2019 WL 6139014
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Jesse CHEN, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
SELECT INCOME REIT, David M. Blackman, Adam D. Portnoy, Donna D. Fraiche, William A. Lamkin and Jeffrey P. Somers, Defendants.

18-CV-10418 (GBD) (KNF)
|
Signed 10/11/2019

Attorneys and Law Firms

Miles Dylan Schreiner, Juan Eneas Monteverde, Monteverde & Associates PC, New York, NY, for Plaintiff.

Patrick George Rideout, Christopher Ryan Fredmonski, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, Joseph Oliver Larkin, Robert Scott Saunders, Pro Hac Vice, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, DE, for Defendants.

MEMORANDUM AND ORDER

KEVIN NATHANIEL FOX, UNITED STATES MAGISTRATE JUDGE

***1** On June 25, 2019, the Court issued a memorandum and order denying the plaintiff's motion for attorneys' fees upon finding that the common benefit doctrine does not apply in the circumstance of this case, in part, because finality had not been achieved in this action. See Docket Entry No. 44. Thereafter, the plaintiff's motion for reconsideration was granted and the June 25, 2019 memorandum and order vacated. See Docket Entry No. 52. The plaintiff's motion for attorneys' fees, Docket Entry No. 23, is analyzed below.

BACKGROUND

On November 9, 2018, the plaintiff commenced this action, "on behalf of himself and the other shareholders of Select Income REIT ('SIR' or the 'Company'), except Defendants," against SIR, David M. Blackman, SIR's managing trustee, president and CEO, Adam D. Portnoy, managing trustee of SIR, GOV ("Government Properties Income Trust") and ILPT ("Industrial Logistics Properties Trust"), Donna D. Fraiche, SIR's trustee, William A. Lamkin, SIR's trustee, and Jeffrey P. Somers, SIR's trustee. The plaintiff alleges "violations of Section 14(a) and 20(a) of the Securities Exchange Act of 1934 (the 'Exchange Act'), 15 U.S.C. §§ 78n(a), 78t(a), SEC [Securities and Exchange Commission] Rule 14a-9, 17 C.F.R. 240.14a-9, and Item 1015 of Reg M-A, 17 C.F.R. 229.1015, in connection with the proposed merger (the 'Proposed Merger') between SIR and [GOV]." The plaintiff asserts that, on September 17, 2018, real estate trusts SIR and GOV issued a joint press release to announce the proposed merger, "which will create a real estate investment trust, or REIT, focused on owning, operating and leasing office buildings primarily leased to single tenants and high credit quality tenants like government entities." According to the plaintiff, "[s]ince the entering into the Merger Agreement, the stock prices of both SIR and GOV have fallen," and the implied value of the considerations for the merger "has also decreased significantly" making the considerations "inadequate compensation for SIR shares." The plaintiff asserts that "[i]t is imperative that shareholders receive the material information ... that Defendants have omitted from the Proxy, which is necessary for shareholders to properly exercise their corporate suffrage rights and cast an informed vote on the Proposed Merger." According to the plaintiff, on October 26, 2018, the defendants filed the Proxy with the SEC in connection with the proposed merger. The plaintiff alleges that the Proxy "misrepresents and/or omits material information" as follows: (1) "the Proxy omits critical financial projections, including the unlevered free cash flow projections for both SIR and GOV (the 'Cash Flow Projections')," referencing page Nos. 115, 121, 125 and 127 of the Proxy; (2) "with respect to the *Discounted Cash Flow Analysis* prepared by UBS [UBS Securities LLC, SIR's financial advisor], the Proxy fails to disclose ... (i) the inputs and assumptions underlying the calculation of the various discount rate ranges (including the WACC/CAPM components)" and "(ii) the actual terminal values calculated"; (3) "the Proxy fails to disclose the amount of compensation UBS received for its prior investment banking and financial services provided to SIR," referencing page No. 124 [1] ; and (4) "the Proxy omits material facts from the *Background of the Merger* section, rendering the summary provided therein misleading." The plaintiff asserts that, absent disclosures of the omitted material information, the plaintiff and other members of the proposed class will be unable to cast a fully-informed vote in favor of the proposed merger and will be irreparably harmed, which is why injunctive relief is warranted. The plaintiff requests an order: (a) certifying a class action and appointing the plaintiff as a class representative and his counsel as class counsel; (b) "[p]reliminarily and/or permanently enjoining Defendants and their counsel, agents, employees, and all persons acting under, in concert with, or for them from proceeding with, communicating, or closing the Proposed Merger, unless and until Defendants disclose the material information identified above which has been omitted from the Proxy"; (c) "[r]escinding, to the extent already implemented, the Merger Agreement or any of the terms thereof, or granting Plaintiff and the Class rescissory damages"; (d) "[d]irecting the Defendants to account to Plaintiff and the Class for all damages suffered as a result of their wrongdoing"; and (e) "[a]warding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and expert fees and expenses." The plaintiff's proposed class pursuant to Rule 23 of the Federal Rules of Civil Procedure is defined as "all holders of SIR common stock who are being and will be harmed by Defendants' actions" excluding "Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants."

***2** On November 21, 2018, the plaintiff made a motion for a preliminary injunction seeking to enjoin "the shareholder vote scheduled for December 20, 2018, at 3:00 p.m., Eastern Time (the 'Shareholder Vote') on the proposed merger" until "Defendants disclose material information they have omitted from the Definitive Proxy Statement filed on November 16, 2018 with the [SEC]." The plaintiff asserted that the November 16, 2018 Proxy omitted "critical financial projections, the financial analyses UBS performed in support of its fairness opinion, and the conflicts of interest faced by UBS." According to the plaintiff, "[a]bsent injunctive relief, SIR's shareholders will be forced to decide whether to vote in favor of the Proposed Merger without reviewing the material information identified" by the plaintiff. On November 28, 2018, the plaintiff made a letter-motion for expedited discovery in connection with the motion for a preliminary injunction. On the same date, an order issued scheduling oral argument for December 13, 2018, in connection with the plaintiff's motion for a preliminary injunction. On December 5, 2018, the defendants opposed the plaintiff's motion for a preliminary injunction. On December 7, 2018, the plaintiff filed a notice withdrawing the plaintiff's motion for a preliminary injunction and request for expedited discovery. On December 10, 2018, an order issued directing the Clerk of Court to close the plaintiff's motion for a preliminary injunction and request for expedited discovery.

Before the Court is the plaintiff's "motion for an award of attorneys' fees and expenses in the amount of $350,000" [2] the plaintiff incurred in this action, including the instant motion. The defendants oppose the motion.

PLAINTIFF'S CONTENTIONS

The plaintiff asserts that, on December 10, 2018, "SIR filed Supplemental Disclosures on a Form 8-K with the SEC," and his efforts provided "a necessary supplement to Commission action." The plaintiff contends that, under the common benefit doctrine, attorneys' fees may be awarded "when there is no judgment on the merits or when the dispute has become moot because the relief sought is otherwise obtained." According to the plaintiff, he "conferred a substantial benefit on SIR shareholders through his prosecution of the action causing Defendants to issue the Supplemental Disclosures," in which the defendants stated that they were issued "solely for the purpose of mooting the allegations in the Lawsuits and avoiding the expense and burden of litigation." The plaintiff asserts that, although other actions have been filed in connection with the proposed merger, the plaintiff was the first to file a complaint and the only one to seek a preliminary injunction, "effectively fighting for the vindication of SIR shareholders' rights" and causing the defendants to issue the supplemental disclosures.

The plaintiff maintains that the supplemental disclosures confer a substantial benefit on SIR shareholders because they provide four categories of material information: (1) "the unlevered free cash flow projections for SIR, GOV, and the pro forma combined company—including synergies—that were previously omitted from the Proxy"; (2) "the key inputs and assumptions omitted from the summaries of UBS's valuation analyses in the Proxy, including *Discounted Cash Flow* Analyses ('DCFs'), their *Selected Public Companies* Analyses and their *Selected Precedent Transactions Analysis*"; (3) "the compensation UBS received for its previous work for SIR, GOV, ILPT, and RMR"; and (4) "material details related to the conflicts of interest surrounding the SIR Board and Special Committee regarding the negotiation process, including the identities of the SIR Special Committee members and the identities of those attending meetings labeled as 'independent trustees' in the *Background of the Merger* section of the Proxy."

The plaintiff asserts that "the fee award is also supported under the Maryland common benefit doctrine because SIR is incorporated in Maryland. According to the plaintiff, "courts in Maryland's Business and Technology Case Management Program look upon decisions of the Delaware Court of Chancery as persuasive authority on corporate law matters," and "[w]hen a plaintiff 'generates benefits for the corporation or its stockholders, Delaware law calls for an award of attorneys' fees and expenses.' " Moreover, under Delaware law, "in the mootness context, 'a fee can be awarded if the disclosure provides some benefit to stockholders, whether or not material to the vote.' "

***3** According to the plaintiff:

> Plaintiff's Counsel expended a total of 207.9 hours of attorney and paralegal time in prosecuting this action, including pre-suit investigation; drafting the complaint; reviewing and analyzing the Preliminary Proxy and the Proxy; drafting and sending a demand letter to Defendants' counsel; drafting and filing a memorandum of law and motion for preliminary injunction; meeting and conferring with Defendants' counsel; drafting and filing a letter motion for expedited discovery to develop the record for the preliminary injunction hearing; reviewing and analyzing Defendants' responses to the motions; and drafting and filing the instant motion.11 *See* Monteverde Dec. ¶ 15. The work performed was necessary to protect the rights of SIR shareholders, and resulted in the Supplemental Disclosures. ... In this case, Plaintiff's Counsel was required to thoroughly and expeditiously review multiple, voluminous proxy statements to assess whether Defendants failed to disclose material information or corrected previously-identified non-disclosures and/or inconsistencies. Thoroughly and properly analyzing complex proxy statements and valuation analyses is time-consuming and often difficult, even for those experienced in doing so, and Counsel demonstrated skill and perseverance in performing the required services. What is more, in light of the fact that disclosure deficiencies are best resolved before a shareholder vote, Plaintiff's Counsel were required to work under intense time pressure to ensure that the Supplemental Disclosures were filed far enough ahead of the vote for shareholders to digest the new information. ... Plaintiff's Counsel respectfully submit that, consistent with the *Johnson* factors, a reasonable multiplier of 3.16 is also appropriate in this case. ... In this case, the Court should give considerable weight to the fact that Plaintiff's Counsel undertook representation on a contingency fee basis on behalf of [a] relatively small shareholder who would have been unable to pay for experienced counsel to protect his corporate suffrage rights and investigate the fairness of the Merger. Plaintiff's Counsel expeditiously fought for, and succeeded in procuring, informed corporate suffrage for Plaintiff and all other SIR shareholders under severe time-pressure. Plaintiff's Counsel risked receiving nothing for their work had they been unable to procure the material Supplemental Disclosures.

In support of the attorneys' fees request, the plaintiff's counsel, Juan E. Monteverde ("Monteverde"), of Monteverde & Associates PC, submitted a declaration with exhibits, including the "Monteverde & Associates, PC Firm Resume" and "Time Entries." In his declaration, Monteverde provided the following chart detailing time spent by and hourly rates of attorneys involved in this action:

PROFESSIONAL*	**HOURS**	**RATE**	**LODESTAR**
JUAN MONTEVERDE (P)	94.6	$750	$70,950.00
MILES SCHREINER (A)	25.3	$500	$12,650.00
JOHN BAYLET (A)	78.1	$325	$25,382.50
EIRC BENZENBERG (A)	2.4	$300	$720.00
ERIC PASSAGLIA (PL)	7.5	$150	$1,125.00
TOTAL	**207.9**		**$110,827.50**

*(P) – Partner; (A) – Associate; (PL) – Paralegal

The plaintiff seeks reimbursement for $774.84 in expenses as follows: (a) $400, filing fee; (b) $24.84, "FedEx,"; and (c) $350, "PSLRA Notice." Monteverde states that his law firm's "compensation for services rendered in this litigation was wholly contingent on the success of the action and was totally at risk" and has not been paid from any source. He states that the fee calculation was prepared based on the contemporaneous time records and "[t]he hourly rates for my firm are the usual and customary hourly rates charged for their services in similar litigation."

DEFENDANTS' CONTENTIONS

***4** The defendants contend that this action is governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which "prohibits the award of attorneys' fees unless counsel's efforts have led to *monetary* relief," and the plaintiff "ignores the PSLRA and instead relies on cases that are inapplicable here" because they: (i) "predate the PSLRA"; (ii) "resulted in a monetary recovery for the class"; or (iii) "were not brought under the federal securities laws." According to the defendants, state law does not apply to the plaintiff's request for attorneys' fees "because Plaintiff did not assert any state law claims." The defendants maintain that the plaintiff "failed to establish a violation of Section 14(a), or that he conferred a substantial benefit on the putative shareholder class" and "Plaintiff was not the proximate cause of the Supplemental Disclosures." The defendants assert that the supplemental disclosures "conferred no benefit on shareholders because they were immaterial as a matter of law," given that they "provided 'only a trivial addition to the extensive disclosures already made in the proxy statement.' " The defendants contend that financial projections are not required to be included "in proxy materials," and the plaintiff "fails to explain how the additional projections were somehow material to SIR's former shareholders." Moreover, the plaintiff failed to show that "additional line items and other minutiae underlying UBS's financial analysis" were material, since "Rule 14a-9 does not require disclosure of such granular 'line item' data." The defendants maintain that "additional information about UBS's compensation" is "no more than 'technical in ... consequence.' " Furthermore, the plaintiff failed to raise, in his motion for a preliminary injunction, the issue of "the identities of the SIR Special Committee members" and those identified as "independent trustees" in the Background of the Merger section of the Proxy. The defendants assert that "the omitted information did not render any other statement in the Proxy Statement false or misleading," and the plaintiff failed to specify "how the Supplemental Disclosures cured any purportedly material omissions that 'ma[de] other statements in the proxy statement materially false or misleading.' " According to the defendants, the "plaintiff was not the proximate cause of the Supplemental Disclosures" because they were issued "in exchange for an agreement by the Other Named Plaintiffs to dismiss their case and release their claims” and, “[b]ut for that agreement, SIR would not have issued the Supplemental Disclosures. Plaintiff refused to join that agreement, and cannot now take credit for the Supplemental Disclosures simply because he asserted claims similar to those that were asserted by the Other Named Plaintiffs.”

The defendants contend that any fee award should be reduced by the significant number of excessive and unreasonable hours counsel spent litigating this case because: (i) he “cannot recover attorneys’ fees for the nearly 43 hours of work performed after Defendants notified Plaintiff of SIR's intention to issue Supplemental Disclosures that would moot Plaintiff's claims, including the purported 37.6 hours spent on the Fee petition itself,” and the time spent on drafting the fee petition should be reduced since the plaintiff's “counsel is a repeat player who has filed substantially similar briefs in the recent past”; (ii) the plaintiff “cannot recover fees for time devoted to his meritless request to expedite discovery” because it “was contrary to the plain text of the PSLRA and served no purpose other than to increase the amount of time his counsel billed on this case”; and (iii) attorneys’ fees should not be awarded “for any time spent before October 3, 2018, when Plaintiff's firm was formally engaged as counsel on this matter.” According to the defendants, the plaintiff's fee request is not supported by the fees paid voluntarily in similar cases and none of the cases the plaintiff cited involved a disputed fee award; rather, each involves an agreement between the parties on the fee amount. The defendants assert that “none of Plaintiff's makeweight disclosure claims was so ‘complex’ as to entitle him to an upward adjustment from the loadstar amount” and “routine disclosure issues raised in this action were neither novel nor difficult;” rather, they “are precisely the same claims that Plaintiff's counsel has regurgitated repeatedly in other frivolous lawsuits challenging other transactions” and “whole portions of the papers filed by Plaintiff's counsel in this case are strikingly similar to those he recently filed in another action currently pending in another federal court” in Delaware. The plaintiff claims that counsel was “required to work under intense time pressure to ensure that the Supplemental Disclosures were filed far enough ahead of the vote for shareholders to digest the new information,” which “is nonsense.” The plaintiff “delayed filing his Complaint until *almost six weeks after* SIR first issued disclosures, and then he waited another eleven days before demanding that Defendants supplement their disclosures.” Moreover, the plaintiff's claim that this short-lived case “necessarily precluded” his counsel “from devoting resources to other cases” is unsubstantiated inasmuch as, in “the last three months since Plaintiff filed the Complaint, Plaintiff's counsel has issued press releases recruiting for stockholder plaintiffs on at least fifty-six different transactions and has instituted at least six other putative class action lawsuits, four of which have been filed with this Court.” The defendants contend that “a threshold multiplier that would provide Plaintiff's counsel with a $1,683.50 average hourly rate is unwarranted and unreasonable” and his “requested multiplier of 3.16 is utterly excessive” and lacks evidentiary support.

PLAINTIFF'S REPLY

***5** The plaintiff asserts that the PSLRA did not abrogate the common benefit doctrine or restrict the federal courts’ equitable powers and, as is apparent from the language of the statute, it applies only when “there is a certified class” and “damages are paid to the class, *i.e.*, in common fund cases, not common benefit cases like this one.” Moreover, the plaintiff is not required to establish that he would have prevailed on the merits to be awarded attorneys’ fees, and in this circuit, “fees may be awarded where the beneficial conduct was caused by an attorney's letter and no litigation was even commenced.” The plaintiff contends that “the factual record demonstrates that Defendant acted in response to Plaintiff's demand and litigation efforts,” since other plaintiffs “filed their copycat complaints after [the plaintiff] and then did absolutely nothing,” and the defendants “failed to establish that this lawsuit was not a significant cause of the Supplemental Disclosures.” The plaintiff maintains that the cases cited in the defendants’ opposition brief do not support the proposition that information revealing an actual conflict of interest is immaterial. According to the plaintiff, his fee request is reasonable and his “motion for expedited discovery was directed at securing the very information that Defendants disclosed in the Supplemental Disclosures.” The plaintiff asserts that “the Court should apply a multiplier, as courts in this circuit routinely do where counsel takes cases on a contingency fee and protect important rights of those who would otherwise be unable to afford legal representation.”

LEGAL STANDARD

Attorneys' Fees: Common Benefit Doctrine
In the United States, "the general rule [is] that, absent statute or enforceable contract, litigants pay their own attorneys' fees." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621 (1975).

> Limited exceptions to the American rule have, of course, developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed). Vaughan v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed.2d 88 (1962). And in a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-428, 43 S. Ct. 458, 465, 466, 67 L.Ed. 719 (1923). The case ...Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184 (1939)—involved yet another exception. That exception had previously been applied in cases where a plaintiff traced or created a common fund for the benefit of others as well as himself. Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S. Ct. 387, 28 L.Ed. 915 (1885); Trustees v. Greenough, 105 U.S. 527, 26 L. Ed. 1157 (188[1]). In that situation to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff. *Sprague* itself involved a variation of the common-fund situation where, although the plaintiff had not in a technical sense sued for the benefit of others or to create a common fund, the *stare decisis* effect of the judgment obtained by the plaintiff established as a matter of law the right of a discernible class of persons to collect upon similar claims. The Court held that the general equity power "to do equity in a particular situation" supported an award of attorney's fees under such circumstances for the same reasons that underlay the common-fund decisions.
>
> Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-19, 87 S. Ct. 1404, 1407 (1967).

"These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." Alyeska Pipeline Serv. Co., 421 U.S. at 259, 95 S. Ct. at 1622.

> The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. ... When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied.
>
> Fleischmann Distilling Corp., 386 U. S. at 719-20, 87 S. Ct. at 1408.

On December 22, 1995, "to curb abuse in securities suits, particularly shareholder derivative suits in which the only goal was a windfall of attorney's fees, with no real desire to assist the corporation on whose behalf the suit was brought," Green v. Ameritrade, Inc., 279 F.3d 590, 595 (8th Cir. 2002) (citation omitted), Congress enacted the PSLRA, amending Title I of the Securities Act of 1933 to add a section styled Private Securities Litigation, which provides, inter alia:

> ***6** Restrictions on payment of attorneys' fees and expenses
>
> Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.
>
> 15 U.S.C. § 78u-4(a)(6).
>
> Disclosure of settlement terms to class members
>
> Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:
>
> * * *
>
> (C) Statement of attorneys' fees or costs sought

> If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.
>
> 15 U.S.C. § 78u-4(a)(7)(C).

The Supreme Court explained that "the inclusion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorneys' fees 'should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate.' " Hall v. Cole, 412 U.S. 1, 11, 93 S. Ct. 1943, 1949 (1973) (quoting Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 390-91, 90 S. Ct. 616, 625 (1970)). It is "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 or property itself or directly from the other parties enjoying the benefit." Alyeska Pipeline Serv. Co., 421 U.S. at 257, 95 S. Ct. at 1621.

> The common fund 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." *Boeing* [*Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980)]. Consistent with this perception, the doctrine has been applied to award fees against a fund created by the plaintiff for the benefit of others, *e.g., id.*; to award fees against a fund not created by the plaintiff but redistributed as a result of its attorneys' efforts, *e.g., United States v. American Society of Composers, Authors and Publishers,* 466 F.2d 917, 918–19 (2 Cir. 1972); and, in shareholder derivative actions, to award fees indirectly against other shareholders benefiting from the law suit by taxing the nominal corporate defendant, *e.g., Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 396–97 (1970). In *Mills,* the Supreme Court explained the rationale underlying application of the common fund doctrine to shareholder derivative actions: "To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." 396 U.S. at 396–97.
>
> ***7** Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 211 (2d Cir. 1987).

The Supreme Court explained in Mills:

> While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. See Fleischmann Corp. v. Maier Brewing Co., 386 U.S., at 718—719, 87 S. Ct. at 1407. To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a "deceit practiced on the stockholders as a group," J. I. Case Co. v. Borak, 377 U.S., at 432, 84 S. Ct. at 1560, and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders. The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses. "[T]he foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 166, 59 S. Ct. 777, 780, 83 L.Ed. 1184 (1939). ... Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable

class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.

Mills, 396 U.S. at 391-94, 90 S. Ct. at 625-26.

"[A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." Id. at 396, 90 S. Ct. at 627 (citation omitted). "Fees may be awarded even when there is no judgment on the merits or when the dispute has become moot because the relief sought is otherwise obtained." Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984). "The common fund doctrine does not apply, however, when fees are sought from the assets of the losing party, and the fee award would not come from a common fund nor be assessed against persons who have derived benefit from the lawsuit." Savoie v. Merchants Bank, 84 F.3d 52, 56 (2d Cir. 1996). The Second Circuit uses "the term 'common fund doctrine' somewhat broadly so as to incorporate the 'common benefit' doctrine—the rule by which plaintiffs may seek recovery of costs, even where no 'fund' has been recovered, as long as it is possible to spread the burden of those costs proportionately among members of the class." Id. at 56 n.3.

***8** [B]efore awarding fees in a case that has become moot, the district court must determine whether plaintiff's suit was a substantial cause of the benefit obtained. When the defendant has taken action to moot the lawsuit, defendant bears the burden of proof to establish the absence of a casual connection between the lawsuit and the defendant's action.

Id. at 56-57.

Reasonable Attorneys' Fees

In common fund cases, the Second Circuit Court of Appeals acknowledged that, although " 'the trend in this Circuit is toward the percentage method,' it remains the law in this Circuit that courts 'may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method.' " McDaniel v. Cry. of Schenectady, 595 F.3d 411, 417 (2d Cir. 2010) (citation omitted). The Second Circuit Court of Appeals explained that,

no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(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."

Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted).

In Arbor Hill Concerned Citizens Neighborhood Ass'n, 522 F.3d 182 (2d Cir. 2008) ("Arbor Hill"), the Second Circuit Court of Appeals articulated a method to be used by the courts for determining attorneys' fees in cases involving statutory fee shifting, which was explained subsequently as follows:

In *Arbor Hill*, this Court proposed the use of a modified version of the lodestar approach and recommended abandonment of the term "lodestar" for the alternative term "presumptively reasonable fee." 522 F.3d at 183. In brief, the Court suggested that a district court's efforts to approximate the reasonable fee that a competitive market would bear—the implicit goal of the lodestar approach—would be better served by considering case-specific "reasonableness" factors earlier in the calculation. Instead of first determining the lodestar (multiplying an hourly rate by the number of hours worked) and then adjusting the lodestar through a multiplicative factor to account for case-specific considerations, the *Arbor Hill* Court suggested that a district court should assess case-specific considerations at the outset, factoring them into its determination of a reasonable hourly rate for the attorneys' work. *See id.* at 186, 190. This reasonable hourly rate could then be multiplied by the number of hours worked to generate a "presumptively reasonable fee." *Id.* at 190. As *Arbor Hill* was a statutory fee shifting case, the Court pointed towards the twelve case-specific factors outlined in Johnson [v. Ga. Highway Express, Inc., 488 F.2d 714,

> 717-19 (5th Cir. 1974)] as being among those relevant to a district court's determination of a reasonable market rate under this revised approach. *See Arbor Hill*, 522 F.3d at 190.
>
> McDaniel, 595 F.3d at 420.

The Johnson factors that must be considered in calculating the presumptively reasonable fee are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.
>
> ***9** Arbor Hill, 522 F.3d at 186-87 n.3.
>
> While it is true some district courts in this Circuit have expressed uncertainty as to the relevance of *Arbor Hill* in common fund cases, this Court's case law does not suggest that there are two different lodestar methods. To the contrary, in discussing the lodestar method, our common fund and statutory fee shifting cases have employed the same definition and referenced the same foundational cases. It is therefore not surprising that several district courts within this Circuit have referred to *Arbor Hill*'s "presumptively reasonable fee" approach in common fund cases.
>
> McDaniel, 595 F.3d at 421-22 (internal citations omitted).

A reasonable hourly rate is "the rate prevailing in the [relevant] community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Farbotko v. Clinton Cry. of N.Y., 433 F.3d 204, 208 (2d Cir. 2005) (quoting Blum v. Stenson, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 1547 n.11 (1984)). "Thus, 'a reasonable hourly rate' is not ordinarily ascertained simply by reference to rates awarded in prior cases." Id.

> [T]he equation in the caselaw of a "reasonable hourly fee" with the "prevailing market rate" contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel. This may, of course, include judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district. ... [T]he fee applicant has the burden of showing by "satisfactory evidence—in addition to the attorney's own affidavits"—that the requested hourly rates are the prevailing market rates.
>
> Id. at 209 (quoting Blum, 465 U.S. at 896 n.11, 104 S. Ct. 1547 n.11).

The Supreme Court "established six important rules" in connection with determining fees under the federal fee-shifting statutes:

> First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. Section 1988's aim is to enforce the covered civil rights statutes, not to provide "a form of economic relief to improve the financial lot of attorneys." Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. Indeed, we have said that the presumption is a "strong" one. Third, although we have never sustained an enhancement of a lodestar amount for performance, we have repeatedly said that enhancements may be awarded in " 'rare' " and " 'exceptional' " circumstances. Fourth, we have noted that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee," and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award.

> This requirement is essential if the lodestar method is to realize one of its chief virtues, *i.e.*, providing a calculation that is objective and capable of being reviewed on appeal.

> ***10** Perdue v. Kenny A. Ex Rel. Winn, 559 U.S. 542, 552-53, 130 S. Ct. 1662, 1672-73 (2010) (internal citations omitted).

The Supreme Court provided guidance for determining when a fee determined by the loadstar method may be enhanced:

> First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate. Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses. Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. Compensation for this delay is generally made "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

> Id. at 554-56, 130 S. Ct. at 1674-75.

Attorney-fee awards include reasonable out-of-pocket expenses that are charged to clients ordinarily, such as photocopying, travel, telephone costs, postage and computerized research. See LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998). A fee application that is not supported by evidence of "contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done" should normally be denied. New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983).

APPLICATION OF LEGAL STANDARD

Whether the PSLRA Bars Attorneys' Fees Based on Non-Monetary Benefits

***11** The defendants contend that the PSLRA "prohibits the award of attorneys' fees unless counsel's efforts have led to *monetary* relief," making citation to 15 U.S.C. § 78u-4(a)(6). However, the defendants do not identify any language in 15 U.S.C. § 78u-4(a)(6) in support of their prohibition argument. The Court finds that no language exists in the provision styled "Restrictions on payment of attorneys' fees and expenses," 15 U.S.C. § 78u-4(a)(6), prohibiting "the award of attorneys' fees unless counsel's efforts have led to *monetary* relief."

In support of their proposition that the PSLRA bars an award of attorneys' fee unless monetary relief was actually paid to the class, the defendants rely on Mostaed v. Crawford, Nos. 3:11-cv-00079 and 3:11-cv-00082, 2012 WL 3947978, at *7 (E.D. Va. Sept. 10, 2012). However, the court in Mostaed found that, since the "plaintiffs have not received a monetary judgment," the PSLRA, 15 U.S.C. § 78u-4(a)(6), "precludes them from seeking attorneys' fees based on alleged Securities and Exchange Act violations"; it did not find that the PSLRA "prohibits the award of attorneys' fees unless counsel's efforts have led to *monetary* relief." Contrary to the defendants' proposition, the court in Mostaed found that an attorneys' fees application could be entertained, albeit under Delaware common law. The court explained that, because the lawsuit was mooted by the additional disclosures in the proxy statement for which the plaintiffs claimed credit, Delaware's corporate benefit rule governed the fee application. Mostaed, 2012 WL 3947978, at *7. Thus, under Mostaed, the PSLRA does not bar an award of attorneys' fees unless "counsel's efforts have led to *monetary* relief."

The defendants also make citation to Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), for the proposition that the PSLRA "prohibits the award of attorneys' fees unless counsel's efforts have led to *monetary* relief." However, Masters involved a fee application made pursuant to the terms of a settlement agreement in an action under the Sherman Antitrust Act, not the PSLRA, as the court explained when it rejected the district court's reliance on the PSLRA provision in determining the attorneys' fee application:

> The fee restrictions described in the PSLRA do not apply in any context other than securities class actions, and, even if they did, it is not clear how they would apply. The statute speaks in terms of a percentage of damages "actually paid to the class." But the entire fund created by the efforts of counsel presumably is "paid to the class," even if some of the funds are distributed under the Cy Pres Doctrine. The PSLRA would not allow for the computation of fees on the basis of such non-damages items as discounts on coupons received in settlement. A key consideration required by the PSLRA "is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. Advisory Comm. Notes to Fed. R. Civ. P. 23, 2003 Amendments. Arguably, the entire Settlement Fund is a "benefit achieved for class members."
>
> Masters, 473 F.3d at 437-38.

Although Masters did not involve the PSLRA, the above-quoted dicta do not suggest that the PSLRA bars an award of attorneys' fees "unless counsel's efforts have led to *monetary* relief." Absent binding authority to the contrary, the Court finds that the PSLRA, 15 U.S.C. § 78u-4(a)(6), does not bar "the award of attorneys' fees unless counsel's efforts have led to *monetary* relief."

Whether the PSLRA, 15 U.S.C. § 78u-4(a)(6), Applies

***12** The plaintiff contends that it is apparent from the language of the statute that 15 U.S.C. § 78u-4(a)(6) does not apply here because it applies only when: (1) "there is a certified class"; and (2) "damages are paid to the class." The plaintiff does not identify any language in 15 U.S.C. § 78u-4(a)(6) in support of his argument that the provision applies only when "there is a certified class." The PSLRA provides: "The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(1). This action was brought as a plaintiff class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the provisions concerning private class actions under the PSLRA, including 15 U.S.C. § 78u-4(a)(6), "shall apply" to this action as required by the PSLRA. Whether a class will be certified in this action and whether any damages and prejudgment interest will actually be paid to the class triggering the PSLRA's restrictions on the payment of attorneys' fees and expenses is unknown at this stage of the litigation. The Court finds that the plaintiff's contention that the PSLRA, 15 U.S.C. § 78u-4(a)(6), does not apply to this action is meritless.

Whether State Law Applies to the Plaintiff's Fee Application

The plaintiff contends that an award of attorneys' fees is "supported under state law," without making citation to any authority authorizing, in an action based solely on federal question jurisdiction, the application of state law in determining the request for attorneys' fees. The plaintiff did not assert state-law causes of action in the complaint; instead, he asserted only Exchange Act violations. Accordingly, no basis exists for applying state law to determine the attorneys' fees application.

Whether the Common Benefit Doctrine Applies

The plaintiff commenced this action on November 9, 2018, seeking to enjoin the defendants from proceeding with the proposed merger until "material information omitted from the Proxy is disclosed to the Company's shareholders prior to the forthcoming shareholder vote" on the proposed merger. Thereafter, the plaintiff filed a motion for a preliminary injunction. See Docket Entry No. 10. The plaintiff withdrew his motion, see Docket Entry No. 21, based on the defendants' information that SIR would file supplemental disclosures with SEC. The December 10, 2018 supplemental disclosures mooted the plaintiff's claims in this action. See Docket Entry No. 41.

The plaintiff contends that the common benefit doctrine applies in this circumstance because the plaintiff "conferred a substantial benefit on SIR shareholders through its prosecution of the action, causing Defendants to issue the Supplemental Disclosures." In support of this argument, the plaintiff relies, inter alia, on Mills. In Mills, the Supreme Court noted that "the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor," and "[t]his development has been most pronounced" in shareholders' derivative actions. Mills, at 394, 90 S. Ct. at 626. The Supreme Court also noted that attorneys' fees have been sustained in cases in which no common fund existed; rather, "there was a 'common fund' only in the sense that the court's jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation." Mills, at 394-95, 90 S. Ct. at 627. No pecuniary relief in the form of a common fund exists in this action filed on behalf of putative class members.

(a) Whether Members of an Ascertainable Class Exist

The plaintiff is a shareholder of SIR's common stock and he commenced this action on behalf of all holders of SIR's common stock alleged to be harmed by the defendants' actions at issue. Thus, members of an ascertainable class exist, notwithstanding that the class has not been certified.

(b) Whether the Court's Jurisdiction Over the Suit Makes Possible That an Award Will Operate to Spread the Cost Proportionately Among Class Members

***13** The court has jurisdiction over the subject matter of this action and personal jurisdiction over corporate defendant, SIR. The court's jurisdiction over this action makes it possible that an award of attorneys' fees will operate to spread the cost proportionally among the ascertainable members of a class, because "reimbursement of the [plaintiff's] attorneys' fees out of the corporate treasury simply shift[s] the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.' " Hall, 412 U.S. at 7, 93 S. Ct. at 1947 (citation omitted).

(c) Whether the Litigation Conferred a Substantial Benefit on the Ascertainable Class Members

The defendants assert that "the Supplemental Disclosures conferred no benefit on shareholders because they were immaterial as a matter of law" and they were "only a trivial addition to the extensive disclosures already made in the proxy statement." The defendants filed SIR's December 10, 2018 Supplemental Declaration with SEC by using SEC's form styled "FORM 8-K," which instructed the defendants: "Check appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions," listing four provisions. The defendants marked the provision "Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)." Section 230.425 of Title 17 of the Code of Federal Regulations governs "filing of certain prospectuses and communications under § 230.135 in connection with business combination transactions" and provides, in pertinent part:

> (a) All written communications made in reliance on § 230.165 are prospectuses that must be filed with the Commission under this section on the date of first use.

(b) All written communications that contain no more information than that specified in § 230.135 must be filed with the Commission on or before the date of first use except as provided in paragraph (d)(1) of this section. A communication limited to the information specified in § 230.135 will not be deemed an offer in accordance with § 230.135 even though it is filed under this section.

(c) Each prospectus or § 230.135 communication filed under this section must identify the filer, the company that is the subject of the offering and the Commission file number for the related registration statement or, if that file number is unknown, the subject company's Exchange Act or Investment Company Act file number, in the upper right corner of the cover page.

17 C.F.R. § 230.425(a)-(c).

Section 230.165 of Title 17 of the Code of Federal Regulations governs "Offers made in connection with a business combination transaction" and Section 230.135 of Title 17 of the Code of Federal Regulations governs "Notice of proposed registered offerings." Since: (1) SIR filed its December 10, 2018 Form 8-K "to simultaneously satisfy [its] filing obligation" in connection with "[w]ritten communications pursuant to Rule 425 under the Securities Act," 17 U.S.C. § 230.425; (2) Rule 425 consists of mandatory filing and identification directives, with certain exemptions not applicable here; and (3) the December 10, 2018 supplemental disclosures addressed all four material issues the plaintiff argued are missing from the proxy statement, namely, (i) unlevered free cash flows, see Nichting v. DPL Inc., No. 3:11-cv-141, 2011 WL 2892945, at *4 n.16 (S.D. Ohio 2011) ("it smacks of materiality that a voter be made aware of the Company's cash flow projections in order to make an informed decision"); U.S. v. Smith, 155 F.3d 1051, 1064 n.20 (9th Cir. 1998) ("investors are concerned, perhaps above all else, with the future cash flows of the companies in which they invest"), (ii) UBS's valuation analyses, see Smith v. Robbins & Myers, Inc., 969 F.Supp.2d 850, 874 (S.D. Ohio 2013) ("if a Proxy discloses valuation information, it must be complete and accurate"), (iii) UBS's conflict of interest, and (iv) the board's conflict of interest, see Wilson v. Great Am. Indus., Inc., 855 F.2d 987, 993 (2d Cir. 1988) ("[A] failure to disclose a relationship between interested parties that might assume significance in the deliberations of a reasonable shareholder is within the province of the federal securities laws" and the "disclosure of ... various interests will give notice to a shareholder to examine the proposed transaction more critically.") (internal quotation marks and citation omitted), no basis exists for the Court to conclude that the supplemental disclosures were "immaterial as a matter of law" or "only a trivial addition to the extensive disclosures already made in the proxy statement." The Court finds that the December 10, 2018 supplemental disclosures provided material information necessary for SIR common stock shareholders to cast an informed vote concerning the proposed merger.

***14** The defendants assert that this litigation was not the cause for the December 10, 2018 supplemental disclosures because SIR issued them "in exchange for an agreement by the Other Named Plaintiffs to dismiss their cases and release their claims," but the plaintiff "refused to join that agreement, and cannot now take credit for the Supplemental Disclosures simply because he asserted claims similar to those that were asserted by the Other Named Plaintiffs." In support of their contention that "Other Named Plaintiffs" filed lawsuits after the plaintiff commenced this action "alleging nearly identical claims and seeking nearly identical relief," the defendants make citation, in a footnote of their memorandum of law, to certain cases filed in various district courts. However, the defendants did not present evidence supporting their contention and they did not ask the Court to take judicial notice of any adjudicative facts.

The record demonstrates that the defendants filed the December 10, 2018 supplemental disclosures in response to the plaintiff's action, commenced on November 9, 2018, including the plaintiff's November 20, 2018 letter to the defendants stating that, upon review of the definitive proxy statement, filed on November 16, 2018, after the plaintiff commenced the action, the plaintiff "identified outstanding disclosure deficiencies constituting a violation of federal securities laws." The plaintiff advised the defendants in his November 20, 2018 letter that he will "seek a preliminary injunction enjoining the shareholder vote and consummation of the Proposed Merger" unless supplemental disclosures are provided. The following day, November 21, 2018, the plaintiff filed his motion for a preliminary injunction. On November 28, 2018, the plaintiff filed a letter-motion for expedited discovery in connection with his preliminary injunction motion, seeking "[c]ore merger-related documents, including the board minutes, banker representations, and financial projections," "[e]mails referencing projections" and a deposition of "John C.

Popeo, David Blackman and a representative of UBS." In an e-mail message to the plaintiff's counsel, dated November 29, 2018, the defendants' counsel stated:

> As discussed, attached please find our client's proposed supplemental disclosures in response to the claims made in the actions *Chen v. Select Income REIT*, Civ. No. 1:18-cv-10418-GBD (S.D.N.Y.); *Schwartz v. Select Income REIT*, Civ. No. 1:18-cv-10790-ER (S.D.N.Y.) [filed on November 19, 2018 and dismissed voluntarily on December 7, 2018]; *Sinkula v. Select Income REIT*, Case No. 1:18-cv-12389 (D. Mass.) [filed on November 15, 2018 and dismissed voluntarily on December 14, 2018]; and *Scarantino v. Fraiche*, Case No. 24C18006068 (Md. Cir. Ct.) [filed on November 16, 2018 and dismissed voluntarily on December 14, 2018] (collectively, "the Actions"). SIR is willing to commit to make the proposed supplemental disclosures in exchange for the immediate withdrawal of the Motion for Preliminary injunction pending in the *Chen* action and dismissal of each of the Actions with prejudice.

As conceded by the defendants, other actions referenced by them were filed after this action and other than filing the complaints, the plaintiffs in those lawsuits took no other actions before voluntarily dismissing them. Since the plaintiff filed this action on November 9, 2018, before other plaintiffs filed their complaints, in Schwartz, on November 19, 2018, Sinkula, on November 15, 2018, and Scarantino, on November 16, 2018, he could not have, as contended by the defendants, "asserted claims similar to those that were asserted by the Other Named Plaintiffs"; rather, other plaintiffs asserted claims similar and subsequent to those the plaintiff asserted in this action.

On December 3, 2018, in an e-mail message to the defendants' counsel, the plaintiff's counsel stated: "If the disclosures are made in a timely manner, I am prepared to withdraw my [preliminary injunction motion]. However, I am not going to release claims and/or agree to a [memorandum of understanding] (or the terms you proposed therein). If you decide not to do the disclosures, then we will see you in Court on Dec. 13." On December 7, 2018, the plaintiff withdrew his motion for preliminary injunction because the defendants informed him, on December 6, 2018, that they would issue the supplemental disclosures, on or before December 10, 2018. The defendants filed the supplemental disclosures on December 10, 2018. On February 25, 2019, the stipulation and order vacated the initial pretrial conference because the plaintiff "considers his claims in this Action mooted and the only outstanding issue is Plaintiff's Motion for Attorney Fees and Expenses filed on December 14, 2018." Docket Entry No. 41.

***15** It is apparent from the record evidence, including the chronology of the filing of other actions referenced by the defendants that followed this action and communications between the plaintiff's counsel and the defendants' counsel in this action, that the defendants' filing of the supplemental disclosures was substantially caused by the plaintiff's filing of this action, on November 9, 2018, and especially the plaintiff's filing of his motion for a preliminary injunction, on November 21, 2018, and the letter-motion for expedited discovery in connection with the motion for a preliminary injunction, on November 28, 2018, seeking "[c]ore merger-related documents, including the board minutes, banker representations, and financial projections," "[e]mails referencing projections" and a deposition of "John C. Popeo, David Blackman and a representative of UBS." See Koppel, 743 F.2d at 135 n.3 ("The chronological sequence of events is an important factor in determining whether or not it can be inferred that the defendants guided their actions in response to plaintiff's lawsuit."). The defendants' proposed supplemental disclosures were sent via-email to the plaintiff's counsel, on November 29, 2018, the day following the plaintiff's filing of the letter-motion for expedited discovery. No other plaintiff in the lawsuits referenced by the defendants took any action, apart from filing the complaint, that caused the defendants to file the supplemental disclosures, and the complaints referenced by the defendants were filed after this action commenced and before the plaintiff's motion for a preliminary injunction. The plaintiff's: (1) motion for a preliminary injunction, seeking an order enjoining the shareholder vote scheduled for December 20, 2018, until the defendants disclose material information omitted from the definitive proxy statement; and (2) letter-motion for expedited discovery in connection with the motion for a preliminary injunction, not the filing of the other plaintiffs' complaints, presented the only imminent risk to the defendants with the potential to delay the shareholders' vote on the proposed merger. The defendants offered to the plaintiff a proposal, that they would file supplemental disclosures in exchange for "the immediate withdrawal of the Motion for Preliminary Injunction pending in the *Chen* action," and, upon withdrawal of the plaintiff's motion for a preliminary injunction on, Friday, December 7, 2018, the defendants filed their supplemental disclosures on the following business day, Monday, December 10, 2018. The defendants' contention that they issued the December 10, 2018 supplemental disclosures "in exchange for an agreement by the Other Named Plaintiffs to dismiss their cases and release their claims" is undermined by the fact that their filing of the supplemental disclosures followed immediately the plaintiff's withdrawal of his motion for a preliminary injunction and while two of the three other actions against the defendants were still pending—Scarantino and Sinkula were not voluntarily dismissed until December 14, 2018, though Schwartz was dismissed voluntarily on December 7, 2018. The defendants did not wait for all other plaintiffs to dismiss their actions voluntarily before filing the December 10, 2018 supplemental disclosures and they filed their supplemental disclosures despite the plaintiff's refusal to dismiss voluntarily this action in exchange for them. The defendants' filing of the December 10, 2018 supplemental disclosures mooted this action. The defendants failed do satisfy their burden of showing that the plaintiff's action was not a substantial cause of the benefit obtained by the shareholders, namely, the fling of the December 10, 2018 supplemental disclosures.

The Court finds that the plaintiff's action conferred a substantial benefit on the ascertainable class of members and was a substantial cause of the defendants' December 10, 2018 supplemental disclosures. Accordingly, the common benefit doctrine applies in the circumstance of this case and any attorneys' fees shall be awarded solely against the corporate defendant, SIR.

Reasonable Attorneys' Fee

This is not a common fund case, since no common fund exists from which attorneys' fees are sought; thus, the percentage method for calculating reasonable attorneys' fees does not apply. Given that "common fund and statutory fee shifting cases have employed the same definition" of the loadstar method, McDaniel, 595 F.3d at 422, in determining reasonable attorneys' fees, the Court will use the loadstar method to calculate the attorneys' fees, guided by the relevant factors articulated in Arbor Hill and Goldberger.

(a) Reasonable Hourly Rates

Although the defendants do not challenge the hourly rates of the plaintiff's counsel, the plaintiff did not discuss, in his motion papers, each hourly rate claimed by his attorneys or make citation to the prevailing market rates for attorneys of experience and skill similar to each of his attorneys who are claiming fees. Other than stating that the hourly rates for his law firm "are the usual and customary hourly rates charged for their [sic] services in similar litigation," Monteverde did not make any statements in his declaration concerning his experience and skills or those of other attorneys from his law firm who are claiming fees. Monteverde did not explain any part of Exhibit 10 to his declaration styled "Monteverde & Associates, PC Firm Resume." Exhibit 10 is cited in the plaintiff's memorandum of law in support of the contention that, "Plaintiff's Counsel have extensive experience in prosecuting shareholder class actions, and the firm's attorneys have obtained significant therapeutic benefits and monetary recoveries for shareholders as sole or co-lead counsel in numerous complex class actions across the country."

The Court's independent review of Exhibit 10 shows that, in 2018, during the relevant time for which the fees are sought, Monteverde had 11 years of experience, Schreiner had five years of experience, Baylet had one year of experience and Benzenberg was admitted to the New York bar in 2018, the year this action commenced. Monteverde does not indicate when he founded his law firm or how long he has been concentrating on "advocating shareholder rights," as stated on his law firm's resume. Exhibit 10 does not indicate when Schreiner joined Monteverde and Associates PC, how many years prior to joining it he "was an associate at a national class action firm where he represented clients in securities and consumer class action litigation" and the duration and quality of his "experience in complex litigation as an associate at a New York City firm that represents plaintiffs in civil RICO actions," as indicated on the law firm's resume. Concerning Baylet, who was admitted to the New York bar in 2017, Exhibit 10 states that he "has experience in financial services and securities class action litigation." However, other than two internships, no professional experience is listed for Baylet on the law firm's resume, including experience concerning securities class-action litigation. Similarly, Exhibit 10 indicates that Benzenberg, who was admitted to the New York bar in 2018, "has experience in financial services and securities class action litigation," listing only two internships and no professional experience, including experience in securities class-action litigation. Exhibit 10 does not contain any information about Eric Passaglia, including his experience and skills.

***16** The plaintiff's citations to unpublished orders, approving certain amounts of attorneys' fees in the court of Chancery of the State of Delaware, United States District Court for the Southern District of Ohio, Western Division, United States District Court for the District of Massachusetts and United States District Court, District of Kansas, are not relevant to determining the prevailing hourly rates for legal services in this judicial district for services rendered by lawyers of reasonably comparable skills, experiences and reputations. Moreover, a letter filed by Monteverde in an unrelated case in this judicial district to notify the court that the parties reached an agreement on the plaintiffs' claim for attorneys' fees is irrelevant to determining the prevailing hourly rates for legal services in this judicial district for services rendered by lawyers of reasonably comparable skills, experiences and reputations. The plaintiff failed to make citation to any relevant authority in support of the hourly rates requested by each attorney claiming fees. The Court finds that the plaintiff failed to satisfy his "burden of showing by 'satisfactory evidence—in addition to the attorney's own affidavits'—that the requested hourly rates are the prevailing market rates." Farbotko, 433 F.3d at 209.

(b) Reasonable Hours

The plaintiff's attorneys seek fees for 207.9 hours of work in this action. The defendants contend that the plaintiff cannot recover for any post-disclosure work, including 37.6 hours spent on the fee petition because work after the defendants' December 10, 2018 supplemental disclosures provided no benefit to the putative class members. The plaintiff did not address this contention in his reply or provide any authority supporting his request for compensation respecting the post-disclosure hours expended, including hours spent preparing the fee application. Generally, courts have discretion "to award attorney's fees expended on a fee application," "so-called fees on fees," under fee-shifting statutes, such as the Civil Rights Attorney's Fees Award, 42 U.S.C. § 1988. Lilly v. City of New York, 934 F.3d 222, 235 (2d Cir. 2019). However, the Court is not aware of any binding authority authorizing "fees on fees" under the common benefit doctrine in a circumstance such as this one—a non-derivative, putative class action without a common fund that was mooted by the defendants' supplemental disclosures, but not voluntarily dismissed at the time of the fee application and the fee application does not appear to have benefitted the putative class members. The Court is not convinced that compensation for post-disclosure hours claimed by the plaintiff's counsel, including 37.6 hours expended by three attorneys preparing the fee application, is warranted.

The defendants assert that the plaintiff cannot recover fees for hours spent on "his meritless request to expedited discovery," which was contrary to the plain text of the PSLRA and served no purpose other than to increase the time billed in this action. The plaintiff asserts that the motion for expedited discovery was not meritless because it was directed at securing the information that the defendants disclosed in the supplemental disclosures. The Court finds that, regardless of the merits of the plaintiff's motion for expedited discovery, the plaintiff made well-supported arguments, citing numerous cases, and prompted the defendants to file their supplemental disclosures the following business day. However, it appears from the time records that the plaintiff's counsel spent about 30.6 hours on the motion for a preliminary injunction and about 42 hours on the four-page letter-motion for expedited discovery, making the hours claimed in connection with the four-page letter-motion for expedited discovery excessive.

The defendants also challenge 3.3 hours of work performed on October 1, 2018, by the plaintiff's counsel, because they were incurred prior to plaintiff's retaining counsel, which occurred on October 3, 2018. The plaintiff did not provide any authority supporting his claim for 3.3 hours of work incurred prior to counsel's engagement. The Court finds that awarding fees for hours prior to the plaintiff's engagement of counsel is not warranted in this circumstance. See Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940 (1983) ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.") (citation omitted).

***17** As explained above, the 42 hours spent by counsel on a four-page letter-motion for expedited discovery are excessive, especially when compared with the 12 hours spent preparing the complaint and the 30.6 hours spent preparing the preliminary injunction motion. The plaintiff seeks fees for: (a) 0.5 hours of work by Bylet for the task styled "Pleading," performed on November 12, 2018, and described as "Prepare and send waivers of service to Def counsel"; and (b) 0.6 hours of work by

Benzenberg for the task styled "Administration," performed on November 16, 2018, and described as "Case Administration; revising PSLRA LP Notice." However, these hours are non-compensable because "[f]iling, delivery, service of papers and other similar administrative tasks are not usually considered recoverable expenditures of time for attorneys' fees." Broome v. Biondi, 17 F. Supp. 2d 230, 236 (S.D.N.Y. 1997).

This is a simple and straightforward securities putative class action that does not involve any novel or difficult questions and requires only a basic level of skill and not significant time and labor to perform the legal services properly. The time and labor expended by plaintiff's counsel in this action, namely 207.9 hours by four attorneys, are excessive and unnecessary in the circumstance of this case. The plaintiff's counsel made similar filings in other cases that included content almost identical to that filed in the instant action, see, e. g., Docket Entry No. 34-5 to 34-8, containing filings from the action captioned Sehrgosha v. Kindered Healthcare, Inc., 18-CV-00230-RGA (D. Del.); see also Comeaux v. Seventy Seven Energy Inc., 17-CV-191-M (W. D. Okla.) (of counsel Monteverde & Associates PC). While counsel should not be penalized for the convenience of copying content from counsel's previous briefs and filings in other similar actions, that practice demonstrates that both time and labor was saved in this action by not performing original research and writing; thus, including almost identical content in subsequent filings cannot be valued the same way in terms of the required time and labor as performing original research and writing.

The quality of counsel's representation was satisfactory, although, at times, inadequate. For example, in the memorandum of law supporting the plaintiff's motion for attorneys' fees, counsel contended that

> on December 6, 2018, Defendants informed Plaintiff that they would issue the Supplemental Disclosures on or before December 10, 2018. As a result, Plaintiffs' disclosure claims raised in his Motion for Preliminary Injunction were moot, obviating the need for an Injunction—and corresponding expedited discovery. Thus, on December 7, 2018, Plaintiff filed a notice of withdrawal of his Motion for Preliminary Injunction and his request for expedited discovery.
>
> Docket Entry No. 24, p.4.

Counsel failed to make citation to any evidence in support of the above contentions and counsel's declaration in support of the motion does not include any statements about the procedural history of this case, including any evidence that the plaintiff's claims "were moot." The plaintiff's notice of withdrawal referenced in the above-mentioned contention states: "On December 6, 2018, Defendants informed Plaintiff that they would issue the Supplemental Disclosures on or before December 10, 2018. ... As a result, Plaintiff's disclosure claims raised in his Motion for Preliminary Injunction will be moot, obviating the need for an injunction. Accordingly, Plaintiff respectfully seeks to withdraw his Motion for Preliminary Injunction and his letter for Expedited Discovery." Docket Entry No. 21.

In determining the plaintiff's motion, initially, the Court considered the plaintiff's notice of withdrawal, Docket Entry No. 21, notwithstanding that counsel failed to make citation to that docket entry. However, the plaintiff's notice of withdrawal stated that the plaintiff's claims "will be moot," not that they "were moot," as contended by counsel in the memorandum of law. At the time of the plaintiff's notice of withdrawal, December 7, 2018, the plaintiff's claims were not moot because the defendants did not file their supplemental disclosure until December 10, 2018. Thus, the plaintiff's notice of withdrawal, anticipating that his claims will become moot in the future, was not evidence that the claims were moot, on December 7, 2018, or at any other time.

***18** It was not until the plaintiff stated affirmatively, in the February 25, 2019 Stipulation and Order Vacating Initial Pretrial Conference, signed by counsel on February 21, 2019, that "Plaintiff considers his claims in this Action mooted and the only outstanding issue is Plaintiff's Motion for Attorney Fees and Expenses filed on December 14, 2018 [ECF 23]," that the plaintiff represented to the court that his claims were mooted by the December 10, 2018 supplemental disclosures. Docket Entry No. 41. Not only did counsel fail to make citation to the February 25, 2019 Stipulation and Oder in the plaintiff's motion papers, but he also failed to mention it anywhere in his motion for reconsideration, despite: (a) knowing that the Court's denial of his motion for attorneys' fees was based, in part, on the finding that his claims were not moot; and (b) arguing in the reconsideration motion that the Court's factual finding, that the claims were not moot, was erroneous. The February 25, 2019 Stipulation and Order, Docket Entry No. 41, was brought to the Court's attention for the first time by the defendants in their opposition to the plaintiff's motion for reconsideration. See Docket Entry No. 48, p. 7 ("Defendants agree that Plaintiff's claims are moot and that no further relief is obtainable by Plaintiff (*See* ECF No. 41)." The fact that evidence, in the form of the February 25, 2019 Stipulation and Order Vacating Initial Pretrial Conference, where the plaintiff stated affirmatively that he "considers his claims in this Action mooted," has never been brought to the Court's attention by the plaintiff's counsel, even on his motion for reconsideration, demonstrates that Monteverde's experience and skills, as well as the firm's collective experience and skills, were not adequate for the purpose of establishing that the common benefit doctrine applies. Yet, making citation to evidence already in the record in support of the plaintiff's factual contention requires no more than basic legal skills. If it was not for the defendants' concession, in the opposition to the motion for reconsideration, that the plaintiff's claims are moot and their citation to Docket Entry No. 41, the Court would have remained unaware of the mootness evidence in the record, despite its best efforts to review thoroughly the procedural history of this action before determining the plaintiff's motion for attorneys' fees. The plaintiff has the burden on his motion for attorneys' fees to demonstrate that his factual assertions are supported by evidence; it is not the Court's job to look for evidence when none is cited. See Albrechtsen v. Bd. of Regents of the Univ. of Wis. System, 309 F.3d 433, 436 (7th Cir. 2002) ("Judges are not like pigs, hunting for truffles buried in the record.") (citation omitted). Had the plaintiff's counsel brought to the Court's attention the February 25, 2019 Stipulation and Order, Docket Entry No. 41, a waste of the Court's and the parties' time and resources could have been avoided.

The plaintiff's counsel does not contend that the acceptance of this case prevented the firm's employment elsewhere or that the case was undesirable, apart from having undertaken it on a contingent basis. The plaintiff's conclusory allegations in his memorandum of law that counsel "was required to work under intense time pressure" and "acceptance of this action necessarily precluded them from devoting resources to other cases" are not supported by any evidence. The primary relief requested in the complaint was equitable, not monetary, and, according to counsel, counsel's compensation was contingent on the success of the action, although no retainer and contingency agreement between the plaintiff and counsel was submitted to the Court. With respect to the contingent fee risk, no matter how slight a probability of success, the plaintiff's application for injunctive relief, which was also the primary relief sought in the complaint, did not require substantial time and labor in this action, as discussed above. As the chronology of counsel's actions demonstrates, this action was strategically short-lived: (i) on October 1, 2018, the defendants filed a preliminary proxy statement with SEC and counsel performed a "Case Development, Investigation and review [of the] corporate filing"; (ii) on October 3, 2018, counsel had communications with and was retained by the plaintiff; (iii) on November 9, 2018, the plaintiff commenced this action, seeking primarily to enjoin the defendants from proceeding with the proposed merger until the supplemental disclosures are filed; (iv) on November 21, 2018, counsel filed a motion for a preliminary injunction; (v) on November 28, 2018, counsel filed a letter-motion for expedited discovery; (vi) on November 29, 2018, counsel received from the defendants, the proposed supplemental disclosures; (vii) on December 7, 2018, counsel filed a notice of withdrawal of the motion for a preliminary injunction and request for expedited discovery; and (viii) the supplemental disclosures were filed by the defendants on December 10, 2018. Thus, it took only 70 days from the defendants' filing of the proxy to their filing of the supplemental disclosures, and it took only 31 days from the filing of this action to obtaining full relief, i. e., the defendants' filing of their supplemental disclosures. The success in this action was achieved rapidly, without intensive bargaining, pretrial activities or trial preparation. The Court does not consider the plaintiff's risk significant or the success exceptional, and no extraordinary or rare circumstances are present in this case that would justify any loadstar enhancement. See Perdue, 559 U.S. at 555, 130 S. Ct. at 1674-75. The Court is not convinced that the contingent nature of the fee agreement between the plaintiff and counsel alone is sufficient to warrant an enhancement of the loadstar in the circumstance of this case.

***19** The Court finds that the plaintiff failed to show that 207.9 hours of counsel's work are reasonable. Having failed to show that the legal services hourly rates and the hours expended by counsel are reasonable, and in light of the deficiencies outlined above, the Court finds that a significant reduction to the attorneys' fees of fifty percent is warranted to be applied to $110,827.50, the amount requested by the plaintiff before the application of the 3.16 multiplier. See Gesualdi v. Stallone Testing Labs., Inc., No. 10-CV-646, 2011 WL 2940606, at *1 (E.D.N.Y. July 19, 2011) (applying a fifty percent reduction of the requested attorneys' fees in part because of "poor drafting" which casted "doubt on the accuracy of a party's submissions to the court and forcing the court to expend resources unnecessarily as a result"); Daiwa Special Asset Corp. v. Desnick, No. 00 Civ. 3856, 2002 WL 31767817, at *5 (S.D.N.Y. Dec. 3, 2002) (applying a fifty percent reduction to the requested attorneys' fees for "duplication of attorney efforts, the overstaffing of meetings and depositions, and the inefficient allocation of human resources").

The Court reaches the decision to award attorneys' fees despite the plaintiff's failures because of the public policy that counsel should be fairly compensated for the services provided and the risks taken, no matter how insignificant, in seeking remedies for individuals damaged by violations of the securities laws, so that the public can have access to counsel experienced in prosecuting securities violations; thus, leaving counsel without any compensation would not further the public policy. See In re Union Carbide Corp. Consumer Prods. Bus. Secs. Lit., 724 F. Supp. 160, 169 (S.D.N.Y. 1989). Accordingly, the Court finds that a reasonable amount of attorneys' fees is $55,413.75.

Reasonable Costs

The plaintiff seeks $774.84 in costs, consisting of $400, filing fee, $24.84, "FedEx" and $350, "PSLRA Notice." Docket Entry No. 1 in this action documents the $400 filing fee incurred by the plaintiff. However, no evidence is submitted by the plaintiff showing $24.84 "FedEx" expense, the date on which it was incurred or the explanation for the expense. Similarly, no evidence is submitted showing the $350 "PSLRA Notice" expense and the date on which it was incurred. Monteverde contends in his declaration that the "FedEx" and "PSLRA Notice" expenses were incurred by his law firm, but his contention is not corroborated by the contemporaneous records, as it must be. See Carey, 711 F.2d at 1154. Accordingly, the Court finds that $400, is the reasonable amount of costs in this action.

CONCLUSION

For the foregoing reasons, the plaintiff's motion for attorneys' fees, Docket Entry No. 23, is granted and the plaintiff is awarded $55,813.75, consisting of $55,413.75, in reasonable attorneys' fees, and $400 in reasonable costs, to be paid solely by the corporate defendant, SIR.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 6139014

Footnotes

1 Paragraph No. 41 of the complaint contains a quotation which the plaintiff asserts erroneously is located on "page 125 of the Proxy." However, the quotation is located on page 124 of the Proxy.

2 Although the plaintiff indicates in the preliminary statement of his memorandum of law and proposed order that he seeks an award in the amount of "350,000 in attorneys' fees and expenses," that amount is inconsistent with the amount of $350,989.74, which is the sum of: (i) $350,214.90, the attorneys' fees claimed in counsel's declaration in support of the motion, which is $110.827.50 multiplied by 3.16, as requested in the memorandum of law; and (ii) $774.84, the expenses claimed in counsel's declaration in support of the motion.

End of Document