes) and we are bound to apply our precedent in *Camden I* and *Johnson* to this common fund"). *See also Union Asset Mgt. Holding A.G. v. Dell, Inc.,* 669 F.3d 632, 642-43 & nn.25-31 (5th Cir. 2012) (applying the *Johnson* factors to a common-fund fee award).

This Court's attention is needed to bring uniformity to the award of common-fund attorney's fees.

II. This Court's Common-Fund and Equitable-Fund Precedents, Like its Statutory Fee-Shifting Decisions, Limit Attorney's Fees to what is Reasonably Necessary to Compensate the Lawyers

The Second Circuit rested its decision on an "acute difference" between attorney's fees under the common-fund doctrine, and attorney's fees under the common-fund doctrine. Pet.App. 4a. "While in both instances an attorney is entitled to a recovery that is ultimately financed by the opposing party," the Second Circuit reasoned, "the Supreme Court has placed greater restrictions on attorney's fees recovered from statutory fee-shifting provisions than on fees recovered from common funds." Pet.App. 7a.

Yet this Court's common-fund decisions exhibit a concern for beneficiaries of the common fund that is at least as great as any solicitude it has shown to defendants liable for the opposing party's attorney's fees under a fee-shifting statute. It has never authorized common-fund fee awards greater than the fee-shifting decisions' goal of "'a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious ... case.'" Pet.App. 7a (quoting *Perdue*, 559 U.S. at 552).

"Since the decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to *a reasonable attorney's fee* from the fund as a whole."[6] Warning that in some cases "these allowances have been excessive, and perhaps illegal," and that "we would be very far from expressing our approval of such large allowances to ... counsel as have sometimes been made, and which have justly excited severe criticism," this Court nonetheless held in *Greenough* that allowances for the payment of attorney's fees from a common fund, "if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice." *Greenough*, 105 U.S. at 536-37.[7] The Court approved reimbursement of the reasonable attorney's fees that

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[6] *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) (emphasis added); *see U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 96 (2013) (quoting same); *see generally* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597 (1974).

[7] Although the opinions below (and Westlaw) erroneously give 1881 as *Greenough's* year of decision, this Court's records show that the oral arguments took place on March 15, 1882, and that this Court issued its decision on May 8, 1882. *See* Anne Ashmore, *Dates of Supreme Court Decisions and Arguments: United States Reports Volumes 2-107 (1791-1882),* at 162 (Washington, D.C.: Library of the Supreme Court of the United States, August 2006), available online at https://www.supremecourt.gov/opinions/datesofdecisions.pdf).

the named plaintiff, Francis Vose, had actually incurred and paid over years of litigation—with no special enhancements or multipliers of any kind.[8]

Moderation and restraint remained the rule in this Court's subsequent common-fund and equitable-fund decisions. Holding in *Pettus* that lawyers whose efforts had produced a common fund may receive "such reasonable attorney's fees as were fairly earned in effecting the result," *Pettus,* 113 U.S. at 123, and are "entitled to reasonable compensation for their professional services, *id.* at 127, this Court ruled that "the sum allowed," coming to ten percent of the fund, "was too great," and cut it to five percent. *Id.* at 128.

In *United States v. Equitable Trust Co.,* 283 U.S. 738 (1931), moreover, while noting that a fund "may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf, *id.* at 744, this Court held that because the beneficiary "had no voice in selecting the attorneys and could have none in fixing their fees," justice "required that special care be taken to confine the fees to what was reasonable." *Id.* at 746. It cut the $100,000 approved by the Second Circuit in half—taking it down to roughly 8% of the fund.[9] It appears, moreover, that

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[8] *See Greenough,* 105 U.S. at 529-31; *see also* Transcript of Record, *Trustees v. Greenough,* No. 601, at 711-24 (original), 228-32 (print) (itemizing expenses, lawyer by lawyer) (1881).

[9] The Second Circuit had rejected the district court's notion that counsel was entitled to one third of the fund and cut the attorney's fee award in half, to just $100,000, warning that "[t]he allowance is a payment for legal services, not a speculative interest in a lawsuit." *Barnett v. Equitable Trust Co.,* 34 F.2d 916, 919 (2d Cir. 1929) (Learned Hand). The attorneys told this Court that "from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent.,

attorney's fees of ten percent or less were long the norm in common-fund cases.[10]

The Court has never held that counsel seeking a common-fund award are entitled to a fee that is more than "'sufficient to induce a capable attorney to undertake the representation of a meritorious ... case.'" Pet.App. 7a (quoting *Perdue,* 559 U.S. at 552).

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even upon the Circuit Court of Appeals basis of computing the amount involved," and that "never yet have counsel been cut down to such a low percentage in any contested case taken upon a contingent basis." Brief for Respondents to Whom Allowances Were Made, *United States v. Equitable Trust*, 283 U.S. 738, [Oct. Term 1929 No. 530], at 55-56 (filed April 16, 1930). But this Court found "the allowance of $100,000 unreasonably high, and that to bring it within the standard of reasonableness it should be reduced to $50,000," or about 8% of the fund. *Equitable Trust*, 283 U.S. at 746.

[10] *See, e.g., Pettus,* 113 U.S. at 128 (slashing 10% award to 5%: "It remains only to consider whether the sum allowed appellees was too great. We think it was. The decree gave them an amount equal to ten per cent. upon the aggregate principal and interest of the bonds and coupons filed in the cause .... One-half the sum allowed was, under all the circumstances, sufficient."); *Harrison v. Perea,* 168 U.S. 311, 325 (1897) (reduction of a $5,000 fee award (or about 14% of an equitable fund) to just 10% of the fund was "within the judicial discretion of the court"); *Harris v. Chicago Great W. Ry.,* 197 F.2d 829, 835-36 (7th Cir. 1952) (reducing fee of $500,000 on a $3.5 million fund recovered to $350,000 or 10% of the fund); *Illinois Bell Tel. Co. v. Slattery,* 102 F.2d 58, 61 (7th Cir. 1939) (7½% of a $19 million fund); *Confederated Bands of Ute Indians v. United States,* 120 Ct.Cl. 609, 682 (1951) (8¾% of $32 million fund); *Farmers & Merchants Nat'l Bank v. Peterson,* 5 Cal. 2d 601, 607, 55 P.2d 867, 870 (Cal. 1936) (in a case that produced a $23,714.70 common fund, approving an award of "5 per cent of the moneys received and recovered herein as an attorney's fee").

The Second Circuit has in other contexts had no difficulty recognizing "that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 190 (2d Cir. 2008); *see, e.g., McDaniel v. County of Schenectady,* 595 F.3d 411, 415 (2d Cir. 2010). "Indeed, by focusing on the hourly rate at which a client who wished to pay no more than necessary would be willing to compensate his attorney, the district court can enforce market discipline, approximating the negotiation that might ensue were the client actually required to pay the attorney's fees." *Arbor,* 522 F.3d at 192.

III. This Court Has Made Clear that Costs Statutes Do Not Limit Common-Fund Fee Awards Precisely Because They Do Not Purport to Define a Reasonable Attorney's Fee

The Second Circuit thought its holding warranted by this Court's decisions indicating that the common-fund doctrine is not subject to the limitation on fees as taxable costs imposed by the Act of Feb. 26, 1853, c. 80, 10 Stat. 161, which provided that fees to be included in taxable costs should be limited to twenty dollars in cases that go to trial, and in cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued."[11] But the limitations on attorney's fees

[11] The 1853 statute provided in relevant part:

> In lieu of the compensation now allowed by law to attorneys . . . the follow- ing and no other compensation shall be taxed and allowed...

as taxable costs codified, today at 28 U.S.C. §1923(a), do not affect common-fund fee awards because they disclaim addressing the question of what is a "reasonable attorney's fee."[12]

> Fees of Attorneys, Solicitors, and Proctors. In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: Provided, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.
>
> In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.
>
> For scire facias and other proceedings on recognizances, five dollars. For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.
>
> A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal ....

Act of Feb. 26, 1853, ch. 80, 10 Stat. 161; *see Alyeska,* 421 U.S. at 252-53 & n. 125 (quoting same).

[12] *See* 28 U.S.C. §1923(a) ("(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows: $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10; $20 in admiralty appeals involving not over $1,000; $50 in admiralty appeals involving not over $5,000; $100 in admiralty appeals involving more than $5,000; $5 on discontinuance of a civil action; $5 on motion for judgment

The opinion below states:

> In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court identified a "consistently followed" rule that fee-shifting statutes do "not interfer[e] with the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund . . . itself or directly from the other parties enjoying the benefit." 421 U.S. at 257. The Supreme Court therefore suggested that, even when statutory fees and the common-fund doctrine collide, the common-fund doctrine operates autonomously from fee-shifting principles.

Pet. App. 9a.

Trouble is, the statutes governing attorney's fees as costs disclaim addressing the question of what is a reasonable attorney's fee. *Alyeska* explains that the act of Feb. 26, 1853, 10 Stat. 161, itself warned that it did not purport to define what is a reasonable attorney's fee: "'But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients ... such *reasonable compensation* for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective States, or [as] may be agreed upon between the parties.'" *Alyeska,* 421 U.S. at 253 (quoting Act of Feb. 26, 1853, 10 Stat. 161) (emphasis added); *see also Alyeska,* 421 U.S. at 257 n.30 (quoting *Greenough,* 105 U.S. at 535-36) (emphasis added).

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and other proceedings on recognizances; $2.50 for each deposition admitted in evidence.").

This Court had made the same point in *Greenough*: "Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee-bill." *Greenough,* 105 U.S. at 533. "The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." *Greenough,* 105 U.S. at 535-36 (quoting Act of Feb. 26, 1853, c. 80, *536 10 Stat. 161; Rev. Stat., sect. 823) (emphasis added).

In short, the taxable-costs statutes clearly do not purport to define a *reasonable* attorney's fee. *See id.* This Court's decisions interpreting statutory provisions authorizing awards of "a reasonable attorney's fee," on the other hand *clearly do* define a "reasonable attorney's fee" as one that is "sufficient to induce a capable attorney to undertake the representation of a meritorious ... case," holding that an attorney's unenhanced lodestar is presumptively sufficient. *Perdue,* 559 U.S. at 552.

IV. The Federal Securities Laws Provide for a Regime of Statutory Fee Shifting Clearly Governed by the Court' Decisions Defining "A Reasonable Attorney's Fee"

Having held that "regardless of whether a case is brought pursuant to a statute with a fee-shifting provision," district courts are free to award fees far greater than those authorized by this Court's fee-shifting jurisprudence, the Second Circuit chose to "offer no opinion on whether the statutes pursuant to which the underling case arose contain applicable fee-shifting provisions." Pet.App. 6a.

Should this Court choose to reach the issue, though, the securities laws' provisions clearly do come within this Court's holdings concerning "a reasonable attorney's fee." Noting that many federal statutes authorize federal courts to award "reasonable attorney's fees," this Court held in *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992), that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *Id.* (citing *International Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 758 n.2 (1989)).

The 1933 Act claims settled in this case clearly are governed by Securities Act of 1933 §11(e), 15 U.S.C. §77k(e), which authorizes courts to award "reasonable attorney's fees" if a suit or a defense is found to be "without merit."[13] The district court concluded that

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[13] Section 11(e) provides:

> In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, *including reasonable attorney's fees*, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

15 U.S.C. §77k(e) (emphasis added); Pet.App. 94a-95a.

fees are available "only when a defense 'borders on the frivolous or is brought in bad faith.'" Pet.App. 60a (quoting *Western Federal Corp. v. Erickson,* 739 F.2d 1439, 1444 (9th Cir. 1984)). But that is not what the statute says. In *Octane Fitness LLC v. ICON Health and Fitness, Inc.,* 572 U.S. 545, 553 (2014), this Court held that "analysis begins and ends with the text" of a fee shifting provision, and that a requirement of frivolousness or bad faith cannot be imposed by the courts when it does not appear in the statutory text.

The 1934 Act's express causes of action, remedying fraudulent market manipulation in §9, and misleading statements filed with the S.E.C. in §18, also include fee-shifting provisions, each of them stating:

> In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. §§78i(f), 78r(a).

The 1934 Act claims in this case are brought under §10(b), 15 U.S.C. §78j(b). Although 1934 Act §10(b) contains no express private cause of action, this Court has long recognized an implied a private right to sue, *see Herman & MacLean v. Huddleston,* 459 U.S. 375, 380 & n.10 (1983), directing lower courts to look to the federal securities laws' express rights of action—1934 Act §§9 and 18 in particular—to fill in the details, such as the statute of limitations and the right to contribution among joint tortfeasors. *See Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson,* 501 U.S. 350, 358-64 & n.9 (1991) (adopting limitations period from 1934 Act §9); *Musick, Peeler & Garret v. Employers Ins. Of Wausau,* 508 U.S. 286, 294-97 (1993) (adopting contribution among jointly liable tortfeasors from 1934 Act §§9, 18).

In *Lampf* this Court held that 1934 Act §9(e)—now §9(f)—would provide the limitations period for §10(b) claims. *Lampf,* 501 U.S. at 358-64 & n.9. In *Musick, Peeler,* moreover, this Court noted that "two sections of the 1934 Act, §§9 and 18 ... are close in structure, purpose, and intent to the 10b-6 action" under §10(b). *Musick, Peeler,* 508 U.S. at 295. Noting that these sections "contain nearly identical express provisions for a right to contribution," the Court held that "consistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b-5." *Musick, Peeler*, 508 U.S. at 297. As sections 9 and 18 similarly contain identical provisions providing that "the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including *reasonable attorneys' fees*, against either party litigant," 15 U.S.C. §§78i(f), 78r(a) (emphasis added), consistency would require applying the fee-shifting provisions of section 9 and 18 to §10(b) actions.

Congress has since specified in 1934 Act §21D(a)(8), moreover, that district courts may shift fees in *any* 1934 Act case that is certified as a class action: "In any private action arising under this chapter that is certified as a class action ... the court may require an undertaking ... for the payment of fees and expenses that may be awarded under this subsection." 15 U.S.C. §78u-4(a)(8). Pet.App. 101a. The provision's legislative history explains that "Congress long ago authorized similar undertakings in the express private right of action in Section 11 of the 1933 Act and in Sections 9 and 18 of the 1934 Act." H.R. Conf. Rep. No. 104-369, at 40 (1995). With §21D(a)(8), Congress authorized fee shifting in *any* 1934 Act case that is certified as a class action – as this case was.

The district court conflated subsection (a)(8) of 21D, authorizing the award of fees "under this subsection" in any case that is certified as a class action, and subsection (c), requiring mandatory Rule 11 findings at the end of every private 1934 Act case, with fee shifting if a Rule 11 violation is found. *Compare* 15 U.S.C. §78u-4(a)(8) (fee shifting in certified class actions) with §78u-4(c) (mandatory Rule 11 findings). But subsection (a)(8) is an independent provision, stating that fees "may be awarded under this subsection." 15 U.S.C. §78u-4(a)(8). Subsection (c), dealing with mandatory Rule 11 findings in every private action, is a different subsection, with its own fee-shifting provisions. "'Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line.'" *Cyan, Inc. v. Beaver County Employees Ret. Fund*, 138 S.Ct. 1061, 1070 (quoting *NLRB v. SW General, Inc.,* 137 S.Ct. 929, 938-39 (2017)). And "'[w]hen Congress want[s] to refer only to a particular subsection or paragraph, it sa[ys] so.'" *Id.* (quoting *SW General*, 137 S.Ct. at 939) (*Cyan*'s brackets). If Congress had intended §21D(a)(8)'s provision authorizing fee awards "under this subsection" to refer instead to fee awards under a different subsection, such as subsection (c), it would have said so. It did not.

There is, in any event, no basis for concluding that these fee shifting provisions do not govern the federal securities claims asserted in this certified class action, and no basis for holding that they are somehow exempt from this Court's "case law construing what is a 'reasonable' fee," which of course "applies uniformly to all of them." *Dague,* 505 U.S. at 562.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: August 21, 2019

Respectfully submitted,

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APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit

17-2662-cv
Fresno Cty. Emps.' Ret. Ass'n v. Isaacson/Weaver Family Tr.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: November 15, 2018 Decided: May 23, 2019)

Docket No. 17-2662

FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,

Plaintiff-Appellee,

v.

ISAACSON/WEAVER FAMILY TRUST,

Objector-Appellant.[14]

Before: JACOBS, POOLER, and WESLEY, *Circuit Judges*.

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[14] The Clerk of Court is directed to amend the caption as above.

The Isaacson/Weaver Family Trust appeals from the July 26, 2017, order of the United States District Court for the Southern District of New York (Alison J. Nathan, J.) granting Bernstein Litowitz Berger & Grossmann LLP's request for a percentage fee awarded from the common settlement fund. The fee award was compensation for the firm's representation of a class of plaintiffs that settled federal securities law claims against BioScrip, Inc. The Isaacson/Weaver Family Trust, a member of the class, objected to the fee award in the district court, arguing that the class's claims were brought pursuant to statutes containing fee-shifting provisions and therefore class counsel's fee award was presumptively limited to the unenhanced lodestar (counsel's hourly rate multiplied by the hours expended on the case). The district court found this objection unavailing and ruled that, because the parties' settlement agreement provided for class counsel to be compensated from a common settlement fund, class counsel was entitled to fees under the equitable common-fund doctrine rather than pursuant to a statutory fee-shifting provision. Under the common-fund doctrine, the district court held that a percentage fee award was appropriate.

On appeal, we conclude that, regardless of whether the claims settled here were initiated under fee-shifting statutes, the common-fund doctrine properly controls the district court's allocation of attorneys' fees from a common settlement fund. This is because class plaintiffs have received the benefit of counsel's representation and assumption of the risk that the lawsuit will not render a recovery, and thus the class may be fairly charged for counsel's assumption of contingent risk. The district court was therefore entitled to exercise its discretion to award either a percentage-of-the-fund fee or a lodestar fee to class counsel. We offer no opinion as to whether the claims settled here were initiated under fee-shifting statutes. Accordingly, we AFFIRM the order of the district court.

Affirmed.

ERIC ALAN ISAACSON, La Jolla, CA, *for Objector-Appellant*.

HANNAH G. ROSS, Bernstein Litowitz Berger & Grossmann LLP (Jai Chandrasekhar, on the brief), New York, NY, *for Plaintiff-Appellee*.

POOLER, *Circuit Judge*:

The objection of the Isaacson/Weaver Family Trust (the "Objector") to Bernstein Litowitz Berger & Grossmann LLP's fee award raises a novel issue of the proper principles for allocating fees awarded from a common-fund settlement. The Objector argues that, whenever an action is initiated under a statute with a fee-shifting provision, an attorney's fee is presumptively limited to the unenhanced lodestar fee, even if the action is settled by the creation of a common fund. Appellee argues that the contrary is true, claiming that, whenever an action is settled with the creation of a common fund, equitable principles permit the district court to award a fee that can be calculated using either the lodestar-fee method or a percentage-of-the-fund method. As Second Circuit case law has long implied, we hold that, even if a case is brought pursuant to a fee-shifting statute, common-fund principles control fee awards authorized from a common fund, and a common-fund fee award may be calculated as the lodestar or as a percentage of the common fund. In so holding, we recognize the acute difference between assessing a fee award against a defendant, who reaps no benefit from an action brought against him, and requiring class members to compensate counsel for representation that enriches the class. We AFFIRM the well-reasoned order of the district court finding that Bernstein Litowitz Berger & Grossmann LLP is entitled to its requested fee and expense award.

BACKGROUND

This case is collateral litigation arising from the June 16, 2016, settlement of a consolidated securities class action brought by shareholders of BioScrip, Inc. The district court appointed Fresno County Employees' Retirement Association as lead plaintiff and Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel") as lead counsel for the action. The class sought to recover for two allegedly material misrepresentations that BioScrip, Inc. made and brought an action under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934; Securities and Exchange Commission Rule 10b-5; and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933.

After the consolidated class-action complaint largely survived a motion to dismiss and the case entered discovery, the parties agreed to settle all of the aforementioned claims. The settlement called for the class-action defendants to pay $10,900,000 into a common fund in exchange for the class releasing all claims asserted against the defendants in the action. The settlement also provided that "Lead Counsel will apply to the Court for a collective award of attorneys' fees to Plaintiffs' Counsel to be paid solely from (and out of) the Settlement Fund." Stipulation &

Agreement of Settlement at 20, ¶19, *Faig v. BioScrip, Inc.*, No. 13-cv- 6922(AJN) (S.D.N.Y. Feb. 4, 2016), ECF No. 104-5. Thereafter, Lead Counsel moved for an award of attorneys' fees of 25% of the settlement fund, totaling $2,725,000 plus interest, and an expense award of $133,565.28. Lead Counsel's requested fee award amounted to a 1.39 multiplier of the lodestar fee.

The Isaacson/Weaver Family Trust filed an objection to Lead Counsel's requested award, arguing that Lead Counsel's award should be reduced to the lodestar amount. No other class member objected to the settlement agreement or the requested fee. The district court subsequently held a settlement fairness hearing where it heard argument on, among other things, Lead Counsel's fee request. In a thorough and discerning opinion, the district court found that Lead Counsel's requested fee was reasonable and granted the fee in full.

DISCUSSION

The parties primarily dispute the method by which a reasonable fee should be calculated when class counsel settles claims brought pursuant to statutes with fee-shifting provisions by establishing a common settlement fund. The Objector argues that, because the parties created the common fund to resolve claims based on statutes with fee-shifting provisions, the Supreme Court's fee-shifting jurisprudence applies, and Lead Counsel is presumptively entitled to only the unenhanced lodestar fee. Lead Counsel disagrees, arguing that the settlement that created the common fund resolved claims based on statutes that do not have applicable fee-shifting provisions, and regardless, the common-fund doctrine governs a district court's award of attorneys' fees when counsel has secured a settlement fund for the benefit of the class. We make clear today what has long been implicit in this Circuit's jurisprudence: regardless of whether a case is brought pursuant to a statute with a fee-shifting provision, if the parties settle the case by creating a common fund, common-fund principles control class counsel's fee recovery. So concluding, we offer no opinion on whether the statutes pursuant to which the underlying case arose contain applicable fee- shifting provisions.

I. Standard of Review

"The Second Circuit reviews a district court's decision to grant or deny an award of attorneys' fees for abuse of discretion, reviewing de novo any rulings of law." *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Emps. Ret. Sys.*, 814 F.3d 652, 656 (2d Cir. 2016). Because the Objector has challenged the fee award based on the district court's ruling of law that Lead Counsel was entitled to a common- fund fee award, our review is de novo.

II. The American Rule and Its Exceptions

In the American system of justice, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). There are two well-known exceptions to this "American Rule": (1) where Congress has specifically legislated that the prevailing party may recover fees from the losing party, *see Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 & n.3 (2010), and (2) where "a litigant or a lawyer ... recovers a common fund for the benefit of persons other than himself or his client," *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). While in both instances an attorney is entitled to a recovery that is ultimately financed by the opposing party, the Supreme Court has placed greater restrictions on attorneys' fees recovered from statutory fee-shifting provisions than on fees recovered from common funds.

When a statute's fee-shifting provision authorizes a reasonable attorneys' fee, the Supreme Court has held that "the lodestar method yields a fee that is presumptively sufficient."[15] *Perdue*, 559 U.S. at 552. Fee-shifting provisions typically encourage counsel to represent plaintiffs in actions where "Congress has opted to rely heavily on private enforcement to implement public policy." *Alyeska Pipeline Serv. Co.*, 421 U.S. at 263. Where a litigant acts as a private attorney general, the goal of fee shifting is to provide "a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious . . . case." *Perdue*, 559 U.S. at 552. The defendant effectively finances the private enforcement action against it as a component of its liability. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 253-54 (quoting fee-shifting provisions that refer to taxing the opposing party for fees "incident to the judgment" (internal quotation marks omitted)).

Notably, an unenhanced lodestar fee does not account for the contingent risk that a lawyer may assume in taking on a case. *See City of Burlington v. Dague,* 505 U.S. 557, 562-63 (1992); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air (Del. Valley II)*, 483 U.S. 711, 724-25 (1987). This makes

[15] The lodestar method calculates a given attorney's fee by multiplying an attorney's reasonable hourly rate by the number of hours that the attorney spent on the case. Perdue, 559 U.S. at 546.

particular sense where the defendant shoulders the burden of fees because "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases." *Dague*, 505 U.S. at 565. Therefore, "enhancing fees for risk of loss forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases." *Del. Valley II*, 483 U.S. at 724-25. The defendant, however, has no responsibility to compensate an attorney for risk in the attorney's other cases and would be unfairly penalized if it were forced to subsidize an attorney's other ventures. Thus, where counsel receives a fee award pursuant to a fee-shifting statute authorizing a reasonable fee, we presume that the unenhanced lodestar is a reasonable fee. *Perdue*, 559 U.S. at 552.

In contrast to fees awarded pursuant to fee-shifting provisions, fees awarded pursuant to the common-fund doctrine do not extract a tax on the losing party but instead confer a benefit on the victorious attorney for her representation of her client and the class members. *See Boeing*, 444 U.S. at 478. "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* The common-fund doctrine is therefore rooted in the courts' "historic power of equity to permit" a person who secures a fund for the benefit of others to collect a fee directly from the fund. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 257 (citing *Trustees v. Greenough*, 105 U.S. 527, 531-33 (1881)). Under the common-fund doctrine, a district court may select "either the lodestar or percentage of the recovery methods" to calculate fees. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 45 (2d Cir. 2000); *see also McDaniel v. County of Schenectady*, 595 F.3d 411, 419

(2d Cir. 2010). A common-fund-percentage fee must still be evaluated for reasonableness, *see, e.g., McDaniel*, 595 F.3d at 423, but may exceed the lodestar—i.e., it may be less than, equal to, or greater than the lodestar, *see, e.g., Goldberger*, 209 F.3d at 47.

Accordingly, the means by which an attorney becomes entitled to a fee can affect the method used to calculate what a reasonable fee is. Subject always to the district court's discretion, an attorney seeking a fee after establishing statutory liability will presumptively receive a fee equal to the unenhanced lodestar, and an attorney seeking a fee after establishing a common fund will receive a fee calculated using either the lodestar method or a percentage-of-the-fund method, which can yield a fee that is less than, equal to, or greater than the lodestar fee.

III. Fee-Shifting Statutes Do Not Circumscribe the Common-Fund Doctrine

Fee-shifting principles and the common-fund doctrine occupy separate realms. In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court identified a "consistently followed" rule that fee-shifting statutes do "not interfer[e] with the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund . . . itself or directly from the other parties enjoying the benefit." 421 U.S. at 257. The Supreme Court therefore suggested that, even when statutory fees and the common-fund doctrine collide, the common-fund doctrine operates autonomously from fee-shifting principles.

Our Circuit has followed suit. In *County of Suffolk v. Long Island Lighting Co.*, this Court considered whether class counsel could be awarded fees from a common fund despite the fact that counsel would be entitled to statutory fees under the Racketeer Influenced and Corrupt Organizations Act if it prevailed on appeal. 907 F.2d 1295, 1326-27 (2d Cir. 1990). En route to deciding that class counsel was entitled to fees for its significant work in bringing about a settlement, we observed that "fee-shifting statutes are generally not intended to circumscribe the operation of the equitable fund doctrine." *Id.* at 1327. An exception to this principle exists only if the equitable-fund doctrine interferes with a fee-shifting statute's purpose "to encourage the prosecution of certain favored actions by private parties," in which case the doctrine yields to the statute. *Id.* We determined that, where a common fund results from the commencement of a favored action, no such interference exists, and class counsel is entitled to fees under the common-fund doctrine notwithstanding a statutory fee-shifting provision. *Id.* at 1327-28.

In *Goldberger v. Integrated Resources, Inc.*, we again obliquely addressed the common-fund doctrine vis-à-vis statutory fee-shifting principles. 209 F.3d 43. There, we considered whether a securities class-action settlement—settling claims brought under Rule 10b-5, *id.* at 45, one of the provisions at issue in this case—could support an award of attorneys' fees based on a percentage-of-the-fund approach. *Id.* at 47. We noted that both the lodestar and the percentage-of-the-fund methods can yield a "reasonable attorneys' fee" from a common-fund settlement. *Id.* at 47-50; *see also McDaniel*, 595 F.3d at 419. The Court's analysis foreshadowed our decision today: in rejecting counsel's claim "that the district court erroneously relied on the strictures against risk multipliers in statutory fee-shifting cases" when it awarded a lodestar fee in a common-fund case, we noted that "[c]ourts have held such strictures inapplicable to cases like this, where the lawyers seek fees from a common fund they won for plaintiffs." *Goldberger*, 209 F.3d at 54 n.3.

IV. Our Sister Circuits Have Articulated Sound Rationale for Precluding the Application of Fee-Shifting Principles to Common-Fund Awards

Our sister circuits have persuasively supported *Goldberger*'s unceremonious rejection of the suggestion that statutory fee-shifting principles curtail a district court's discretion in common-fund cases and have offered compelling reasons why a common-fund fee may differ from a statutory fee.

The Ninth Circuit has held that "unless Congress has forbidden the application of the common fund doctrine in cases in which attorneys could potentially recover fees under the type of fee-shifting statutes at issue here, the courts retain their equitable power to award common fund attorneys' fees." *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003). The court reasoned that in negotiating a settlement, "a defendant is interested only in disposing of the total claim asserted against it." *Id.* at 964 (internal quotation marks omitted). Therefore, "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Id.* (internal quotation marks omitted); *see also Goldberger*, 209 F.3d at 52-53 (noting this principle in the context of parties' incentives to oppose a fee award).

The settling defendant's focus is on its bottom line, and once that bottom line has been inked, the defendant's interest in how class members and class counsel spend the settlement money dwindles. This is in stark contrast to fees awarded pursuant to a fee-shifting statute, where as part of its liability and in addition to any monetary judgment, the defendant is forced to pay for the costs of the statute's enforcement against it. *Cf. Alyeska Pipeline Serv. Co.*, 421 U.S. at 247-54 (tracing the evolution of taxable costs against a defendant as an incident of the defendant's liability). Therefore, where a statute shifts fees, we consider a reasonable fee with the defendant's perspective in mind. *See Del. Valley II*, 483 U.S. at 724-25 (rejecting contingency enhancement of lodestar fee after discussing the ramifications of such an enhancement on defendants).

In contrast, where an attorney has settled a case and created a common fund, we determine what a reasonable fee is from the plaintiff's perspective. Critically, a reasonable fee from the plaintiff's perspective can account for contingency risk where such risk exists,[16] and a common-fund fee may therefore exceed what would be a "reasonable fee" in the fee-shifting context. The Seventh Circuit has persuasively articulated why accounting for contingency risk can be appropriate when the plaintiff funds the fee but not when the defendant funds the fee. Assessing a fee that accounts for contingency risk against a defendant would require the defendant to "subsidiz[e] plaintiffs' attorneys for unsuccessful lawsuits against other defendants."

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[16] We note that it will not always be the case that an attorney representing a class assumes compensable contingency risk. A case may, for example, have such a high likelihood of being meritorious that compensation for contingency risk is unnecessary. *See, e.g., Goldberger*, 209 F.3d at 52 (noting that there is not "a substantial contingency risk in every common fund case" and cautioning against calculating contingency risk into every percentage-fee award).

Florin v. Nationsbank of Ga., N.A., 34 F.3d 560, 565 (7th Cir. 1994). But "[i]n a common fund case, ... because compensation for risk is charged against the plaintiff class, defendants would not be forced to subsidize directly plaintiffs' attorneys' losing endeavors." *Id*. (emphasis added).

The plaintiff class is therefore appropriately charged for contingency risk where such risk is appreciable because the class has benefited from class counsel's decision to devote resources to the class's cause at the expense of taking other cases. That is, because class counsel has decided to represent the plaintiff class, class counsel's ability to freely represent other clients is limited by the risk she has assumed that the class's cause will be unsuccessful. The class, having been enriched by counsel's acceptance of its cause at the expense of other clients' causes, may be charged for counsel's assumption of risk on its behalf. Consistent with the reasoning and holding of the Ninth Circuit in *Staton*, the Seventh Circuit has therefore held that "common fund principles properly control a case [that] is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund." *Id.* at 564; *see also Staton*, 327 F.3d at 968.

V. The Common-Fund Doctrine Does Not Threaten to Misalign Counsel and Her Client's Incentives

In agreeing with the Seventh and Ninth Circuits, we decline to yield to the Objector's contention that applying common-fund principles to fee recoveries from cases initiated under fee-shifting statutes will misalign attorneys' incentives. The Objector argues that allowing counsel to extract a percentage fee under the common-fund doctrine encourages counsel to settle cases early—even when her client's best interests are served by prosecuting the claim to trial. We recognize that both the lodestar methodology and the common-fund methodology provide imperfect solutions for aligning an attorney's incentive to settle with her client's. *McDaniel*, 595 F.3d at 419 ("[N]either the lodestar nor the percentage-of-fund approach to awarding attorneys' fees in common fund cases is without problems."). We nonetheless do not share in the Objector's concern that the percentage-fee approach will destroy class representation for two primary reasons: first, a fee awarded under the common-fund doctrine provides class counsel with the incentive to maximize the settlement payout for the class because a larger settlement yields a proportionally larger fee; second, a district court is required to review class settlements and class counsel's fees, providing an extra layer of security that class counsel will fairly and adequately represent the class.

As to the first reason, we have previously noted that "the percentage method has the advantage of aligning the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation." *Id*. Thus, once the parties have agreed to settle, the percentage-of-the-fund methodology serves as important motivation for counsel to maximize the class's recovery, and, a fortiori, counsel's fee.

This incentive structure is critically important because, under the common-fund doctrine, class counsel is not entitled to a common-fund fee or an unenhanced lodestar fee by force of entering into a settlement agreement on the class's behalf. Rather, the district court retains discretion to determine which methodology it will use to calculate class counsel's reasonable fee. *Goldberger*, 209 F.3d at 50 ("[W]e hold that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases."). As such, class counsel cannot enter into a premature settlement confident that it will receive a percentage-of-the-fund fee that exceeds its lodestar fee. Since the district court alone makes the decision of how class counsel's fee will be calculated, class counsel's safest bet for securing a large fee award is to prosecute the action until the point at which settlement is the best available option and thereafter maximize her client's returns.

As to the second reason that a percentage-fee method is workable despite the Objector's concerns, we are comforted by the fact that a "court is to act as a fiduciary who must serve as a guardian of the rights of absent class members" in reviewing a class-action settlement and a class fee award. *Id.* at 52 (internal quotation marks omitted). The Federal Rules of Civil Procedure require that "[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed.R.Civ.P. 23(e) (emphasis added). Rule 23 requires the district court to hold a hearing and consider a number of factors to ensure that a proposed settlement "is fair, reasonable, and adequate," *id.* 23(e)(2), and the court must specifically evaluate "the terms of any proposed award of attorney's fees," *id.* 23(e)(2)(C)(iii). Thus, the district court is required to review both the terms of the settlement and any fee award encompassed in a settlement agreement. This review provides a backstop that prevents unscrupulous counsel from quickly settling a class's claims to cut a check.

In addition to ex post facto review of fee awards, some district courts have elected to exercise their discretion to select and manage class counsel at the outset of the litigation. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 n.6 (3d Cir. 2000) ("[D]istrict courts can avoid many of [the] complications associated with fee awards by setting fee guidelines and ground rules early in the litigation process."). One example of such an ex ante approach to selecting class counsel, popular in securities class actions, is for the district court to request that prospective class attorneys submit proposals regarding their qualifications, predictions for expected recovery, and their prospective fees. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720 (7th Cir. 2001). Thereafter, "[t]he judge in turn acts as an agent for the class, selecting the firm that seems likely to generate the highest recovery net of attorneys' fees." *Id.*; *see also Gunter*, 223 F.3d at 201 n.6. Placing the district court at the helm of class-counsel selection allows the district court to actively consider class counsel's performance while the litigation remains pending and is another means of monitoring fee awards.

Further, if judicial review of class-action settlements with a "searching assessment" of counsel's fee award, *McDaniel*, 595 F.3d at 419 (internal quotation marks omitted), were not solace enough for the Objector, we have also counseled that the district court should use the lodestar as a "baseline" against which to cross-check a percentage fee: "we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage," *Goldberger*, 209 F.3d at 50. Thereafter, "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.* Fee requests that deviate wildly from the unenhanced lodestar fee are unlikely to pass this cross-check, and district courts are at liberty to reduce the requested fee within their discretion.

We thus have confidence in the district court as fiduciary of the class and ultimate decisionmaker on a class-action settlement to substantially alleviate the Objector's concerns about class counsel's incentives. Having obtained such reassurance, we hold that, where a class action results in a common-fund settlement for the benefit of the class, the common-fund doctrine applies and permits a district court to use its discretion to award class counsel either an unenhanced lodestar fee or a fee calculated as a percentage of the settlement fund. This principle applies even when claims are initiated pursuant to a statute with a fee-shifting provision. Since the parties do not argue that the district court abused its discretion in analyzing the propriety of the fee award under the discretionary factors, we affirm the order of the district court.

CONCLUSION

The class, including the Objector, has benefited from Lead Counsel's negotiation of a common settlement fund. Because Lead Counsel's fee is extracted directly from the beneficiaries of its work, Lead Counsel is entitled to compensation not only for skillfully negotiating that settlement fund but for bearing the risk that the suit would not generate any recovery. Accordingly, even if the class's claims were initiated under fee-shifting statutes, common-fund principles would govern, and the district court had the discretion to award Lead Counsel a fee equaling either the lodestar fee or a percentage of the fund.

The district court did not abuse its discretion when it determined that a percentage of the fund reasonably compensated counsel. The district court's order is hereby **AFFIRMED**.

APPENDIX B

Judgment of the U.S. Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of May, two thousand and nineteen.

Before: Dennis Jacobs,
Rosemary S. Pooler,
Richard C. Wesley,
Circuit Judges.

Fresno County Employees' Retirement Association,

Plaintiff–Appellee,

v.

Isaacson/Weaver Family Trust,

Objector–Appellant.

JUDGMENT

Docket No. 17-2662

The appeal in the above captioned case from an order of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the order of the district court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX C

Opinion of the District Court Awarding Attorney's Fees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

13-cv-6922

MEMORANDUM & ORDER

In re BioScrip, Inc. Securities Litigation

ALISON J. NATHAN, District Judge:

On June 16, 2016, the Court issued orders approving the plan of allocation of the net settlement fund and the class action settlement. Dkt. Nos. 123-24. The Court now addresses Lead Counsel's application for attorney's fees. For the reasons that follow, Counsel's application is granted in its entirety.

I. Background

The above case is a securities class action brought on behalf of all persons and entities who purchased or acquired the publicly traded common stock of BioScrip, Inc. ("BioScrip") between November 9, 2012 and November 6, 2013. *See* Dkt. No. 68, at 1 (hereafter "Mar. 31, 2015 Order"). The consolidated actions stem from allegations that BioScrip violated the securities laws through two sets of allegedly misleading statements: first, statements affirming

BioScrip's compliance with relevant laws notwithstanding the Government's investigation into an alleged kickback scheme between BioScrip and Novartis Pharmaceuticals Corp.; and second, statements affirming the profitability of BioScrip's pharmacy benefit management operating segment, notwithstanding the undisclosed loss of a significant segment of that business. *See generally* Consolidated Class Action Complaint (Dkt. No. 22) (hereafter the "Complaint"). The Court assumes familiarity with the Court's Memorandum and Order of March 31, 2015, granting in part and denying in part Defendants' motions to dismiss, which describes in detail the factual and legal contours of the case. *See* Mar. 31, 2015 Order.

On September 30, 2013, Plaintiff Timothy Faig filed the first class action complaint in this case, Dkt. No. 1, which was followed by the filing of a related complaint on November 15, 2013, by the West Palm Beach Police Pension Fund, 13-cv-8175, Dkt. No. 1. On December 2, 2013, the Fresno County Employees' Retirement Association ("Fresno" or "Lead Plaintiff") moved for appointment as lead plaintiff, as well as for approval of its selection of lead counsel, the law firm of Bernstein Litowitz Berger & Grossmann LLP ("BLB&G" or "Lead Counsel"[1]). Dkt. No. 11. On

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[1] In its December 19, 2013 Order consolidating the actions in this case and appointing Lead Plaintiff and Lead Counsel, the Court appointed Fresno Lead Plaintiff and BLB&G Lead Counsel. *See* Dkt. No. 17. In the Consolidated Class Action Complaint, however, Fresno added an additional named plaintiff, the West Palm Beach Police Pension Fund, which was represented by Saxena White P.A. *See* Complaint at 1, 110. In its request for fees, Lead Counsel includes Saxena White (and thus includes hours billed by Saxena White in the lodestar calculation). See Memorandum of Law in Support of

December 19, 2013, the Court consolidated the two class action complaints, and appointed Fresno as Lead Plaintiff and BLB&G as Lead Counsel. Dkt. No. 17.

Lead Counsel represents that, over the next few months, it conducted an extensive factual and legal investigation, pursuant to which counsel reviewed numerous documents, conducted 72 interviews with former employees of BioScrip and other relevant individuals, researched relevant case-law, and consulted with various experts. Ross Decl. ¶19. On the basis of this investigation, on February 19, 2014, Lead Counsel filed Plaintiffs' Consolidated Class Action Complaint, a 110-page document asserting claims under both the Exchange Act of 1934, 15 U.S.C. §78a *et seq.,* and the Securities Act of 1933, 15 U.S.C. §77a *et seq. See* Complaint. In particular, Plaintiffs brought five claims against the Defendants: a claim under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated pursuant to that section, a Section 20(a) control person claim, a claim under Section 11 of the Securities Act, a Section 12(a)(2) claim under that act, and a Section 15 control person liability claim. See Mar. 31, 2015 Order at 13. Two sets of Defendants then moved to dismiss the Complaint. See Dkt. Nos. 41, 45. On March 31, 2015, the Court granted in part and denied in part both motions. Mar. 31, 2015 Order. On June 5, 2015, the

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Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses, Dkt. No. 110, at 25 (hereafter "Pl. Mem."); Declaration of Hannah G. Ross, Dkt. No. 111 ¶90 (hereafter "Ross Decl."); Ross Decl., Ex. 5. In referring to "Lead Counsel" then, the Court refers to both BBL&G and Saxena White, and, in approving Lead Counsel's request, approves the fees requested as to both firms.

Court denied the Defendants' motion for partial reconsideration. Dkt. No. 86. Thereafter, the parties began the discovery process, which included Defendants' production of approximately 800,000 pages of documents. Ross Decl. ¶41.

In August of 2015, the parties agreed to seek a settlement via mediation, and selected former U.S. District Judge Layn Phillips as a mediator. *Id.* ¶42. As part of the mediation process, both parties submitted briefing, and appeared for a full-day mediation session on September 25, 2015. *Id.* ¶46. At the session, the parties debated numerous factual and legal areas of dispute, and ultimately failed to reach an agreement to settle the action. *Id.* After additional negotiations, however, and after Judge Phillips provided a recommended settlement amount, the parties ultimately reached a resolution, which they submitted to this Court for preliminary approval on December 18, 2015. Dkt. No. 101. On February 11, 2016, the Court issued an order preliminarily approving the settlement and providing for notice. Dkt. No. 106.

In the settlement, BioScrip agreed to pay $10,900,000 to settle the lawsuit in its entirety (on behalf of all defendants). Ross Decl. ¶3; *see also* Settlement ¶1(rr) (Dkt. No. 101-1); Dkt. No. 124 (Judgment Approving Class Action Settlement). The settlement agreement also stipulated that Lead Counsel would apply for attorney's fees, as well as costs and expenses, directly from the fund. See Settlement ¶19. The settlement also specified that Defendants would have no responsibility nor liability for attorney's fees beyond the settlement amount. *Id.* ¶23.

On May 9, 2016, Lead Plaintiff moved to approve the class action settlement and plan of allocation, Dkt. No. 107, and Lead Counsel moved for an award of attorney's fees, costs, and expenses, Dkt. No. 109. In particular, Lead Counsel requested attorney's fees in the amount of 25% of the settlement fund, i.e. $2,725,000, plus interest earned at the same rate as the Settlement Fund, reimbursement for $133,565.28 in litigation expenses incurred, and reimbursement to Lead Plaintiff for $1,378.61 in costs. *See* Pl. Mem. at 1; Ross Decl. ¶2. Lead Counsel argued that, relying on the percentage method to calculate a reasonable attorney's fee, the request should be approved. *See id.* at 3-4 (citing *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir. 2000) (contrasting the percentage method, under which "[t]he court sets some percentage of the recovery as a fee," with the lodestar method, "under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate")). In this case, Lead Counsel acknowledged that 25% of the fund would amount to a 1.39 multiplier of Lead Counsel's lodestar. *See* Pl. Mem. at 9.

On May 23, 2016, the Court received an objection to the fee award, from the Isaacson/Weaver Family Trust (the "Trust" or "Objector"). See Dkt. No 113 (hereafter "Obj. Mem."). The Trust objected to any award above the lodestar, primarily on the basis that such an award would be inconsistent with the Supreme Court's admonition in *Perdue v. Kenny A. ex rel. Winn* that, when calculating "an attorney's fee[] under federal fee-shifting statutes ... there is a strong presumption that the lodestar is sufficient." 559 U.S. 542, 546 (2010). No additional objections to the settlement or fee application were received from any class members. *See* June 13, 2016 Tr. at 4 (Dkt. No. 125).

On June 13, 2016, the Court held a settlement fairness hearing to discuss both the proposed settlement and Lead Counsel's request for fees. *See generally* June 13, 2016 Tr. At that hearing, the Court heard argument from Lead Counsel and the Objector as to the reasonableness of the fee request. *See id.* at 12-35.

On June 16, the Court issued orders approving the plan of allocation of the net settlement fund and the class action settlement, but reserved on the question of attorney's fees. Dkt. Nos. 123, 124. The Court now addresses Lead Counsel's application for attorney's fees amounting to 25% of the common fund and the Objector's arguments that the fee award should be limited to the lodestar. For the reasons that follow, Lead Counsel's application for fees is granted in its entirety.[2]

II. The Objection

In opposition to Lead Counsel's requested fee, the Objector raises two principal arguments. First, and primarily, the Objector argues that Supreme Court precedent requires this Court to apply a "'strong presumption' that the lodestar figure is reasonable," a legal standard that would preclude the award of a lodestar multiplier in all but the most extraordinary of cases. *See Perdue,* 559 U.S. at 554; *City of Burlington v. Dague,* 505 U.S. 557, 562, 567 (1992) (holding that such a presumption applies when a court awards fees pursuant to a fee-shifting statute).

[2] No party has objected to the reimbursement requests for costs and Lead Plaintiff's expenses, which the Court deems reasonable and approves.

Were the Objector correct, it would follow that the Court would lack the discretion- absent a finding that this case were "'rare'" and "'exceptional'"—to award Lead Counsel a fee higher than its lodestar. *Perdue,* 559 U.S. at 552 (quoting *Penn. v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986)).

Second, were the Court to reject the Objector's legal argument and conclude that it has discretion to award a lodestar multiplier without such a finding, the Objector argues that the Court should, in its discretion, decline to award a fee that would result in any lodestar enhancement. Obj. Mem. at 11-21.

The Court addresses each argument in turn. In summary, the Court concludes, first, that the presumption against a lodestar enhancement articulated in *Dague* and *Perdue* when a court awards a reasonable attorney's fee from a defendant pursuant to a fee-shifting provision does not apply to the award of fees in this case from a common fund created after a settlement. Second, evaluating the fee request using the common fund principles articulated in *Goldberger*, the Court finds the request reasonable and approves it in full.

III. The Legal Standard Governing the Award of Fees in this Case

The Court first addresses the Objector's primary argument: that, in awarding fees in this case, the Court must apply a "'strong presumption' that the lodestar figure is reasonable," and thus has little to no discretion to award a lodestar enhancement or a percentage of the fund that would exceed the lodestar. *Perdue,* 559 U.S. at 554. The Court disagrees.

In the American system, "parties to a lawsuit usually bear their own expenses, regardless of which party prevails." *Florin v. Nationsbank a/Georgia, NA.,* 34 F.3d 560, 562 (7th Cir. 1994). At least two prominent exceptions exist to this general rule, however. First, Congress has inserted fee-shifting provisions in certain statutes - provisions that permit prevailing plaintiffs to seek compensation from defendants for "the costs they incurred to enforce [their] rights." *Id.* at 563. Second, a case may result in the creation of a "common fund"—a fund created, often after settlement, for the benefit of the plaintiff class. "In such a case, the defendant typically pays a specific sum into the court, in exchange for a release of its liability"—often (although not always) including a release from any "potential liability for statutory attorney's fees." *Id.* at 563-64. In the context of a common fund (as is this case here), the defendant's liability is generally "fixed-it cannot exceed the amount of the common fund the defendant has agreed to pay," regardless of the award of attorney's fees. *Id.* at 564.

In the context of an award of fees from a common fund created after settlement, the Second Circuit has held that a court has a great deal of discretion in calculating a reasonable fee. *See Goldberger,* 209 F.3d at 47. A court may employ the lodestar method, "under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate," or the percentage method, under which "[t]he court sets some percentage of the recovery as a fee." *Id.* In either case, a district court has considerable discretion to award a fee reflecting a lodestar enhancement designed to compensate attorneys for, *inter alia*, "the risk of the litigation." *Id.*; *see also McDaniel v. Cty. of Schenectady,* 595 F.3d 411, 425-26 (2d Cir. 2010) (affirming this framework).

In contrast, in the context of an award of fees directly from a defendant pursuant to a fee-shifting statute, the Supreme Court has held that a district court's discretion is far more limited. As the Objector notes, in calculating such a fee, "there is a 'strong presumption' that the lodestar figure is reasonable." *Perdue,* 559 U.S. at 554. Although that presumption may be overcome, it is only the "rare circumstance[]" that would ever justify requiring a defendant to pay an enhancement to the lodestar. *See id.*; *see also Dague,* 505 U.S. at 562.

The Objector argues that, notwithstanding the fact that courts in this Circuit routinely apply the Goldberger methodology to calculate a reasonable attorney's fee from a common fund created after settlement of a securities class action, the "strong presumption" against a lodestar multiplier articulated in *Perdue* and *Dague* must apply in this case. *See* Obj. Mem. at 1-2. The Objector bases this conclusion on two interlocking premises. First, although the Objector concedes that *Perdue* and *Dague* addressed how courts should calculate a statutory award of fees from a defendant pursuant to a fee-shifting provision, it argues that the presumption against a lodestar multiplier articulated in these cases necessarily applies where counsel seeks an award of attorney's fees from a common fund if the claims settled themselves allowed for fee-shifting. *See id.* at 2 (arguing that the alternative would create "perverse incentives and place[] the[] interests [of class counsel] in conflict with interests of the class"). Second, the Objector argues that the claims in this case are indeed governed by fee-shifting provisions, such that the Dague and Perdue presumption must apply. *See id.*

The Court addresses each of these premises (both of which must be adopted for the Objector's position to be correct), and rejects each of them. For two independent reasons, then, the Court holds that the common fund principles articulated in *Goldberger,* and not the statutory fee-shifting principles articulated in *Dague* and *Perdue,* govern the award of fees in this case, and that the Court has discretion to award a lodestar enhancement.

A. The *Perdue* Presumption Against a Lodestar Enhancement Does Not Apply When a Court Awards Fees from a Common Fund Created after a Settlement

The first premise of the Objector's argument is that the presumption against a lodestar multiplier articulated in *Dague* and *Perdue*—two Supreme Court cases addressing the calculation of a reasonable attorney's fee pursuant to a fee-shifting statute—applies even when a court awards fees from a settlement fund pursuant to equitable principles, provided that the claims settled were themselves subject to fee-shifting provisions. The Court disagrees.

In *Dague* and *Perdue,* the Supreme Court reviewed two awards of attorney's fees made pursuant to fee-shifting regimes. In *Dague,* the district court awarded fees to the plaintiff after finding the plaintiff a "substantially prevailing party," entitled to an award of fees under both the Solid Waste Disposal Act and the Federal Water Pollution Act. 505 U.S. at 559. In *Perdue,* children in the Georgia foster care system brought a class action asserting violations of 42 U.S.C. §1988. 559 U.S. at 547. After the parties entered a consent decree, the plaintiffs submitted a request for fees pursuant to the fee-shifting provisions of§ 1988. *Id.* In both *Dague* and *Perdue,* the respective district courts, in calculating the fee awards in question, required the defendant to pay a fee that reflected an enhancement to the lodestar. See *Dague,* 505 U.S. at 560; *Perdue,* 559 U.S. at 548. In each case, the Supreme Court reversed. Interpreting the fee-shifting provisions at issue, each of which allowed for the award of a "reasonable attorney['s] fee[]" to the prevailing or substantially prevailing party, *Dague,* 505 U.S. at 561-62; *Perdue,* 559 U.S. at 550, the Supreme Court held that, in the context of such awards, "there is a 'strong presumption' that the lodestar figure is reasonable," *id.* at 554. Although declining to hold that a district court may never enhance a lodestar in awarding such a fee, the Court noted that such an enhancement would only be permissible in "rare" and "exceptional" circumstances. *Id.* at 543 (internal quotation marks omitted). Such an enhancement would not be appropriate on the basis of contingency risk. *Dague,* 505 U.S. at 567.

The Objector concedes that neither *Dague* nor *Perdue* addressed the award of fees from a common fund created after a settlement. Nevertheless, the Objector argues that the limitations articulated in *Dague* and *Perdue* necessarily apply to such a scenario when the claims are brought pursuant to a statute that would allow class counsel to move, after a finding of liability, for an award of fees from a defendant. According to the Objector, this conclusion flows both from the analysis of *Dague* and *Perdue,* and from a simple normative argument: that any alternative conclusion would mean counsel could achieve a higher award if it seeks funds from a settlement under equitable principles than if it moves for attorney's fees from the defendant directly pursuant to a statute, which would create a problematic incentive for lead counsel to settle a case through the creation of a common fund, rather than either seek a settlement that does not resolve the issue of attorney's fees or eschew settlement in favor of seeking a verdict. *See Brytus v. Spang & Co.,* 203 F.3d 238, 247 (3d Cir. 2000) ("[T]here remains the possibility that in some cases counsel for a class of plaintiffs may receive a higher fee award upon settlement than they would have received had the case proceeded to judgment.").

The Objector's argument is not without force. Neve1iheless, the Court holds that the presumption articulated in *Dague* and *Perdue* does not apply in the context of an award of fees from a settlement fund, even if a statute would permit a party to otherwise seek a statutory fee award directly from a defendant. The Court reaches this conclusion for two reasons: First, although the Second Circuit has never addressed the issue the Objector raises directly, its holdings and dicta strongly disclaim the Objector's position. And second, other circuits, which have directly addressed the question, have persuasively concluded that *Dague* and *Perdue* do not, as either a statutory or policy matter, extend to the equitable award of fees from a common fund, and the Court agrees with their reasoning.

1. Second Circuit Precedent Strongly Indicates that Common Fund Principles, not Statutory Fee-shifting Principles, Govern an Award of Attorney's Fees from a Common Fund Created After Settlement

First, although the Second Circuit has never addressed the precise question the Objector raises—

its holdings and reasoning in other cases strongly suggest an understanding that the *Dague* and *Perdue* presumption does not apply when a court awards fees from a common fund.

The most obvious place to begin is *Goldberger*. As Lead Counsel observes, the leading case in this Circuit holding that a district court may enhance a lodestar when awarding fees from a common fund itself involved claims brought under Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder. *See Goldberger,* 209 F.3d at 45; *id.* at 47 (affirming that a "district court may, in its discretion, increase the lodestar by applying a multiplier based on 'other less objective factors,' such as the risk of the litigation and the performance of the attorneys"). In *Goldberger,* the Second Circuit nowhere addressed the possibility that attorney's fees might be available in a 10b-5 class action—likely because, as the Court explains, *infra,* the Second Circuit has long held that such fees are not available to prevailing parties in such actions. *See Cotton v. Slone,* 4 F.3d 176, 181 (2d Cir. 1993). Nevertheless, the Second Circuit has since applied the Goldberger standard in the context of statutes that clearly contain fee-shifting provisions, suggesting that the Circuit understands equitable - and not statutory-fee-shifting - principles to apply to such an award even where a statute contains a fee-shifting provision. *See McDaniel,* 595 F.3d at 415, 417-18 (analyzing the district court's assessment of the *Goldberger* factors in the context of claims brought pursuant to 42 U.S.C. §1983). Were the Objector correct, the legal standards articulated in *Goldberger* and *McDaniel* (not to mention in numerous district court decisions in this circuit) would be erroneous.[3] 3

Although much of the reasoning in *Goldberger* and *McDaniel* is inconsistent with the Objector's position, the Objector rightly observes that in neither case did the Second Circuit squarely address the scope and implications of Dague. Nevertheless, dicta in *Goldberger,* and a holding in an earlier Second Circuit case, further support the conclusion that *Dague* is limited to statutory fee awards. First, in *Goldberger,* in a footnote, the Second Circuit noted that counsel had argued that the district court "erroneously relied on the strictures against risk multipliers in statutory fee-shifting cases ... in which Congress has provided by statute for the recovery of fees from losing defendants." *Id.* at 54 n.3. The Second Circuit found the district court had not held that it was unable to award a risk multiplier, and thus the Circuit did not need to determine whether reversal would be warranted on this ground (and in any case, as noted, the objection did not presuppose that attorney's fees are readily available in a 10b-5 action). *Id.* Nevertheless, in citing counsel's argument, the panel noted that "[c]ourts have held such strictures inapplicable to cases like this, where the lawyers seek fees from a common fund they won for plaintiffs," and favorably cited *Florin,* a case in which the Seventh Circuit rejected the precise argument the Objector makes here. *See id.* (citing 34 F.3d at 564-65).

Prior to *Goldberger,* the Second Circuit addressed a distinct but related argument in *County of Suffolk v. Long Island Lighting Co.,* and provided analysis

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[3] As Lead Counsel correctly observes, adoption of the Objector's position would "mark a drastic change in securities class-action jurisprudence." Pl. Reply at 1.

which again cuts against the Objector's position. 907 F.2d 1295 (2d Cir. 1990). In *Suffolk,* plaintiffs brought claims against a set of defendants for, inter alia, violating the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* (1988) ("RICO"). *Id.* at 1300. After a trial resulting in a verdict in favor of the plaintiffs on the RICO claims, the district court granted judgment to the defendants on those claims and thereafter certified a class of plaintiffs pursuing the remaining claims. *Id.* at 1301. After the class settled with the defendants, Suffolk, a plaintiff in the action, opted out of the class and appealed the district court's dismissal of the RICO claims. *Id.* at 1302. Notwithstanding its objection to the settlement and its appeal, Suffolk moved for an equitable disbursement of attorney's fees from the settlement fund, on the ground that Suffolk's counsel had provided a substantial benefit to the class. *See id.* at 1326-27. The district court denied the request on the grounds, inter alia, that were Suffolk to prevail in its appeal, it would have "an independent basis for recoupment of its attorney's fees" under the RICO fee-shifting provision. *Id.* at 1327.

The Second Circuit affirmed the district court's dismissal of the RICO claims, but reversed its decision as to attorney's fees, relying on analysis that undercuts the Objector's position. *See id.* at 1327-38. Assessing the interplay between a fee-shifting statute and an award of fees from a common fund, the court explained that "fee-shifting statutes are generally not intended to circumscribe the operation of the equitable fund doctrine." *Id.* at 1327. The court acknowledged that "[d]uplicative recovery is to be avoided," and that if "under a particular combination of facts, the operation of the equitable fund doctrine conflicts with an intended purpose of a relevant fee-shifting statute, the statute must control and the doctrine must be deemed abrogated to the extent necessary to give full effect to the statute." *Id.* Such was not the case, however, in *Suffolk,* where "[t]he action intended to be encouraged ha[d] already been commenced and prosecuted." *Id.*

Suffolk does not foreclose the possibility that a fee-shifting statute could limit a court's discretion in awarding fees from the common fund. Its analysis, however, argues against the conclusion that such a limitation would be imported in the ordinary case. Both *Dague* and *Perdue* involved, at least in part, the interpretation of the text of fee-shifting provisions. *See Perdue,* 559 U.S. at 550; *Dague,* 505 U.S. at 561-62; see also Florin, 34 F.3d at 564 (explaining that "*Dague,* by its terms, applies only to statutory fee-shifting cases, and its reasoning is largely based on the statutory language of fee-shifting provisions"). If fee-shifting provisions are not generally intended to circumscribe operation of the equitable fund doctrine, it follows that there is little basis for importing a presumption rooted in the text of these provisions into the award of fees in a context not governed by that text. Additionally, the Suffolk court suggested that application of the equitable fund doctrine was consistent with the central purpose of fee-shifting provisions, which it described as "to encourage the prosecution of certain favored actions by private parties." *Id.* at 1327. The availability of the common fund doctrine provides an additional avenue for lawyers retained on contingency to receive reasonable compensation, and is thus not inconsistent with this stated purpose.

In sum, although the Second Circuit has not directly addressed the issue before this Court, its prior holdings and analysis suggest the conclusion that *Dague* and *Perdue* are limited to the context they purport to address: the award of fees pursuant to a specific statute from a defendant, rather than the award of fees pursuant to equitable principles from a common fund.

2. Persuasive Precedent from Other Circuits Further Disputes the Objector's Position

Although the Second Circuit has not directly addressed the question the Objector raises, two circuits have squarely addressed this question. *See Staton v. Boeing Co.,* 327 F.3d 938, 967- 69 (9th Cir. 2003); *Florin,* 34 F.3d at 563-64.[4] Each has held that common fund principles that allow for lodestar enhancements, and not statutory fee-shifting principles that do not, govern the award of funds from a settlement even where the settled claims contain fee-shifting provisions, and the Court finds the reasoning in these decisions persuasive.

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[4] In *Staton,* the Ninth Circuit identified the Third Circuit as having also held that "there is no preclusion on recovery of common fund fees where a fee-shifting statute applies." *Staton,* 327 F.3d at 967 & n.18 (citing *Brytus,* 203 F.3d at 246-47). Although, as this Court explains, *infra*, language in *Brytus* indeed supports Counsel's position in this case, *see infra* pp. [46a-48a] it stretches the language of that decision to read it as squarely addressing the Objector's argument in this case. *See Brytus,* 203 F.3d at 246 ("This, of course, is not a case that was concluded by settlement. This case was tried to judgment, and a fee awarded on that basis. We are not inclined to base our ruling on some hypothetical situation that might be presented in the future."); *id.* at 244 ("[Counsel's argument] presupposes that the *Dague* bar is inapplicable and that counsel in common fund cases are entitled to a multiplier for risk of contingency, an issue we need not decide today.").

In Florin, the Seventh Circuit held that "common fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund." *Id.* at 564. Analyzing the scope of *Dague,* the panel explained that "*Dague,* by its terms, applies only to statutory fee-shifting cases," and concluded that "its reasoning is largely based on the statutory language of fee-shifting provisions." *Id.* Given that such statutes do not address the award of fees from a common fund—an award made pursuant not to statute, but to a court's inherent powers to effect equity—the Seventh Circuit held that *Dague*'s holding does not apply in such a context. *See id.*

Turning to the policy considerations animating Dague, the Seventh Circuit further concluded that such considerations do not support application of the Dague holding in the equitable fund context. As the panel explained, "[u]nlike in fee-shifting cases ..., the fee award in a common fund case is ultimately charged against the plaintiffs' fund, rather than directly against the defendant. Thus, the defendant's liability is fixed-it cannot exceed the amount of the common fund the defendant has agreed to pay." *Id.* Accordingly, any risk of "unduly burdening the defendant with a multiplier to compensate for risk of loss" is not present. *Id.* (internal quotation marks omitted). The Seventh Circuit explained that this distinction between awarding fees directly from the defendant and awarding such fees from a fund created for the benefit of the plaintiffs was a material one, not simply a formal one: in contrast to taxing a losing defendant with a lodestar enhancement, awarding a fee from a common fund taxes plaintiffs, who, in contrast to the defendant, benefited from an attorney taking the case with no guarantee of compensation, as well as from the creation of the fund itself. *See id.* at 565 ("[T]here is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class' case without any assurance of compensation.").

Finally, the Seventh Circuit explained that allowing an award of fees from a common fund was in no way inconsistent with the goal of the fee-shifting provisions in question. In the Seventh Circuit's estimation, such fee-shifting provisions have two purposes: to shift the burden of paying expenses to defendants and, more broadly, to "enabl[e] meritorious plaintiffs who would not otherwise be able to afford to bring a lawsuit under [the statute], to pursue their claims." Id. at 564; see also id. at 562-63 ("These fee-shifting statutes were enacted for the purpose of encouraging the private prosecution of certain favored actions, by requiring defendants who have violated plaintiffs' rights to compensate plaintiffs for the costs they incurred to enforce those rights." (citing *Suffolk,* 907 F.2d at 1327)). Under the common fund doctrine, although funds come from the settlement fund, the fund itself is paid for by defendants, and it is understood during negotiations that the settlement fund will cover attorney's fees. *See id.* at 564. More significantly, the availability of the common fund doctrine, not unlike the existence of a fee-shifting provision, serves as another way of incentivizing counsel to take a case notwithstanding plaintiffs' inability to pay. The Seventh Circuit thus held that the doctrine "comports with the" policy of fee-shifting provisions - to encourage the bringing of such suits—and there is no reason to infer that the statute should be read to abrogate the use of common fund principles.

On the basis of these distinctions - both textual and normative—as well as the court's understanding of the interaction between a fee-shifting provision's purpose and the equitable fund doctrine, the Seventh Circuit held that a risk multiplier was indeed available in the equitable context of awarding a fee from a common fund created for the benefit of plaintiffs, even if not in the statutory context of awarding a fee from the defendant pursuant to a fee-shifting provision. *See Florin,* 34 F.3d at 565.

The Ninth Circuit subsequently reached the same conclusion. In *Staton,* the court addressed "whether the existence of potentially applicable fee-shifting statutory provisions precludes class counsel from recovering attorneys' fees under the common fund doctrine," and concluded that it does not. 327 F.3d at 967-69; *see also id.* at 967 (making clear that a risk multiplier would be permitted under common fund principles, although not under statutory fee-shifting principles). Explaining its decision, the court began by discussing the nature of the common fund doctrine. Although the general rule that "attorney's fees ... are not a recoverable cost of litigation 'absent explicit congressional authorization'" would preclude a court from awarding a fee from a defendant absent affirmative authorization in a statute, *Key Tronic Corp. v. United States,* 511 U.S. 809, 814 (1994) (quoting *Runyon v. McCrary,* 427 U.S. 160, 185 (1976) (citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240,247 (1975))), the Ninth Circuit explained that that background rule would "not prohibit the award of fees under the common fund doctrine," *Staton,* 327 F.3d at 968; *see also Boeing Co. v. Van Gemert,* 444 U.S. 472, 481 (1980) (noting that, in a case where the defendant's liability was fixed by the settlement amount, "the common-fund doctrine, ...

is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees"). Thus, while a court would require specific congressional authorization to shift fees from a losing party to a prevailing party, the opposite presumption would apply to the availability of a common fund award: Congress would have to have "forbidden the application of the common fund doctrine in cases in which attorneys could potentially recover fees under the type of fee-shifting statutes at issue here" for that doctrine—otherwise available under general equitable principles—to be abrogated. *Id.* at 968 (emphasis added). The Ninth Circuit went on to hold, as had the Seventh Circuit, that the intent to render unavailable a common fund award could not be inferred from the existence of such fee-shifting provisions, in part because "[t]he intent of the fee-shifting provisions ... is not countered by the application of common fund principles." *Id.*

In addition to its core argument, the Ninth Circuit also cited two additional and persuasive considerations. First, the court observed that "contingent fee agreements between counsel and client are valid in cases where statutory fees are available," and "[c]ommon fund fees are essentially an equitable substitute for private fee agreements." *Id.* Second, the court cited to a previous Ninth Circuit case that had stated, in holding that the Dague presumption does not generally apply in the context of an award of fees from a common fund, that "the concerns expressed in *Dague* about unduly burdening losing parties in statutory fee cases are not present in common fund cases where fees are paid out of the settlement fund. How the fund is divided between members of the class and class counsel is of no concern whatsoever to the defendants who contributed to the fund." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1301 (9th Cir. 1994).

This Court agrees with these cases and their collective reasoning: *Dague* and *Perdue* relied on interpretations of specific statutory provisions to hold that a lodestar multiplier would rarely be available when a plaintiff moves for a reasonable attorney's fee from a defendant pursuant to a fee-shifting statute. As *Florin*, *Staton*, and *Suffolk* persuasively explain, an award of fees under equitable principles is not governed by these statutes, nor subject to their text; the normative analyses in these cases neither requires—nor suggests—that the *Dague* and *Perdue* presumption should be applied when a court awards fees from a common fund; and none of the purposes of these fee-shifting provisions is obviously compromised by application of common fund principles.

Finally, the Court observes two additional reasons that *Dague* and *Perdue* do not apply in the common fund context. First, as noted, *Florin* and *Staton* both find it significant that a statutory fee is taxed directly to a defendant, whereas an award from a common fund—although it comes from funds provided by the defendant—is taxed to the class's recovery. This distinction is significant for an additional reason not identified in these cases: Plaintiffs, unlike defendants, are capable of avoiding the potential for any lodestar enhancement by opting to pay their counsel directly as the case progresses, rather than hire counsel on contingency. In electing to hire counsel on a contingent basis, plaintiffs trade the risk of footing the bill in the event of non- recovery for the possibility that counsel may end up being paid more than what plaintiff would have had to pay for a non-contingent arrangement (which presumably would approximate the lodestar). It is plainly unfair to tax the defendant for the plaintiffs choice to proceed in such a manner—i.e. to charge a defendant directly for contingency risk—as such a policy would have the effect of requiring the defendant to internalize the downside of the plaintiffs gamble, while providing plaintiff the upside of that gamble. But it is not unfair to tax such an enhancement against the plaintiff, or, here, the plaintiff class, which thus internalizes the benefits and detriments of the contingency agreement to which the plaintiffs explicitly or implicitly agreed. *See Goldberger,* 209 F.3d at 47 (noting that the availability of a fee from the common fund derives from equitable principles, and the "rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost").

Second, although the Objector cites potential (and not unpersuasive) incentive problems with allowing for a lodestar enhancement in the common fund context, he fails to grapple with the significant benefits to permitting a district court the discretion to award such enhancements—benefits which may serve a class and, in turn, the purposes of fee-shifting regimes. The Second Circuit has held that the availability of the percentage method to calculate a fee award from a common fund can serve as a benefit to the class in two ways: first, by aligning counsel's incentives with the class at the time the settlement is negotiated (by tying counsel's recovery to the size of the fee) and second, by counteracting any incentive counsel might have to eschew early settlement so as to increase their lodestar over the course of protracted litigation. *See Wal-Mart Stores, Inc. v. Visa US.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." (internal quotation marks and citation omitted)); *McDaniel,* 595 F.3d at 419 (acknowledging problems with the percentage method, but nevertheless explaining that "the percentage method has the advantage of aligning the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation"); *Hayes v. Harmony Gold Min. Co.,* 509 F. App'x 21, 23-24 (2d Cir. 2013) (summary order) (affirming an awarded fee of one third of a $9 million settlement, and noting that "the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class"); *Hayes v. Harmony Gold Min. Co.,* No. 08 CIV. 03653 (BSJ), 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (providing the details of the settlement and fee award). Of course, at the time a fee is awarded from a settlement fund, there is no question that a lower fee benefits the class - insofar as the class receives a greater percentage of the fund. But the incentive structure created by the availability of a lodestar multiplier or percentage-of-the-fund recovery is, in the aggregate, beneficial to the class. It is these benefits that support the determination that a district court should have discretion to rely on the percentage method when appropriate, and nothing in *Dague* or *Perdue* suggests the intention to eliminate this discretion.

In response to this precedent - from the Second Circuit and beyond—the Objector points to several circuit opinions he claims have adopted his position. Obj. Mem. at 8-10. None of these cases addresses the question before this Court or is directly contradictory to the Court's conclusion.

First, in *Pierce v. Visteon Corp.*, the Seventh Circuit addressed a scenario distinct from that at issue here: when a court awards fees (after a verdict) pursuant to a fee-shifting statute, and then lead counsel moves for additional fees from a damages award under common fund principles. 791 F.3d 782, 786 (7th Cir. 2015) ("[C]ounsel asks us to put ERISA to one side and hold that he is entitled, in addition to $303,000 from [the defendant awarded pursuant to a fee-shifting provision after a verdict], to a supplemental award from the class."). The court held that such an additional award would "undercut if not countermand Dague and similar decisions." *Id.* at 787. It is true that, notwithstanding the factual context of its holding, some of the language in *Pierce* appears to support the Objector's position. *See id.* ("Three principle reasons justify limiting the common-fund approach to cases outside the scope of a fee-shifting statute."). Nevertheless, the Seventh Circuit's holding was limited to the facts of the case, *see id.* ("A common-fund award ... often builds in a multiplier in the cases where counsel prevails. Adding a common-fund award to a statutory 'reasonable' fee would undercut if not countermand *Dague* and similar decisions."), and the court at no point addressed or purported to overturn *Florin*. Although it is possible for one panel in the Seventh Circuit to overturn a prior panel, it is hard to imagine that the *Pierce* panel intended to do so sub silentio and without analysis. *See United States v. Reyes-Hernandez,* 624 F.3d 405, 412 (7th Cir. 2010) (citing the "long-standing principle [in the Seventh Circuit] that [a panel] may not overturn circuit precedent without compelling reasons").

In *Brytus*, the Third Circuit addressed the same hybrid scenario (where a court awards a fee pursuant to a fee-shifting statute, and counsel then moves for an additional award from a common fund), and held that a district court did not abuse its discretion in declining, in such a situation, to award additional fees. *See* 203 F.3d at 247. The court explicitly distinguished the hybrid scenario from the scenario in this case. *See id.* at 246 ("This, of course, is not a case that was concluded by settlement. This case was tried to judgment, and a fee awarded on that basis."). Further, the *Brytus* court made clear that it was deciding no more than that the district court acted within its discretion in declining to provide the requested enhancement even in the hybrid scenario - not whether or not such fees could ever be available. *See id.* at 243 ("[T]he fact that a common fund has been created does not mean that the common fund doctrine must be applied in awarding attorney's fees, a suggestion that is implicit in counsel's argument." (emphasis added)). It did not conclude that such an enhancement was not available should a court choose to award it.

Of particular note, in *Brytus*, the Third Circuit addressed the Objector's normative argument in this case - that distinctions in how fees are awarded in the common fund and statutory contexts could create perverse incentives for counsel - and rejected it. Lead counsel argued in *Brytus* that, if the court declined to award additional common fund fees in addition to the statutory award, the fact that such fees would have been available had the case settled through creation of a common fund would create problematic incentives. *See id.* at 246 ("Of the many additional arguments counsel raise, the one that we believe requires some discussion is their contention that the

District Court penalized them for proceeding to judgment, which resulted in the award of a statutory fee, whereas they would have been entitled to a fee under the common fund doctrine had they accepted a settlement. Counsel argue that, as a result, lawyers' self-interest might lead them to accept an otherwise inadequate settlement rather than rely on the vagaries of a court-awarded counsel fee."). The Third Circuit acknowledged this possibility, but stressed, inter alia, that "the distinction between the statutory fee and the fee from a common fund is more than the amount of the fee; it is the party who pays the fee," and made clear that "by far the largest number of ERISA cases to apply the common fund analysis are those that were settled, which, as we have noted, present a different circumstance." *Id.* at 247; *see also id.* at 248 (Stapleton, J., dissenting) (suggesting his "colleagues are content to have one set of principles apply to settlements and another to judgments").[5] The Third Circuit thus not only did not adopt the Objector's position in, but in fact rejected it.

Finally, in *Haggart v. Woodley*, the Federal Circuit similarly held that an additional enhancement from a common fund is not generally available after a party receives funds pursuant to a fee-shifting provision. 809 F.3d 1336, 1341-42 (Fed. Cir.), *cert. denied,* 136 S. Ct. 2509 (2016) (addressing a scenario where the parties reached a settlement awarding a statutory

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[5] The one judge who dissented from the majority's position did not endorse any variation of the Objector's position in this case. Instead, he argued that courts *should* generally permit an additional award from a common fund created after judgment in addition to a statutory fee, a holding he suggested would have the effect of eliminating the incentive issues the Objector invokes. *See id.* at 247-248.

attorney's fee, and then class counsel moved for an additional award from the settlement fund under the common-fund doctrine). Although some of the language in *Haggart* supports the Objector's position, the Government in that case argued, and the Court held, that "[t]here is no basis in equity for awarding common-fund fees *as well as* [statutory] fees." *Id.* at 1355 (emphasis added).

Whether or not *Haggart*, *Pierce*, and *Brytus* were correctly decided (and the Court notes that the Second Circuit has not yet weighed in on the hybrid scenarios at issue in these cases), it is evident their holdings do not apply to the present case.

In sum, the Second Circuit has suggested—although not explicitly held—that statutory fee-shifting principles do not govern the award of a fee from a common fund created after settlement even when a statute contains a fee-shifting provision, and both circuits to address the question directly have persuasively determined that the limitations in *Dague* and *Perdue* do not apply to such a context. The Court agrees, and holds that the presumption against a lodestar enhancement in statutory fee-shifting cases does not limit a court's discretion to award such an enhancement in calculating a reasonable attorney's fee from a common fund, even where the claims settled are otherwise subject to fee-shifting provisions.

B. In Any Event, the Claims Asserted in this Case Do Not Contain Fee-Shifting Statutes Analogous to Those in *Dague* and *Perdue*

Even were the Court to hold that the presumption against a lodestar enhancement at issue in *Dague* governs the award of attorney's fees from a common fund created after a settlement- a proposition the

Court rejects—the Court would still disagree that such a presumption applies in this case. That is because no claim settled in this case contains a fee-shifting provision analogous to that at issue in *Dague* and *Perdue*.

As noted, the Objector's position relies on two premises: that *Dague* and *Perdue* apply to equitable awards, and that the claims in this case are subject to fee-shifting provisions that would trigger the presumption against a lodestar enhancement. As justification for the second premise, the Objector cites three fee-shifting provisions that he argues govern the claims in this case. Obj. Mem. at 3-6. First, the Objector points to provisions under the Securities Act that allow the court to award attorney's fees to either party when the court "believes the suit or the defense to have been without merit." 15 U.S.C. §77k(e). Second, the Objector points to provisions under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 109 Stat. 737, that, for purposes of the Exchange Act claims, allow the court to award attorney's fees as a sanction for violations of Federal Rule of Civil Procedure 11, 15 U.S.C. §78u-4(c). Finally, the Objector argues that, although no additional fee-shifting provision is explicitly provided for under the judicially- implied remedy to enforce § 1O(b)of the Exchange Act, Supreme Court precedent requires the conclusion that the fee-shifting provisions in Sections 9 and 18 of that Act also govern claims brought to enforce Section 10(b). See Obj. Mem. at 4-6 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991) and *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993)).

The Court addresses these arguments as follows: first, the Court holds that the broader fee-shifting provision governing Sections 9 and 18 of the Exchange Act is not incorporated by analogy into the implied right-of-action under Section 10(b). As to the remaining fee-shifting provisions provided for by statute, the Court finds that material distinctions between these narrower provisions and the broader fee-shifting provisions at issue in *Dague* and its progeny require the conclusion that, even if *Dague* were to operate to limit a court's discretion in awarding fees pursuant to a common fund, such limitation would not apply here.

1. Binding Second Circuit Authority Requires the Conclusion that the Fee-shifting Provisions in Sections 9 and 18 of the Exchange Act Are Not Incorporated by Analogy into an Action Based on Section 10(b)

First, the Court addresses the Objector's argument that Section 10(b) includes, by analogy, the fee-shifting provisions explicitly provided for under Sections 9 and 18 of the Exchange Act (such that the claims in this case are governed by fee-shifting provisions analogous to those in *Dague*). As the Objector notes, the Supreme Court has, in the past, looked to the express causes of action under Sections 9 and 18 of the Exchange Act to define the contours of the implied cause-of-action under §10(b). *See Lampf*, 501 U.S. at 360-61 (looking to Sections 9 and 18 to determine, by analogy, the statute of limitations for the implied cause-of-action under §10(b)); *Musick*, 508 U.S. at 294-97 (engaging in the same inquiry to find that the implied cause-of-action under §10(b) includes a right of contribution). Relying on these cases, the Objector argues that, because Sections 9 and 18 include a broad fee-shifting provision, see 15 U.S.C. § 78i(f) ("In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."), it follows that Congress, had it had occasion to consider the question, would have intended for the implied cause-of-action to enforce §10(b) to similarly include such a provision, *see* Obj. Mem. at 6; *see also Key Tronic Corp.*, 511 U.S. at 815 ("The absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees.").

The Objector's argument is not without force. Nevertheless, even were this Court inclined to adopt the argument were it to assess it on a blank slate, binding Second Circuit authority precludes such a holding.

First, in *Van Alen v. Dominick & Dominick, Inc.,* the Second Circuit rejected the precise argument the Objector now makes - although without the benefit of *Lampf* or *Musick*. 560 F.2d 547 (2d Cir. 1977). In *Van Alen*, the appellees also argued that, although "no statutory provision permit[s] the award of attorneys' fees to a successful party in an action based on Section 10(b) of the Securities Exchange Act of 1934, pursuant to which Rule 10b-5 was promulgated, ... such fees should be allowed by analogy to the express allowance of attorneys' fees in connection with the two statutorily authorized private rights of action under Sections 9(e) and 18(a) of the 1934 Act." *Id.* at 553. The Second Circuit rejected this argument. *Id.* The court noted that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* (quoting *Alyeska Pipeline Service Co.*, 421 U.S. at 262). In the panel's estimation, "Congress ha[d] been on notice that the courts would imply a private right of action under Rule 10b-5 at least since the early 1950s ... [but] ha[d] not expressly authorized fee awards in such cases during the intervening years." *Id.* at 553-54 (internal citations omitted). Such history was "at least as consistent with the thesis that Congress did not intend to allow such awards as . . . with the thesis put forward by appellees." *Id.* at 554. The Circuit thus held that "in the absence of a clear expression of congressional intent, the district court properly denied appellees' motion for attorneys' fees." *Id.*

Van Alen predated *Lampf* and *Musick*. Nevertheless, in 1993, after both Supreme Court cases had been decided, the Second Circuit again affirmed that attorney's fees are not available in 10(b) actions. In *Cotton v. Slone*, the Second Circuit stated, although without analysis, that "although attorney's fees are not permitted in actions brought solely under section 10(b) of the Securities and Exchange Act, attorney's fees may be awarded on a pendent state law claim if the claim permits such an award and if the claimant has established the elements necessary for recovery on the pendent state law claim." 4 F.3d at 181; *see also Mazuma Holding Corp. v. Bethke*, 1 F. Supp. 3d 6, 19 (E.D.N.Y. 2014) (citing to *Cotton* for the same proposition). The *Cotton* panel did not cite *Van Alen*. *See Cotton*, 4 F.3d at 181. The holding in Cotton did reaffirm the Second Circuit's position that attorney's fees are not generally available in an action under Section 10(b).

The Objector does not deny this precedent. He instead argues that any decision by the Second Circuit holding that attorney's fees are not available in 10b-5 actions has been abrogated in the years since—both by provisions in the PSLRA, and by the holdings in both *Lampf* and *Musick*. The Court disagrees as to both counts.

a. The PSLRA Does Not Abrogate *Van Alen* and *Cotton*

First, the Objector argues that the PSLRA contains a provision which "independently authorizes district courts to require bonds and to shift fees in any Exchange Act case that is certified as a class action," and thereby abrogates the holdings in *Van Alen* and *Cotton*. *See* Obj. Sur-reply at 2 (Dkt. No. 121) (citing 15 U.S.C. § 78u-4(a)(8)). Not so.

§78u-4(a)(8) of the PSLRA states as follows:

> **(8) Security for payment of costs in class actions**
>
> In any private action arising under this chapter that is certified as a class action pursuant to the Federal Rules of Civil Procedure, the court may require an undertaking from the attorneys for the plaintiff class, the plaintiff class, or both, or from the attorneys for the defendant, the defendant, or both, in such proportions and at such times as the court determines are just and equitable, for the payment of fees and expenses that *may be awarded under this subsection.*

15 U.S.C. § 78u-4 (emphasis added).

As Lead Counsel argued at the class action fairness hearing, the text of this provision merely authorizes securities for the payment of fees that may be awarded under the "subsection" in which it appears. *See* June 13, 2016 Tr. at 19-20. Under that subsection, the PSLRA lays out a presumption in favor of the award of attorneys' fees and costs for violation of Federal Rule of Civil Procedure 11. 15 U.S.C. §78u-4(c)(3). Thus, the most reasonable meaning of the text is that a security may be set aside to ensure such a fee is available—so as to provide teeth to any such sanctions.

Even were the Court to ignore the limitation "under this subsection" included in the text and assume that the provision allows for a security to be set aside to pay *any* available fees, the text would still not support the conclusion that attorney's fees are available under a 10b-5 suit. That is because, by its clear terms, the provision does not create any new substantive rights to attorney's fees; it simply provides a mechanism for a court to require a security to pay whatever attorney's fees may otherwise be available. Whether or not such fees are available, then, is in no way answered or addressed by the provision.

b. *Lampf* and *Musick* Do Not Abrogate *Van Alen* and *Cotton*

Second, the Objector argues that the reasoning in *Lampf* and *Musick* implicitly abrogates the holding in *Van Alen*, such that that case's holding no longer binds this court. "[A]s a general rule," prior decisions by the Second Circuit bind subsequent panels of the circuit - as well as district courts. *Union of Needle trades, Indus. & Textile Employees, AFL-CIO, CLC v. US. INS.*, 336 F.3d 200, 210 (2d Cir. 2003). However, there exists an exception to this rule when the prior decision's "rationale is overruled, implicitly or expressly, by the Supreme Court, or the Second Circuit court in banc." *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014) (citing *World Wrestling Entm't Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006)) (internal quotation marks and alteration omitted). Such is not the case here.

First, although *Van Alen* was decided prior to *Lampf* and *Musick*, *Cotton* was decided after both of them. Compare *Cotton*, 4 F.3d at 176 (noting that the case was argued on June 4, 1993, and decided on September 10, 1993); with *Musick*, 508 U.S. at 286 (noting that the case was decided on June 1, 1993). Cotton did not address either *Lampf* or *Musick*, or revisit the analysis of *Van Alen*; nevertheless, neither of these Supreme Court cases is an intervening authority for purposes of the *Cotton* holding, an argument the Objector makes no attempt to confront. *See* Objector Sur-reply at 1.

In any event, even assuming *Lampf* and *Musick* did operate as intervening authority in this case, "it is insufficiently clear to this Court" that either case—neither of which addressed statutory fee-shifting provisions—may be read to "implicitly overrule" *Van Alen*. *World Wrestling Entm't, Inc.*, 425 F. Supp. 2d at 500. An analysis of the reasoning and holdings of these cases makes this conclusion evident.

In *Lampf*, the Supreme Court, faced with the question of how to determine the applicable statute of limitations for the implied cause-of-action under section 10(b), held that, "where ... the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." 501 U.S. at 359. The Court acknowledged the "state-borrowing doctrine," or the "usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action," a court should look to the "local time limitation most analogous to the case at hand." *Id.* at

355-56. Nevertheless, faced with "the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed," the Court determined that analogous provisions in the Exchange Act, namely Sections 9 and 18, provided a better source. *Id.* at 359-60. Significantly, the Supreme Court recognized that, notwithstanding ambiguity as to Congressional intent, "a [statute of limitations] period [had to be] selected," and noted that, although "[o]n rare occasions, th[e] Court ha[d] found it to be Congress' intent that no time limitation be imposed upon a federal cause of action," neither party took that position before the Court. *Id.* at 356 & n.3. Additionally, in holding that the statutes of limitation in Sections 9 and 18 should be incorporated into Section 10(b), the Court joined "every Court of Appeals" that had yet assessed the question. *Id.* at 362.

In *Musick*, the Court faced the question of "whether a right to contribution is within the contours of the l0b-5 action." 508 U.S. at 294. In engaging with the question, the Court acknowledged that, in the past, it had inquired whether particular statutes "expressly or by clear implication envisioned a contribution right to accompany the substantive damages right created, or, failing that, whether Congress intended courts to have the power to alter or supplement the remedies enacted." *Id.* at 291 (internal quotation marks and citation omitted). The Court noted that such investigation of Congressional intent, however, was of limited use in explicating a judicially-created right of action. *See id.* Thus, the Court turned to analogous provisions in the Exchange Act—Sections 9 and 18—and again determined that, because a right of contribution was included in both express causes of action, Congress would have intended such a right to exist in the context of 10(b). *See id.* at 295-96. Finally, the Court noted, as it had in *Lampf*, that its conclusion was "consistent with the rule adopted by the vast majority of Courts of Appeals and District Courts that have considered the question," a point "of particular importance because in the more than 20 years since a right to contribution was first recognized for 10b-5 defendants, neither the Securities and Exchange Commission nor the federal courts [had] suggested that the contribution right detracts from the effectiveness of the 10b-5 implied action or interferes with the effective operation of the securities laws." *Id.* at 297-98 (internal citations omitted).

There is no question that *Musick*, and to some extent *Lampf*, lend support to the Objector's position: that the analogy rejected in *Van Alen* has been rehabilitated by the Supreme Court. Nevertheless, and putting aside that *Cotton* post-dates these decisions—the cases do not clearly overturn binding Second Circuit precedent for several reasons. First, neither decision addressed the availability of attorney's fees, and thus neither had occasion to confront case-law suggesting, in the fee-shifting context, that Courts presume no such fees to be available absent clear Congressional intent. *See Key Tronic Corp.*, 511 U.S. at 814-15; *see also Van Alen*, 560 F.2d at 553 (relying on such case-law). In *Musick*, the Court did note that a search for clear intent by Congress to create a right of contribution would be futile in the context of a judicially created cause of action. 508 U.S. at 291; *see also id.* at 291-92 ("Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed."). Nevertheless, the presumption in favor of the American Rule is a significant one on which *Van Alen* relied, and nothing in *Musick* or *Lampf* directly confronts it.

Second, in both cases the Supreme Court pointed out that numerous courts had already interpreted the private right of action under §10(b) to borrow its statute of limitations and right of contribution from Sections 9 and 18. *See Lampf*, 501 U.S. at 362; *Musick*, 508 U.S. at 297-98. In contrast, the Objector has pointed to no case that has held attorney's fees to be routinely available under the 10b-5 private right of action. The distinction is relevant under the reasoning in *Musick*: in that case, the Court, as noted, found the existence of extensive supporting precedent relevant because "in the more than 20 years since a right to contribution was first recognized for 10b-5 defendants, neither the Securities and Exchange Commission nor the federal courts [had] suggested that the contribution right detracts from the effectiveness of the 10b-5 implied action or interferes with the effective operation of the securities laws." *Id.* at 298 (internal citation omitted). The inverse argument would apply here: despite courts not generally reading a fee-shifting provision into such actions, there is no indication that that absence has affected the viability or effectiveness of such suits.

In short, neither *Lampf* nor *Musick* directly addressed the issue here, and their reasoning is—if plainly not irrelevant—at least distinguishable. In such a circumstance, the Court cannot ignore binding Second Circuit authority, some of which post-dates these decisions. The Court thus concludes that the only fee-shifting provisions available in this case are the ones expressly provided for by statute, allowing for fees only when a court "believes the suit or the defense to have been without merit," 15 U.S.C. §77k(e), or when the Court sanctions a party under Federal Rule of Civil Procedure 11, 15 U.S.C. §78u-4(c).

2. The Express Fee-Shifting Provisions Available in this Case Are Materially Distinct from those in Dague and its Progeny

As to those express fee-shifting provisions, the Court finds that material distinctions between such narrow provisions and the broad fee-shifting provisions in *Dague* and its progeny require the conclusion that, even if *Dague* could be read to apply in the common fund context, its presumption would not apply here.

In *Dague* and *Perdue*, as in *Pierce*, *Brytus*, and *Haggart*, courts assessed the award of fees pursuant to traditional fee-shifting statutes under which a prevailing plaintiff is generally entitled to a reasonable fee. *See, e.g., Dague*, 505 U.S. at 561-62 (noting that the statute at issue provided for a fee to a "prevailing or substantially prevailing party" and was thus "similar to ... many other federal fee-shifting statutes").

In contrast to these statutory fee-shifting provisions, the express fee-shifting provisions in this case are much narrower, allowing for fees only when a court "believes the suit or the defense to have been without merit," 15 U.S.C. §77k(e), or when the Court sanctions a party under Federal Rule of Civil Procedure 11, 15 U.S.C. §78u-4(c). Such provisions are materially distinct from those in *Dague* in two ways fatal to the Objector's argument. First, the fee provisions in the statutes in this case have distinct purposes from those in traditional fee-shifting statutes. *Cf. Suffolk*, 907 F.2d at 1327 (acknowledging that if "the operation of the equitable fund doctrine conflicts with an *intended purpose* of a relevant fee-shifting statute, the statute must control" (emphasis added)). Whereas the fee provisions at issue in Dague and its progeny arguably evince a Congressional intent to have defendants pay plaintiffs' counsel's fees,[6] the narrower provisions at issue here are designed to deter both parties from abusing the judicial process. *See, e.g.*, *W. Fed. Corp. v. Erickson*, 739 F.2d 1439, 1444 (9th Cir. 1984) (noting that fees under §77k(e) are available only when a defense "borders on the frivolous or is brought in bad faith"). Such a distinction is significant, given that courts that have extended the *Dague* presumption to the hybrid fee context (where a reasonable fee has already been paid pursuant to statute) have cited the Congressional purpose in having defendants pay counsel's fee as one argument in favor of expanding the scope of the *Dague* holding. *See Haggart*, 809 F.3d

[6] The Court notes that, as *Florin* and *Staton* explained, application of the common fund doctrine is not plainly inconsistent with this purpose, and further, as the Suffolk court itself observed, application of that doctrine is consistent with the core purpose of fee-shifting statutes - to encourage the prosecution of certain classes of cases notwithstanding the plaintiff's inability to pay. *See Suffolk*, 907 F.2d at 1327; *Staton*, 327 F.3d at 968; *Florin*, 34 F.3d at 564. Nevertheless, the point the Court makes here is: even assuming, *arguendo*, that application of the common fund doctrine could conflict with the purpose of some fee-shifting statutes to have defendants bear the costs of litigation (a point that is more persuasive, in any case, when defendants have *already* paid a fee pursuant to a fee-shifting statute as in hybrid cases such as *Pierce*), such argument would be inapplicable in the present case.

at 1357 ("Under the URA, it is the Government, as opposed to class counsel or another member of the plaintiff class, who bears the reasonable cost of the action.").

Second, and relatedly, the Objector's normative arguments, although not without force in the context of the fee-shifting statute at issue in *Dague*, have no purchase in the context of the limited fee provisions at issue here. The Objector's primary argument in this case is that "[t]o award Lead Counsel a larger fee than they could recover after proving defendants liable produces perverse incentives and places their interests in conflict with interests of the class they are supposed to represent." Obj. Mem. at 2; *see also id.* at 7-8 ("The fact that all claims in this case are subject to a fee-shifting regime should preclude Lead Counsel from seeking attorneys' fees under a percentage of fund methodology that produces a significantly higher fee award than they could obtain by proving the claims and seeking an award of fees from defendants found liable by a trier of fact."). Such an argument makes little sense when applied to fee-shifting provisions that allow for fees from either party to be paid only in the rarest of circumstances. In such a case, the availability of such fees is unlikely to affect counsel's incentives. Indeed, the Objector makes no attempt to argue that, in this case, counsel would have been reasonable in assuming there was any possibility that fees could be recovered under any of these provisions, and the Court sees no basis to make such a conclusion.[7]

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[7] Lead Counsel represents, in a declaration in support of approval of the settlement, that the Defendants "raised numerous compelling arguments in their motions to dismiss and would have repeated these arguments at summary

In sum, there is simply no statutory or equitable argument why the existence of the fee-shifting provisions at issue in this case could or should in any way affect the award of fees from the common fund.[8] Even if the fee-shifting statutes in *Dague* and its progeny could be read to implicitly impose such a restriction, that restriction would not extend beyond the fee-shifting provisions at issue in those cases. *Cf. Staton*, 327 F.3d at 968 ("[U]nless Congress has forbidden the application of the common fund doctrine in cases in which attorneys could potentially recover fees *under the type of fee-shifting statutes at issue here*, the courts retain their equitable power to award common fund attorneys' fees." (emphasis added)).

IV. The Fee Request

Having found that the Court has the discretion to approve the requested fee award, the Court must now determine whether or not, in its discretion, the award

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judgment and trial," Ross Decl. ¶51, and indeed the Court acknowledged that some of these arguments might present impediments to a Plaintiffs' judgment in resolving the Defendants' motion to dismiss, see Mar. 31, 2015 Order at 24 (noting, *inter alia*, that the timing of the Government's communication with BioScrip "may cast doubt on whether the statements or omissions [addressing BioScrip's legal compliance] were truly misleading"). The Court agrees with Lead Counsel's representation, and sees no basis to assume that in this case Lead Counsel could reasonably have anticipated recovering attorney's fees under the narrow provisions available in the Securities and Exchange Acts claims.

[8] The Court observes that the Objector did not argue, more generally, that the *Dague* and *Perdue* presumptions govern any award of fees from a common fund, regardless of whether a fee-shifting provision otherwise exists.

is reasonable. For the following reasons, the Court concludes that the request is reasonable, and approves it in full.

In awarding fees from a common fund created after a settlement, "both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees" *Goldberger*, 209 F.3d at 50; *see also McDaniel*, 595 F.3d at 417. Although both methods are available, however, "'the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases,' particularly in complex securities class actions." *Athale v. Sinotech Energy Ltd.*, 11 Civ. 05831 (AJN), 2013 WL 11310686, at *7 (S.D.N. Y. Sept. 4, 2013) (quoting *In re Beacon Assocs. Litig.*, No. 09 Civ. 777(CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013)); *see also Wal-Mart Stores, Inc.*, 396 F.3d at 121 ("The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." (internal quotation marks and citation omitted)). Regardless of which method the court selects, a district court has considerable discretion to award a fee reflecting a lodestar enhancement designed to compensate attorneys for, inter alia, "the risk of the litigation and the performance of the attorneys." *Goldberger*, 209 F.3d at 47.

Even when applying the percentage method to calculate a reasonable attorney's fee, the lodestar is not "irrelevant." *In re Citigroup Inc.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013). The Second Circuit has endorsed the use of the lodestar as a "'cross-check' on the reasonableness of the requested percentage."

Goldberger, 209 F.3d at 50 (quoting *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 820 (3d Cir. 1995)). A district court relying on the cross-check approach need not "exhaustively scrutinize[]" "the hours documented by counsel." *Id.* Nonetheless, the approach can help affirm that the requested percentage is not, given the circumstances, excessive.

Finally, "[n]o matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(l) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, No. 10 Civ. 7332 (AJN), 2013 WL 2395615, at *1 (May 31, 2013) (citing *Goldberger*, 209 F.3d at 50). Ultimately, the "[d]etermination of 'reasonableness' is within the discretion of the district court." *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527(DLC), 2004 WL 2397190, at* 10 (S.D.N.Y. Oct. 26, 2004) (quoting *Goldberger*, 209 F.3d at 47).

The Court agrees that the percentage-of-the-fund method is appropriate in this case as a starting point to calculate a reasonable attorney's fee. *See Sinotech Energy Ltd.*, 2013 WL 11310686, at *7-8. Applying that methodology, and for the following reasons, the Court approves the award.

a. 25% Is a Reasonable Percentage of the Common Fund in Light of Comparable Awards

First, Lead Counsel's request in this case, 25 percent of a $10,900,000 common fund, "falls within the range of percentages regularly awarded in" analogous common fund cases. *See Sinotech Energy Ltd.*, 2013 WL 11310686, at *8 (noting that 25% of the common fund is reasonable in a securities class action, but reducing this percentage on the basis that, applying the lodestar cross-check, the award would amount to a lodestar multiplier of 7.04); *see also, e.g., Hayes*, 2011 WL 6019219, at *1 (approving a fee in the amount of one third of a $9 settlement fund); *Hicks v. Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (holding that 30% of a $10,000,000 fund was reasonable, on the basis that a "30% fee is consistent with fees awarded in comparable class action settlements in the Second Circuit"); *see also id.* ("As the size of the settlement fund increases, the percentage of the fund awarded as fees often decreases so as to prevent a windfall to plaintiffs' attorneys. A settlement amount of $10 million does not raise the windfall issue in the same way as would a $100 million settlement, and a 30% fee does not produce such a windfall." (internal citation omitted)); *id.* (collecting cases for the proposition that courts routinely award a percentage amounting to approximately 1/3 of a 10 million dollar settlement); Pl. Mem. at 6-7 (collecting numerous additional examples). Indeed, the Second Circuit regularly affirms similarly sized awards. *See, e.g., Hayes*, 509 F. App'x at 23-24; *see also id.* (noting that "*Goldberger* [recognizes] that '[w]hat constitutes a reasonable fee is properly committed to the sound discretion of the district court,'" and further noting that "the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class" (quoting *Goldberger*, 209 F.3d at 47)).

b. The Lodestar Cross-Check Supports the Requested Award

Applying the lodestar cross-check underscores and affirms the reasonableness of the requested percentage. There is no question that Lead Counsel's lodestar multiplier of 1.39 is at the lower range of comparable awards in common fund cases. *See Sinotech Energy Ltd.*, 2013 WL 11310686, at *8 (collecting examples of courts awarding lodestar multipliers of "between four and five"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[L]odestar multiples of over 4 are routinely awarded."); *Maley v. Del Global Techs. Corp.* 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (noting that multiplier of 4.65 was "well within the range awarded by courts in this Circuit and courts throughout the country"); *see also Wal-Mart Stores, Inc.*, 396 F.3d at 123 (noting that, although in a megafund case, the lodestar multiplier of 3.5 "ha[d] been deemed reasonable under analogous circumstances"); Pl. Mem. at 9-10 & n.8 (collecting numerous cases). This multiplier is especially reasonable given the fact that the lodestar does not reflect any work Lead Counsel has done since December 18, 2015 or will do subsequent to the date of the publication of this order. Ross Decl. ¶90; *cf. In re Facebook, Inc. IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015), *aff'd sub nom. In re Facebook, Inc.*, 674 F. App'x 37 (2d Cir. 2016) (summary order) (finding, in awarding a fee of 33% of a $26.5 million settlement fund, amounting to a lodestar multiplier of 1.02, that the fact that "the work in [the] matter [was] not yet concluded for [p]laintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist Class Members in submitting their Proof of

Claims" supported the reasonableness of the award). Indeed, although the Objector argues that a presumption against any multiplier applies in this case, counsel for the Objector acknowledged at the Fairness Hearing that, in the context of a common fund award, a multiplier of 1.39 or 1.4 is "not a huge multiplier as multipliers go." June 13, 2016 Tr. at 31.

c. The *Goldberger* Factors Further Support the Requested Award

Applying the Goldberger factors further affirms the reasonableness of counsel's requested fee award. See 209 F.3d at 50 (listing the factors as "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations" (internal quotation marks and alteration omitted)). The Court observes, as an initial matter, that the facts cited as follows are merely examples to support the Court's ultimate factual conclusions as to these factors: the Court relies on the record as a whole to support its findings, and has not cited every relevant fact here.

1. The Time and Labor Expended by Counsel

First, there is no question that Lead Counsel expended significant time and labor in this case. As Lead Counsel points out, the relatively low lodestar multiplier underscores the fact that counsel expended almost 4,000 hours of time over a course of two years without receiving any compensation or guarantee of compensation. *See* Pl. Mem. at 2. That work included conducting an extensive investigation of the allegedly fraudulent misrepresentations and omissions in order to draft the consolidated class action complaint (an investigation that included reviewing numerous documents, conducting 72 interviews, and consulting with experts); drafting numerous legal memoranda, including responses to two motions to dismiss by two sets of Defendants and a motion for reconsideration; engaging in extensive discovery after the Court denied in part those motions including the review of approximately 800,000 pages of documents; and negotiating a settlement over several months with Defendants. *See generally* Ross Decl. This was not a case where, after the filing of the Consolidated Class Action complaint, the parties immediately turned to settlement discussions. *See Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (summary order) (quoting the district court as noting that the case before it was not "the average class action where there is a complaint served, a few things occur, and then there is a settlement"). It was a hard-fought, complicated case, requiring extensive work on the part of Lead Counsel.

2. The Magnitude and Complexities of the Litigation

Second, and for similar reasons, the Court finds that this case was an unusually complex securities class action. Courts in this circuit have noted, in the past, that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Flag Telecom Holdings, Ltd.* Sec. Litig., No. 02-CV-3400 (CM), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (internal quotation marks omitted). That is so, but in this case several complex legal and factual questions, many of which came to the forefront in Defendants' motions to dismiss, *see generally* Mar. 31, 2015 Order, rendered the litigation particularly complicated, and those issues continued to divide the parties throughout the settlement discussions, see Ross Decl. ¶46. Further, the case required briefing a shifting legal landscape: the Supreme Court issued its decision in *Omnicare Inc. v. Laborers Dist. Counc. Constr. Ind. Pension Fund*, 135 S. Ct. 1318 (2015), on March 24, 2015, altering the standard governing when an opinion statement may be found misleading in certain Securities actions and requiring supplemental briefing by the parties. *See* Dkt. Nos. 63-66.

3. The Risk of the Litigation

Third, the risk of the litigation undoubtedly supports Lead Counsel's requested fee. Courts consistently assess the risk involved in litigation when assessing the reasonableness of an award. *See, e.g., Sinotech Energy Ltd.*, 2013 WL 11310686, at *5-6. In particular, they address three categories of risk: (1) risks inherent in the litigation itself (i.e. hurdles to successfully establishing liability); (2) risks that the defendant may be unable to pay any ultimate award (i.e. risks of recovery); and (3) contingency fee risks (i.e. the specific risk that Lead Counsel will not be compensated at all for its work). *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (Lynch, J.) ("From the outset ..., this case presented significant litigation, collectability, and contingency risks."); *see also McDaniel*, 595 F.3d at 424-25 (noting that a district court's determination that a case was "an ordinary civil rights case in which liability appear[ed] reasonably certain" was not clearly erroneous); *Sinotech Energy Ltd.*, 2013 WL 11310686, at *9 (noting that the facts that the case presented "a number of risks of litigation and recovery ... and counsel was working on a contingent fee basis" weighed in favor "of a substantial award"). "It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55.

The Court concludes that this case presented significant risks across all three categories: litigation, recovery, and contingency. First, in an attached declaration, Lead Counsel persuasively describes numerous factual and legal issues that presented challenges to any ultimate finding of liability. *See* Ross Decl. ¶¶49-60; *see also* June 13, 2016 Tr. at 6-8; Mar. 31, 2015 Order (granting in part and denying in part the Defendants' motions to dismiss). Without exhaustively detailing these factual and legal challenges, the Court cites, by way of example, the parties' disagreement as to the significance of the Government's civil investigative demand ("CID"), served on BioScrip in October 2012. *See* Mar. 31, 2015 Order at 6. As noted, Plaintiffs asserted in the Complaint that a series of statements made by the Defendants misled the public as to whether BioScrip was under investigation for participating in an alleged kickback scheme with Novartis, and as to BioScrip's internal beliefs as to its own legal compliance. Much of Plaintiffs' theory of the case turned on the allegation that a CID the Government served on BioScrip in October 2012 put BioScrip on notice that it was or might become the target of a Government investigation into the alleged kickback scheme, and that its own conduct had not been in compliance with relevant laws. *See* Mar. 31, 2015 Order at 14-29 (discussing this theory). As Lead Counsel noted at the Fairness Hearing, BioScrip, in turn, consistently maintained that the CID "was a standard subpoena and that that investigative demand did not in any way inform defendants that they were themselves being investigated for any type of kickback scheme." June 13, 2016 Tr. at 6. Instead, Defendants maintained that BioScrip did not believe itself to be a target until it received that information explicitly—only days before BioScrip alerted the public of the existence of the investigation. *See* Memorandum of Law in Support [of] The Bioscrip Defendants' Motion to Dismiss the Consolidated Amended Complaint at 3 (Dkt. No. 42) ("In October 2012, BioScrip received a [CID] - the equivalent of a third-party subpoena .... [and] fully cooperated with the government by producing documents and testimony for nearly a year. It was only in September 2013 that the Department of Justice ... first notified BioScrip that it was contemplating bringing anti-kickback claims against BioScrip itself, in addition to Novartis."). As the Court explained in denying BioScrip's motion to dismiss claims brought under this factual theory, the Stipulation of Settlement signed by BioScrip and the Government on January 8, 2014 stated that it was only on "September 11, 2013 [that] the United states (sic) first notified BioScrip that the United States was contemplating civil claims against BioScrip ...." Mar. 31, 2015 Order at 24 (internal quotation marks omitted). Because the date of this notification was "after the last of BioScrip's statements identified by Plaintiffs as being misleading," the Court, although citing its obligation to take as true all facts asserted in the Complaint on a motion to dismiss, observed that the statement "may cast doubt on whether the statements or omissions were truly misleading in light of the fact that BioScrip had not yet been told that the United States was contemplating civil changes." *Id.* (emphasis omitted). Going further, the Court noted that "[t]he meaning and import of this statement may very well seriously undermine Plaintiffs' plausible allegations about the information conveyed by the CID." *Id.*

Additionally, to persist with the same example, BioScrip's statements as to its own beliefs about its legal compliance, as opinion statements, were initially governed by the standard articulated by the Second Circuit in *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011) (holding that an opinion statement is actionable as securities fraud "to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed"); *see also* Mar. 31, 2015 Order at 18-19. During the pendency of this litigation, the Supreme Court arguably altered the standard for liability on such statements in a way that made it somewhat easier for Plaintiffs to establish liability. *See* Mar. 31, 2015 Order at 20 ("To the extent Fait has been construed to mean that there is liability for legal compliance opinions only in the context of statements subjectively disbelieved when made, but not in instances where a speaker's statement, although sincerely believed, failed to make clear the factual basis for that statement, *Omnicare* may call that interpretation into question."). Yet, at the time the first complaint in this case was filed (as well as at the time the Consolidated Class Action Complaint was filed by Lead Counsel), *Omnicare* was not yet the law—and the risks associated with the *Fait* standard instead governed. *See Goldberger*, 209 F.3d at 55 ("It is well-established that litigation risk must be measured as of when the case is filed."). In sum, then, as to the claims arising out of BioScrip's statements concerning its legal compliance, Lead Counsel faced a key factual hurdle—the challenge of building a case on the CID—as well as a significant (if interrelated) legal one.

The Objector argues that Lead Counsel's arguments as to the factual and legal risks in the case (including, but not limited to, the examples cited above), amount to the argument that "Lead Counsel should be specially rewarded for pleading claims that may not be meritorious." Obj. Mem. at 18. Such a statement misconstrues the nature of the Court's inquiry. It is true that, in measuring the risks associated with litigation, the Court would not enhance a lodestar on the basis that Lead Counsel pursued frivolous claims. But the risk analysis asks something else: whether certain claims and cases, although potentially meritorious, might face factual and legal hurdles that create a material risk that the case may fail. It is surely in the interest of public policy that such claims—which indeed *may* be meritorious, measured at the outset, even if they are not ultimately successful—are brought—and the risk analysis is designed to compensate Lead Counsel for accepting such representation. Indeed, case-law clearly establishes that such risk is a relevant factor in the Court's analysis. *See, e.g., McDaniel*, 595 F.3d at 424 (2d Cir. 2010) (noting that a district court's determination that a case was "an ordinary civil rights case in which liability appear[ed] reasonably certain" was not clearly erroneous); *Goldberger*, 209 F.3d at 53 (finding that a district court did not abuse its discretion in concluding that "from counsel's perspective, this was a 'promising' case, with almost certain prospects of a large recovery from solvent defendants").

The Objector also argues that certain risks in the case pertaining to challenges proving scienter and loss causation should not be factored into the Court's analysis, as neither scienter nor loss causation are elements of the Securities Act claims brought by claimants such as the Trust. Obj. Mem. at 19. The Objector cites no case-law suggesting that the Court should, or must, assess risk on a claim by claim basis in the context of awarding a fee from a fund created after collective settlement of a number of securities claims. In any case, however, many of the material risks in this case, including those associated with the CID, extended to all of the claims: The Court noted in its March 31, 2015 order, in addressing the element of scienter under the Exchange Act claims relating to BioScrip's statements of legal compliance, that the "question of scienter largely turn[ed]" on the same issues relevant to whether the opinion statements were misleading. Mar. 31, 2015 Order at 26. The Court further noted, in analyzing the Securities Act claims, that "[t]he test for whether a statement is materially misleading under §12(a)(2) is identical to that under §10(b) and §11: whether representations, viewed as a whole, would have misled a reasonable investor." *Id.* at 44 (quoting *Rombach v. Chang*, 355 F.3d 164, 178 (2d Cir. 2004)). In other words, the challenges associated with proving the legal compliance statements were misleading apply to both Securities Act and Exchange Act claims—and the Court sees no reason to hold that the former claims were subject to a materially lesser degree of risk.

In addition to litigation risk, this case also presented recovery risk and contingency risk. As to recovery risk, evidence in the case—including from the January 2014 settlement agreement between BioScrip and the Government—raised doubts as to whether BioScrip would be able to withstand a large financial judgment. *See* Ross Decl., Ex. 2, at 2 (noting that, "in connection with its discussions with the United States, BioScrip has submitted records and information regarding its financial circumstances, and has demonstrated to the United States that BioScrip lacks the financial wherewithal to pay certain damages and penalties sought by the United States in connection with its claims against

BioScrip”); *see also* Ross Decl. ¶¶61-65 (describing in detail shortcomings in the Defendants’ ability to pay the full value of a judgment against them). As to contingency risk, Lead Counsel in this case worked for two years without compensation on a contingency fee basis, and in that time billed almost 4,000 hours without a guarantee of recovery. *See* June 13, 2016 Tr. at 14. As courts have noted, this arrangement weighs in favor of a large award here. *In re Glob. Crossing Sec.*, 225 F.R.D. at 467 (“Securities Lead Counsel pursued this case intensely for over two years on an entirely contingent basis. The contingent nature of Securities Lead Counsel’s representation is a key factor in determining a reasonable award of attorneys’ fees.”).

Finally, the Court makes two additional points about the risk in this case. First, the Court concludes that the risks associated with this litigation did not simply emerge when the Defendants filed their motions to dismiss: they were predictable from the outset. Thus, Lead Counsel would reasonably have been aware, in accepting this representation, that it could be involved in protracted motion practice for years prior to receiving any fee. Second, the Court notes that it is aware that the Second Circuit has, in the past, expressed some doubt that securities class actions are, on the whole, risky. *See Goldberger*, 209 F.3d at 52 (relying on a pre-PSLRA article for the proposition that such risk rarely exists (citing Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991)). Regardless of whether or not such litigation is, as a *general* matter, risky, the Court concludes that the risks in *this* case weigh in favor of approving the award.

4. The Quality of the Representation, The Requested Fee in Relation to the Settlement, and Public Policy Considerations

The remaining *Goldberger* factors similarly weigh in favor of approving the award. As to quality of representation, the Court finds that Lead Counsel's work was consistently of a high quality—in its motion practice, in its appearances before the Court, and in attaining a fair and reasonable settlement. This finding is further buttressed by two relevant factors. First, opposing counsel in this case was itself highly skilled, a factor courts have considered in approving fees. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) ("Defendants were represented by a well-staffed team of lawyers from the New York office of Gibson, Dunn & Crutcher, LLP, one of the country's largest law firms, who tenaciously challenged Plaintiffs at every stage of the litigation up until the eve of trial. That Plaintiffs' Counsel was able to obtain a substantial settlement from these Defendants confirms the quality of Plaintiffs' Counsel's representation in this matter, and is a factor in determining the reasonableness of the fee request."); *accord In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) (summary order); *In re Glob. Crossing Sec.*, 225 F.R.D. at 467. Second, Lead Plaintiff, a governmental defined-benefit pension plan that "manages billions of dollars of assets on behalf of its members," Kendig Decl. ¶3 (Ross Decl., Ex. 4), approved the fee request, and Donald Kendig, the Retirement Administrator for Lead Plaintiff, represents that he reviewed "the work performed [by Lead Counsel], the recovery obtained for the Settlement Class, and the risks of the Action" in reaching that determination, *id.* ¶7. The Second Circuit has indicated that this factor may be weighed by a court in determining the reasonableness of the requested fee. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("We expect ... that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement").

As to the size of the requested fee in relation to the settlement, the Court finds that, in relation to the settlement, 25% is a reasonable fee. As already noted, 25%—although perhaps on the higher end of percentages awarded in all common fund cases—is reasonable in a case with around a $10,000,000 settlement. *See Hicks*, 2005 WL 2757792, at *9. The Court is of course aware that the Second Circuit has rejected any contention that 25% of a fund serve as a "benchmark" for a common fund award. *Goldberger*, 209 F.3d at 51. The Court finds, on the facts of this case, 25% to be reasonable.

Finally, the Court finds that public policy favors the award. Courts have, as a generic matter, frequently observed that "the public policy of vigorously enforcing the federal securities laws must be considered" in calculating an award. *Maley*, 186 F. Supp. 2d at 373. Specifically in this case, however, the Court finds that it is important to incentivize counsel to accept representations that, as a result of complex factual and legal issues, are less likely to settle immediately—and may instead present complex challenges and extensive motion practice. Further, the Court observes that there are substantial public policy reasons to endorse the percentage-of-the-fund method in this case—reasons that contradict the

Objector's suggestion that an award above the lodestar need create problematic incentives. *See supra* [pp numbers][*].

In short, comparing the requested fee to comparable awards in other cases, comparing the lodestar multiplier to comparable multipliers in such cases, and evaluating the *Goldberger* factors, the Court concludes that the request is reasonable.

d. The Objector's Remaining Contentions

In addition to those arguments addressed above, the Objector makes two primary contentions as to why the Court, even applying common fund principles, should limit Lead Counsel's fee to the lodestar. Neither argument alters the Court's conclusion.

First, the Objector argues that Lead Counsel should receive only the lodestar because Lead Counsel benefitted from the work of the law firm that filed the first complaint in this case, Pomerantz Grossman Hufford Dahlstrom & Gross LLP. *See* Dkt. No. 1. While the Second Circuit has held, in the past, that a district court did not abuse its discretion in reducing a fee on the basis of advance spadework that assisted counsel in their suit, no such reduction is warranted here for several reasons. *McDaniel*, 595 F.3d at 423. First, the complaint in question was filed on September 30, 2013—seven days after the purported truthful disclosure of the Government's investigation of the kickback scheme—and is a mere 18 pages long. *See* Dkt. No. 1. The complaint leaves out numerous facts later uncovered by Lead Counsel. *See* Pl. Reply at 11 (listing numerous facts and claims

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[*] [*sic*: so in the original]

left out of the complaint that later appeared in the complaint filed by Saxena White, and in the Consolidated Class Action Complaint). Although it is arguable that the complaint assisted both Saxena White, and Lead Counsel in their later efforts, there is simply no argument that this assistance was sufficiently material to affect this Court's evaluation of the reasonableness of the fee award. Additionally, even were the Court to conclude that this initial complaint were materially useful to Lead Counsel, the Court would still award the requested fee: the existence of the complaint in no way alters the fact that Lead Counsel conducted an extensive investigation, crafted the Consolidated Class Action Complaint, engaged in extensive briefing, and negotiated the settlement.

The Objector also argues that the Court should limit the award to the lodestar as Lead Counsel's high hourly rates already incorporate contingency risk. *See* Obj. Mem. at 14-21. The Court finds this argument unpersuasive for three reasons. First, the Objector largely (although not entirely) cites to rules articulated in the fee-shifting context for the proposition that "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." Obj. Mem. at 15 (citing *Perdue*, 559 U.S. at 553; *Dague*, 505 U.S. at 562-63). As noted, *Perdue* and *Dague* apply in the fee-shifting context and hold that factors like the complexity of a case and the quality of a counsel's performance may not be used to an enhance a lodestar. *See Perdue*, 559 U.S. at 553; *Dague*, 505 U.S. at 562-63. In the common fund context, such factors may result in an enhancement.

Second, Lead Counsel's rates do not appear to clearly reflect contingency risk. BLB&G charges a partner rate of between $700 and $975 and an associate rate of between $450 and $550, and Saxena White charges a partner rate of $750 and associate rate of between $345 and $385 dollars. *See* Ross Decl., Ex. 5. Lead Counsel points out that other firms charge rates for contingent and non-contingent matters that equal or exceed these numbers. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at* 17 (S.D.N.Y. Apr. 26, 2016) (granting a fee award amounting to a lodestar multiplier of six, in a case where a successful, international law firm cited partner rates of $834 to $1,125 and associate rates of $411 to $714, *see* Dkt. No. 120, Ex. 2); *see also* Pl. Reply at 13-14 (collecting cases and examples). In any case, even were the Court to conclude that the rates reflected contingency risk—or that the rates were, for other reasons, higher than reasonable—the effect would simply be to render the lodestar multiplier of 1.39 artificially low. Even were the true multiplier higher (say, 2.5), it would still be well within the reasonable range of similar awards, and the Court would still approve the fee request.

In short, the Court finds that the requested attorney's fee award is reasonable, and that the Objector's counter-arguments to that determination are unconvincing.

IV. Conclusion

In conclusion, the Court grants Lead Counsel's requested attorney's fee. The Court also grants Lead Counsel's request for litigation expenses and costs and expenses incurred by the Court-appointed Plaintiff.

SO ORDERED.

Dated: July 26, 2017

New York, New York

/s/________________________

ALISON J. NATHAN

United States District Judge

APPENDIX D

Opinion of the District Court Approving Class-Action Settlement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BioScrip, Inc. Securities Litigation	Civil Action No. 13-cv-6922-AJN

JUDGMENT APPROVING CLASS ACTION SETTLEMENT

WHEREAS, a consolidated class action is pending in this Court entitled *In re BioScrip, Inc. Securities Litigation*, No. l 3-cv-6922 (AJN) (the "Action");

WHEREAS, (a) Lead Plaintiff Fresno County Employees' Retirement Association, on behalf of itself and the Settlement Class (defined below), and (b) defendants BioScrip, Inc. ("BioScrip"), Richard M. Smith, Hai V. Tran, Patricia Bogusz, Myron Z. Holubiak, Charlotte W. Collins, Samuel P. Frieder, David R. Hubers, Richard L. Robbins, Stuart A. Samuels, Gordon H. Woodward, and Kimberlee Seah (the "Individual Defendants"); Jefferies LLC, Morgan Stanley & Co. LLC, SunTrust Robinson Humphrey, Inc., Dougherty & Company, and Noble International Investments, Inc. (the "Underwriter Defendants") and Kohlberg & Co., LLC ("Kohlberg" and, together with BioScrip, the Individual Defendants and the

Underwriter Defendants, the "Defendants," and, together with Lead Plaintiff, the "Parties") have entered into a Stipulation and Agreement of Settlement dated December 18, 2015 (the “Stipulation”), that provides for a complete dismissal with prejudice of the claims asserted against Defendants in the Action on the terms and conditions set forth in the Stipulation, subject to the approval of this Court (the “Settlement”);

WHEREAS, unless otherwise defined in this Judgment, the capitalized terms herein shall have the same meaning as they have in the Stipulation;

WHEREAS, by Order dated February 11, 2016 (the "Preliminary Approval Order"), this Court: (a) preliminarily approved the Settlement; (b) preliminarily certified the Settlement Class solely for purposes of effectuating the Settlement; (c) ordered that notice of the proposed Settlement be provided to potential Settlement Class Members; (d) provided Settlement Class Members with the opportunity either to exclude themselves from the Settlement Class or to object to the proposed Settlement; and (e) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, due and adequate notice has been given to the Settlement Class;

WHEREAS, the Court conducted a hearing on June 13, 2016 (the “Settlement Hearing”) to consider, among other things, (a) whether the terms and conditions of the Settlement are fair, reasonable and adequate to the Settlement Class, and should therefore be approved; and (b) whether a judgment should be entered dismissing the Action with prejudice as. against the Defendants; and

WHEREAS, the Court having reviewed and considered the Stipulation, all papers filed and proceedings held herein in connection with the Settlement, all oral and written comments received regarding the Settlement, and the record in the Action, and good cause appearing therefor;

T IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Jurisdiction** – The Court has jurisdiction over the subject matter of the Action, and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and each of the Settlement Class Members.

2. **Incorporation of Settlement Documents** – This Judgment incorporates and makes a part hereof: (a) the Stipulation filed with the Court on December 18, 2015; and (b) the Notice and the Summary Notice, both of which were filed with the Court on May 9, 2016.

3. **Class Certification for Settlement Purposes** – The Court hereby affirms its determinations in the Preliminary Approval Order and finds, for purposes of the Settlement Only, that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the members of the Settlement Class are so numerous that their joinder in the Action would be impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of Plaintiffs in the Action are typical of the claims of the Settlement Class they seek to represent; (d) Plaintiffs and Lead Counsel have and will fairly and adequately represent and protect the interests of the Settlement Class; (e) the questions of law and fact common to the members of the Settlement Class predominate over

any questions affecting only individual members of the Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the Action.

4. Accordingly, for the purposes of the Settlement only, the Court hereby finally certifies the Action as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Settlement Class consisting of all persons and entities who purchased BioScrip common stock during the period from November 9, 2012 through November 6, 2013, inclusive (the "Settlement Class Period"), and were damaged thereby. Excluded from the Settlement Class are: (i) Defendants; (ii) members of the immediate families of the Individual Defendants; (iii) the subsidiaries of BioScrip, the Underwriter Defendants, and Kohlberg; (iv) any persons who served as partners, control persons, officers, and/or directors of BioScrip, the Underwriter Defendants, or Kohlberg during the Settlement Class Period and/or at any other relevant time; (v) any firm, trust, corporation, or other entity in which any Defendant has or had a controlling interest; (vi) Defendants' liability insurance carriers; and (vii) the legal representatives, heirs, successors, and assigns of any such excluded party. Also excluded from the Settlement Class is the person listed on Exhibit 1 hereto who is excluded from the Settlement Class pursuant to his request for exclusion that is valid and timely in accordance with the Preliminary Approval Order and is hereby accepted by the Court.

5. **Appointment of Class Representatives and Class Counsel** – Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, the Court hereby certifies Plaintiffs as Class Representatives for the Settlement Class

and appoints Lead Counsel as Class Counsel for the Settlement Class. Plaintiffs and Lead Counsel have fairly and adequately represented the Settlement Class both in terms of litigating the Action and for purposes of entering into and implementing the Settlement and have satisfied the requirements of Federal Rules of Civil Procedure 23(a)(4) and 23(g), respectively.

6. **Notice** – The Court finds that the dissemination of the Notice and the publication of the Summary Notice: (a) were implemented in accordance with the Preliminary Approval Order; (b) constituted the best notice practicable under the circumstances; (c) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of (i) the pendency of the Action; (ii) the effect of the proposed Settlement (including the Releases to be provided thereunder); (iii) Lead Counsel's motion for an award an attorneys' fees and reimbursement of Litigation Expenses; (iv) their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses; (v) their right to exclude themselves from the Settlement Class; and (vi) their right to appear at the Settlement Hearing; (d) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (e) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§77z-l (a)(7), 78u-4(a)(7), and all other applicable law and rules. A full opportunity has been offered to the Settlement Class Members to object to the proposed Settlement and to participate in the hearing thereon.

7. **<u>Final Settlement Approval and Dismissal of Claims</u>** – Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the amount of the Settlement; the Releases provided for therein; and the dismissal with prejudice of the claims asserted against Defendants in the Action), and finds that the Settlement is, in all respects, fair, reasonable and adequate to the Settlement Class. The Parties are directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

8. The Action and all of the claims asserted against Defendants in the Action by Lead Plaintiff and the other Settlement Class Members are hereby dismissed with prejudice. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Stipulation.

9. **<u>Binding Effect</u>** – The terms of the Stipulation and of this Judgment shall be forever binding on Defendants, Lead Plaintiff and all other Settlement Class Members (regardless of whether or not any individual Settlement Class Member submits a Claim Form or seeks or obtains a distribution from the Net Settlement Fund), as well as their respective successors and assigns. The person listed on Exhibit 1 hereto is not bound by the terms of the Stipulation or this Judgment because he is excluded from the Settlement Class pursuant to his request for exclusion.

10. **<u>Releases</u>** – The Releases set forth in paragraphs 5 and 6 of the Stipulation, together with the definitions contained in paragraph I of the

Stipulation relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date. Accordingly, this Court orders that:

(a) Without further action by anyone, and subject to paragraph 11 below, upon the Effective Date of the Settlement, Lead Plaintiff and each of the other Settlement Class Members, on behalf of themselves, and their respective current and future heirs, executors, administrators, predecessors, successors, attorneys, insurers, agents and assigns, in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Plaintiffs' Claim against the Released Defendant Persons, and shall forever be barred and enjoined from commencing any action with respect to, instituting any action with respect to, or prosecuting any or all of the Released Plaintiffs' Claims against any of the Released Defendant Persons.

(b) Without further action by anyone, and subject to paragraph 11 below, upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their respective current and future heirs, executors, administrators, predecessors, successors, attorneys, insurers, agents and assigns, in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Defendants' Claim against Lead Plaintiff and the other Released Plaintiff Persons, and shall forever be barred and enjoined from commencing any action with respect to, instituting any action with respect to, or prosecuting any or all of the Released Defendants' Claims against any of the Released Plaintiff Persons. This Release shall not apply to the person listed on Exhibit 1 hereto because he is excluded from the Settlement Class pursuant to his request for exclusion.

11. Notwithstanding paragraphs 1O(a) - (b) above, nothing in this Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this Judgment.

12. **<u>Rule 11 Findings</u>** – The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with [redacted] [any complaint, responsive pleading, or dispositive motion, as specified in the Private Securities Litigation Reform Act, 15 U.S.C § 78u-4(c)(1). *AJN*]

13. **<u>No Admissions</u>** – To the extent permitted by Federal Rule of Evidence 408, neither this Judgment, the Stipulation (whether or not consummated), including the exhibits thereto and the Plan of Allocation contained therein (or any other plan of allocation that may be approved by the Court), the negotiations leading to the execution of the Stipulation, nor any proceedings taken pursuant to or in connection with the Stipulation and/or approval of the Settlement (including any arguments proffered in connection therewith):

(a) shall be offered against any of the Released Defendant Persons as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by any of the Released Defendant Persons with respect to the truth of any fact alleged by Lead Plaintiff or the validity of any claim that was or could have been asserted or the deficiency of any defense that has been or could have been asserted in this Action or in any other litigation, or of any liability, negligence, fault, or other wrongdoing of any kind of any of the Released Defendant Persons or in any way referred to for any other reason as against any of the Released Defendant Persons, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; *provided*, however, that Released Defendant Persons may file the Stipulation and/or this Judgment in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(b) shall be offered against any of the Released Plaintiff Persons, as evidence of, or construed as, or deemed to be evidence of any presumption, concession or admission by any of the Released Plaintiff Persons that any of their claims are without merit, that any of the Released Defendant Persons had meritorious defenses, or that damages recoverable under the Complaint would not have exceeded the Settlement Amount or with respect to any liability, negligence, fault or wrongdoing of any kind, or in any way referred to for any other reason as against any of the Released Plaintiff Persons, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; or

(c) shall be construed against any of the Releasees as an admission, concession, or presumption that the consideration to be given under the Settlement represents the amount which could be or would have been recovered after trial; *provided*, however, that the Parties and the Releasees and their respective counsel may refer to this Judgment and the Stipulation to effectuate the protections from liability granted hereunder and thereunder or otherwise to enforce the terms of the Settlement.

14. **Retention of Jurisdiction** – Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) the disposition of the Settlement Fund; (c) any motion for an award of attorneys' fees and/or Litigation Expenses by Lead Counsel in the Action that will be paid from the Settlement Fund; (d) any motion to approve the Plan of Allocation; (e) any motion to approve the Class Distribution Order; and (f) the Settlement Class Members for all matters relating to the Action.

15. Separate orders shall be entered regarding approval of a plan of allocation and the motion of Lead Counsel for an award of attorneys' fees and reimbursement of Litigation Expenses. Such orders shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement.

16. **Modification of the Agreement of Settlement** – Without further approval from the Court, Lead Plaintiff and Defendants are hereby authorized to jointly agree to and adopt such amendments or modifications of the Stipulation or

any exhibits attached thereto to effectuate the Settlement that: (a) are not materially inconsistent with this Judgment; and (b) do not materially limit the rights of the Settlement Class Members in connection with the Settlement. Without further order of the Court, Lead Plaintiff and Defendants may agree to reasonable extensions of time to carry out any provisions of the Settlement.

17. **Termination of Settlement** – If the Settlement is terminated as provided in the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall be vacated, rendered null and void and be of no further force and effect, except as otherwise provided by the Stipulation, and this Judgment shall be without prejudice to the rights of Lead Plaintiff, the other Settlement Class Members and Defendants, and the Parties shall be deemed to have reverted to their respective positions in the Action as of October 30, 2015, preserving in that event all of their respective claims and defenses in the Action.

18. **Entry of Final Judgment** – There is no just reason to delay the entry of this Judgment as a final judgment in this Action. Accordingly, the Clerk of the Court is expressly directed to immediately enter this "l judgment in this Action.

SO ORDERED this *16th* day of *June*, 2016.

/s/____________________________
The Honorable Alison J. Nathan
United States District Judge

APPENDIX E

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 23(h)

Federal Rule of Civil Procedure 23(h) provides:

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed.R.Civ.P. 23(h).

Securities Act of 1933 §11(e), 15 U.S.C. §77k(e)

Securities Act of 1933 §11(e), 15 U.S.C. §77k(e) provides:

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

15 U.S.C. §77k(e).

Securities Act of 1933 §27(c), 15 U.S.C. §77z-1(c)

Securities Act of 1933 §27(c), 15 U.S.C. §77z-1(c), provides:

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

15 U.S.C. §77z-1(c).

Securities Exchange Act of 1934 §9(f), 15 U.S.C. §78i(f)

Originally designated as §9(e), the provision currently designated Securities Exchange Act 9(f), 15 U.S.C. §78i(f), provides:

> **(f) Persons liable; suits at law or in equity**
>
> Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

15 U.S.C. §78i(f).

Securities Exchange Act of 1934 §10(b),

15 U.S.C. §78j(b)

Securities Exchange Act of 1934 §10(b), 15 U.S.C. §78j(b), provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. §78j(b).

Securities Exchange Act of 1934 §18(a),

15 U.S.C. §78r

Section 18 of the Securities Exchange Act of 1934 provides:

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Contribution

Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

15 U.S.C. §78r.

Securities Exchange Act of 1934 §21D(a)(8),

15 U.S.C. §78u-4(a)(8)

Securities Exchange Act §21D(a)(8), 15 U.S.C. §78u-4(a)(8), provides:

> **(8) Security for payment of costs in class actions**
>
> In any private action arising under this chapter that is certified as a class action pursuant to the Federal Rules of Civil Procedure, the court may require an undertaking from the attorneys for the plaintiff class, the plaintiff class, or both, or from the attorneys for the defendant, the defendant, or both, in such proportions and at such times as the court determines are just and equitable, for the payment of fees and expenses that may be awarded under this subsection.

15 U.S.C. §78u-4(a)(8).

Securities Exchange Act of 1934 §21D(c),

15 U.S.C. §78u-4(c)

Securities Exchange Act §21D(c), 15 U.S.C. §78u-4(c), provides:

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of

Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(c).