

13-2919

*In Re: Bank of America Corp.*

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In the  
United States Court of Appeals  
For the Second Circuit

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AUGUST TERM, 2015

ARGUED: AUGUST 26, 2015

DECIDED: MARCH 17, 2015

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No. 13-2919

FLANAGAN, LIEBERMAN, HOFFMAN & SWAIM,  
*Appellant,*

*v.*

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, STATE TEACHERS  
RETIREMENT SYSTEM OF OHIO,  
*Movants-Appellees,*

*v.*

PUBLIC PENSION FUNDS, THE PUBLIC PENSION FUND GROUP, STEVEN J.  
SKLAR, AS (IRA ACCOUNT BENEFICIARY), ON BEHALF OF HIMSELF AND  
ALL OTHERS SIMILARLY SITUATED, RHONDA WILSON, MICHAEL R.  
BAHNMAIER, ALMA ALVAREZ, MARK ADAMS, ELIZABETH EAGEN,  
VERNON C. DAILEY, RICHARD ADAME, ARLENE KAHN,  
PETRA CHATMAN, STICHTING PENSIOENFONDS ABP, GRANT  
MITCHELL, NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, PUBLIC  
EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, STEVE R.  
GRABER, INDIVIDUALLY AND AS ASSIGNEE OF CLAIMS OF THE SRG 2008  
TRUST, SCHWAB SP500 INDEX FUND, SCHWAB 1000 INDEX FUND,  
SCHWAB INSTITUTIONAL SELECT SP500 FUND, SCHWAB DIVIDEND

1 EQUITY FUND, SCHWAB CORE EQUITY FUND, SCHWAB PREMIER EQUITY  
2 FUND, SCHWAB FUNDAMENTAL US LARGE COMPANY INDEX FUND,  
3 SCHWAB TOTAL STOCK MARKET INDEX FUND, SCHWAB SP500 INDEX  
4 PORTFOLIO, SCHWAB MARKETTRACK GROWTH, PORTFOLIO, SCHWAB  
5 MARKETTRACK BALANCED PORTFOLIO, SCHWAB INVESTMENTS,  
6 SCHWAB CAPITAL TRUST, DR. SALOMON MELGEN, FLOR MELGEN, SFM  
7 HOLDINGS LIMITED PARTNERSHIP, INTERNATIONAL FUND  
8 MANAGEMENT S.A., DEKA INTERNATIONAL S.A. LUXEMBURG, DEKA  
9 INVESTMENT GMBH, DI, AARON KATZ, JOEL KATZ, JEREMY FINEBERG,  
10 SYLVIA WEISSMANN, PARKER FAMILY INVESTMENTS L.L.C., JEFFREY R.  
11 PARKER, THE 1997 JEFFREY R. PARKER FAMILY TRUST, DREW E. PARKER,  
12 THE 1994 DREW E. PARKER FAMILY TRUST, KEITH D. PARKER, JULIE M.  
13 SORIN, THE 1991 JEFFREY R. PARKER FAMILY TRUST, THE 1994 JULIE P.  
14 MANTELL FAMILY TRUST, MICHAEL A. PARKER, MARK D. WENDER,  
15 ELLIOT WENDER, PENINA WENDER, STANLEY L. WENDER, RAZELLE M.  
16 WENDER, JILL W. GOLDSTEIN, JERRY E. FINGER, AMBASSADOR LIFE  
17 INSURANCE COMPANY, SELECT INVESTORS EXCHANGE FUND, L.P.,  
18 RICHARD FINGER, JEF FAMILY TRUST, 1976 REAL ESTATE TRUST,  
19 WALTER FINGER, THE JERRY E. FINGER FAMILY TRUST D/T/D  
20 12/28/1989, THE JERRY E. FINGER FAMILY TRUST, LEO R. JALENAK,  
21 PEGGY E. JALENAK, KERS & Co., ROBERT GEGNAS, 198 LOCHA DRIVE,  
22 JUPITER, FL 33458-7752, STEVEN L. SHAPIRO, HARVEY M. MITNICK,  
23 NATHAN A. FRIEDMAN, BONNIE FRIEDMAN, KENNETH A. CIULLO,  
24 JOANNA CIULLO, THOMAS P. DiNAPOLI, COMPTROLLER OF THE STATE  
25 OF NEW YORK, AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE  
26 AND LOCAL RETIREMENT SYSTEMS AND AS SOLE TRUSTEE OF THE NEW  
27 YORK STATE COMMON RETIREMENT FUND, SCHWAB FINANCIAL  
28 SERVICES FUND ,  
29 *Plaintiffs-Appellees,*

30  
31 *v.*

32  
33 BANK OF AMERICA CORP., GARY A. CARLIN, NELSON CHAI, KENNETH  
34 D. LEWIS, JOHN A. THAIN, WILLIAM BARNET, III, FRANK P. BRAMBLE,  
35 SR., JOHN T. COLLINS, GARY L. COUNTRYMAN, TOMMY R. FRANKS,  
36 CHARLES K. GIFFORD, MONICA C. LOZANO, WALTER E. MASSEY,

1 THOMAS J. MAY, PATRICIA E. MITCHELL, THOMAS M. RYAN, O. TEMPLE  
2 SLOAN, JR., MEREDITH R. SPANGLER, ROBERT L. TILLMAN, JACKIE M.  
3 WARD, MERRILL LYNCH & CO., INC., NEIL A. COTTY, JOE L. PRICE,  
4 BANC OF AMERICA SECURITIES L.L.C., MERRILL LYNCH, PIERCE,  
5 FENNER & SMITH INCORPORATED, BANK OF AMERICA, J. STEELE  
6 ALPHIN, AMY WOODS BRINKLEY, BARBARA J. DESOER, LIAM E. MCGEE,  
7 TIMOTHY J. MAYOPOULOS, BRIAN T. MOYNIHAN, BRUCE L.  
8 HAMMONDS, RICHARD K. STRUTHERS, BANK OF AMERICA  
9 CORPORATION CORPORATE BENEFITS COMMITTEE DEFENDANTS, BANK  
10 OF AMERICA COMPENSATION AND BENEFITS COMMITTEE DEFENDANTS,  
11 KEITH T. BANKS, TERESA BRENNER, CAROL T. CHRIST, ARMANDO M.  
12 CODINA, VIRGIS W. COLBERT, GREGORY CURL, JOHN D. FINNEGAN,  
13 GREGORY FLEMING, FOX-PITT KELTON COCHRAN CARONIA WALLER  
14 (USA) L.L.C., J.C. FLOWERS & Co., L.L.C., JUDITH MAYHEW JONAS,  
15 PETER KRAUS, AULANA L. PETERS, JOSEPH W. PRUEHER, ANN N. REESE,  
16 MICHAEL ROSS, CHARLES O. ROSSOTTI, PETER STINGI, THOMAS K.  
17 MONTAG, BANK OF AMERICA CORPORATION, KENNETH D. DAVIS,  
18 MARTIN I. FINEBERG, KENNETH A. LEWIS, MERRILL LYNCH & Co., 4  
19 WORLD FINANCIAL CNETER, NEW YORK, NY 10080, JOSEPH L. PRICE,  
20 *Defendants-Appellees.*

21 \_\_\_\_\_  
22  
23 Appeal from the United States District Court  
24 for the Southern District of New York.  
25 No. 09 MD 2058 – P. Kevin Castel, *Judge.*

26 \_\_\_\_\_  
27  
28 Before: WALKER, JACOBS, and LIVINGSTON, *Circuit Judges.*

29 \_\_\_\_\_  
30  
31 Petitioner-appellant Flanagan, Lieberman, Hoffman & Swaim  
32 (“Flanagan”) appeals from the decision of the United States District  
33 Court for the Southern District of New York (Castel, *J.*) denying the  
34 law firm’s request for attorneys’ fees drawn from a settlement fund

1 in a consolidated securities class action. Two of the lead plaintiffs in  
2 the class action had retained Flanagan shortly before the  
3 consolidation of the action and, after the appointment of several  
4 other firms as co-lead counsel, Flanagan had continued to work as  
5 non-lead counsel. The district court held that Flanagan was not  
6 entitled to its requested fee because, contrary to the contentions of  
7 the class's lead plaintiffs, Flanagan's efforts had not provided a  
8 benefit to the class. We conclude that the district court analyzed  
9 Flanagan's request under an incorrect standard. Accordingly, we  
10 VACATE the district court's orders denying Flanagan's fee request  
11 and REMAND the case for further proceedings consistent with this  
12 opinion.

13 \_\_\_\_\_  
14  
15 KEVIN P. PARKER (Michelle M. Carreras, Evan M.  
16 Janush, Arthur Miller, *on the brief*), The Lanier  
17 Law Firm, P.C., Houston, TX, *for Appellant*.

18 \_\_\_\_\_  
19  
20 JOHN M. WALKER, JR., *Circuit Judge*:

21 Petitioner-appellant Flanagan, Lieberman, Hoffman & Swaim  
22 ("Flanagan") appeals from the decision of the United States District  
23 Court for the Southern District of New York (Castel, J.) denying the  
24 law firm's request for attorneys' fees drawn from a settlement fund  
25 in a consolidated securities class action. Two of the lead plaintiffs in

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2 consolidation of the action and, after the appointment of several  
3 other firms as co-lead counsel, Flanagan had continued to work as  
4 non-lead counsel. The district court held that Flanagan was not  
5 entitled to its requested fee because, contrary to the contentions of  
6 the class's lead plaintiffs, Flanagan's efforts had not provided a  
7 benefit to the class. We conclude that the district court analyzed  
8 Flanagan's request under an incorrect standard. Accordingly, we  
9 VACATE the district court's orders denying Flanagan's fee request  
10 and REMAND the case for further proceedings consistent with this  
11 opinion.

## 12 **BACKGROUND**

13 In April 2009, the Ohio Public Employees Retirement System  
14 and the State Teachers Retirement System of Ohio (collectively,  
15 "Ohio Lead Plaintiffs") hired Flanagan to represent them in an  
16 action against Bank of America, Merrill Lynch, and several officers  
17 and directors of the two companies. Ohio Lead Plaintiffs' action was  
18 one of twenty-eight separate securities lawsuits alleging the  
19 insufficiency of public disclosures made in connection with the  
20 companies' merger. On April 14, 2009, Flanagan and the Ohio  
21 Attorney General, acting on behalf of Ohio Lead Plaintiffs and as  
22 their statutory legal counsel, executed a retention agreement. Ohio  
23 Lead Plaintiffs also retained the law firms of Bernstein, Litowitz,

1 Berger & Grossman (“BLB&G”) and Kaplan, Fox & Kilsheimer  
2 (“Kaplan Fox”).

3 On June 30, 2009, the United States District Court for the  
4 Southern District of New York (Chin, J.) consolidated the twenty-  
5 eight separate actions into a single class action lawsuit. The district  
6 court then appointed a group of Lead Plaintiffs that included Ohio  
7 Lead Plaintiffs. The district court also appointed BLB&G; Kaplan  
8 Fox; and Kessler, Topaz Meltzer & Check as Co-Lead Counsel. All  
9 Lead Plaintiffs (including Ohio Lead Plaintiffs) had executed  
10 retainer agreements with their respective counsel (including Co-  
11 Lead Counsel and Flanagan) that included an identical fee schedule.  
12 The fee schedule capped total attorneys’ fees for the actions at a  
13 specific percentage of class recovery; the fee schedule was set forth  
14 in a grid, such that the percentage compensation was graduated  
15 according to settlement amount and status of the case at the time of  
16 resolution.

17 Flanagan’s involvement with the case continued after the  
18 appointment of Lead Plaintiffs and Co-Lead Counsel. Flanagan  
19 devoted 7,576.25 hours to the suit (for which the firm later sought  
20 \$3,417,283.75 in fees) and advanced \$12,843.28 in expenses. At the  
21 request of Co-Lead Counsel, Flanagan performed discovery work;  
22 assisted in the selection and preparation of expert witnesses; and  
23 provided analysis of legal developments, strategy, discovery

1 matters, and trial matters. Flanagan also attended all mediations,  
2 mock trials, focus groups, and trial and settlement strategy sessions.  
3 The firm, however, never filed a notice of appearance in the case.

4       Lead Plaintiffs ultimately agreed to settle their claims for  
5 \$2,425,000,000. On February 19, 2013, with the prior approval of  
6 Lead Plaintiffs, Co-Lead Counsel filed a request that "Plaintiffs'  
7 Counsel" be awarded attorneys' fees in an amount representing  
8 6.56% of the settlement fund less Plaintiffs' Counsel's expenses  
9 (amounting to \$158,549,766.46 in total fees), as well as  
10 reimbursement of \$8,082,828.32 in litigation expenses. As support  
11 for the requested percentage, Co-Lead Counsel affirmed that  
12 Plaintiffs' Counsel had expended 193,547 hours in the litigation,  
13 amounting to a lodestar value of \$88,307,135; the requested fees  
14 yielded a multiplier of 1.8 on the lodestar. The fee request explicitly  
15 defined "Plaintiffs' Counsel" to include Flanagan. The request also  
16 included Flanagan's hours and expenses in its hour and expense  
17 totals.

18       On April 5, 2013, the district court (Castel, J.) conducted a  
19 hearing on the fee request. Max Berger, an attorney from BLB&G  
20 who represented Co-Lead Counsel, confirmed that "all five lead  
21 plaintiffs have approved the fee request" and that "the request was  
22 authorized under the fee grid in the retainer agreements entered into  
23 in this action with the lead plaintiffs." App. 167. Berger told the

1 district court that “lead plaintiff’s counsel functioned exceedingly  
2 well together . . . [a]nd everybody contributed materially to the  
3 litigation.” App. 172. After the district court questioned Flanagan’s  
4 entitlement to any fee, Berger defended Flanagan’s specific  
5 contributions.

6 The district court denied the portion of the fee request  
7 pertaining to Flanagan’s fees and expenses. The district court noted  
8 that it was not contesting that Flanagan may have done “valuable  
9 work” in the litigation and explicitly declined to challenge  
10 Flanagan’s claims regarding the quantity and nature of that work.  
11 The district court, however, concluded that Flanagan’s efforts had  
12 not provided a benefit to the class. In doing so, the district court  
13 emphasized that (a) Flanagan had never been appointed class  
14 counsel, (b) Flanagan had not filed a notice of appearance in the  
15 case, and (c) Ohio Lead Plaintiffs did not mention Flanagan in  
16 declarations they submitted in support of the fee request. The  
17 district court also ordered that Co-Lead Counsel could not share any  
18 portion of their own fees with Flanagan without permission from  
19 the court.

20 On April 8, 2013, the district court entered an order that  
21 awarded Co-Lead Counsel attorneys’ fees in the amount of  
22 \$152,414,235.89, plus interest, and litigation expenses in the amount  
23 of \$8,069,985.04. The order reiterated that Co-Lead Counsel could

1 not share their award “with any person not associated with Co-Lead  
2 Counsel’s law firms, absent an order from the Court.” App. 201.

3 On April 11, 2013, the district court entered a further order  
4 denying any fee award or reimbursement to Flanagan. Citing *Victor*  
5 *v. Argent Classic Convertible Arbitrage Fund L.P.*, which held non-lead  
6 counsel entitled to reasonable attorneys’ fees for work completed  
7 prior to the appointment of a lead plaintiff if such work conferred “a  
8 substantial benefit to the class,” 623 F.3d 82, 87 (2d Cir. 2010), the  
9 district court explained that Flanagan was not entitled to its fee  
10 because “th[e] record does not establish that services rendered by  
11 [Flanagan] were for the benefit of the class.” App. 207-209.

12 On July 3, 2013, the district court denied Flanagan’s motion  
13 for reconsideration, noting that “while [Flanagan] undoubtedly did  
14 work pertaining to the litigation, it has not identified any  
15 meaningful contribution that was not covered by lead counsel.”  
16 App. 255. On August 1, 2013, Flanagan filed a notice of appeal from  
17 the district court’s April 8, April 11, and July 3 orders.

## 18 DISCUSSION

19 The Second Circuit reviews a district court’s decision to grant  
20 or deny an award of attorneys’ fees for abuse of discretion,  
21 reviewing de novo any rulings of law. *Union of Needletrades, Indus. &*  
22 *Textile Emps. AFL-CIO, CLC v. INS*, 336 F.3d 200, 203 (2d Cir. 2003).  
23 Here, Flanagan argues that the district court made an error of law

1 when it applied *Victor* and rejected Lead Plaintiffs' contentions that  
2 Flanagan's contributions to the class entitled the firm to its  
3 requested fee. Flanagan argues that the proper standard for  
4 assessing Flanagan's fee application is not the "substantial benefit"  
5 test outlined in *Victor* but rather a standard of deference to lead  
6 plaintiffs, as outlined by the Third Circuit in *In re Cendant*  
7 *Corporation Securities Litigation*, 404 F.3d 173, 199 (3d Cir. 2005)  
8 ("*Cendant II*"). Since the firm's fee request was based on work  
9 completed after the appointment of lead plaintiff and *Victor* only  
10 defines the standard for requests based on non-lead counsel's work  
11 prior to such appointment, Flanagan argues that the Second Circuit  
12 should apply *Cendant II*'s analytical framework. We decline to adopt  
13 a categorical reading of *Victor* to the effect that its standard is only  
14 relevant for work done before the appointment of a lead plaintiff.  
15 Under the circumstances presented in this case, however, we agree  
16 that the district court should have applied a standard of deference to  
17 lead plaintiff's determination.

18 **I. The *Victor* Standard**

19 Under the "common fund doctrine," attorneys whose work  
20 produces a common fund benefitting a group of plaintiffs may  
21 receive reasonable attorneys' fees from that fund. *Victor*, 623 F.3d at  
22 86. This doctrine frequently applies in the context of a class action  
23 lawsuit. *Id.*

1 Under the Private Securities Litigation Reform Act of 1995  
2 (“PSLRA”), 15 U.S.C. § 78u-4, the district court appoints the lead  
3 plaintiff of a class action and that plaintiff, in turn, selects lead  
4 counsel, subject to approval of the court. 15 U.S.C. §§ 78u-  
5 4(a)(3)(B)(i), 78u-4(a)(3)(B)(v). The district court then acts “as a  
6 fiduciary who must serve as a guardian of the rights of absent class  
7 members.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir.  
8 2000) (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d  
9 Cir. 1997); see *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 221  
10 (2d Cir. 1987) (acknowledging “the court’s role as guardian of class  
11 rights in relation to settlement review”). Congress enacted the  
12 PSLRA to reduce the frequency of meritless and abusive securities  
13 lawsuits. See *Amgen Inc. v. CT Ret. Plans & Trust Funds*, 133 S. Ct.  
14 1184, 1200 (2013); *Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp.,*  
15 *Inc.*, 186 F.3d 157, 166-67 (2d Cir. 1999). Among the PSLRA’s  
16 provisions designed to mitigate abusive lawsuits are limitations on  
17 attorneys’ fees. 15 U.S.C. § 78u-4(a)(6); see *Amgen Inc.*, 133 S. Ct. at  
18 1200.

19 In *Victor*, the Second Circuit set forth certain standards for  
20 allocating attorneys’ fees to non-lead counsel under the PSLRA.  
21 *Victor*, 623 F.3d at 86-7. *Victor* held, as noted above, that non-lead  
22 counsel are entitled to reasonable attorneys’ fees for work completed  
23 prior to the appointment of a lead plaintiff if such work conferred “a

1 substantial benefit on the class.” *Id.* at 86. *Victor*, however, did not  
2 address the framework for analyzing a fee request from non-lead  
3 counsel for work completed after the appointment of lead plaintiff,  
4 nor the narrower question presented by this case of what framework  
5 should apply when that request is part of a general fee allocation  
6 that complies with an *ex ante* agreed-upon percentage-of-the-fund  
7 cap.

## 8 II. The *Cendant II* Standard

9 In *Cendant II*, the Third Circuit held that the district court  
10 must afford a “presumption of correctness” to a lead plaintiff’s  
11 decision not to award fees to non-lead counsel for its work  
12 performed after lead plaintiff’s appointment. 404 F.3d at 199. In  
13 reaching this determination, the Third Circuit relied broadly on the  
14 proposition that, whereas courts bear the responsibility for  
15 determining non-lead counsel’s fees for work performed prior to the  
16 appointment of lead plaintiff, post-appointment “the primary  
17 responsibility for compensation shifts from the court to that lead  
18 plaintiff.” *Id.* at 197. There are important distinctions between  
19 *Cendant II* and the present case – in particular that Flanagan asks us  
20 to afford a presumption of correctness to lead plaintiff’s decision to  
21 award fees rather than to deny such fees. Nevertheless, we agree  
22 that *Cendant II*’s presumption of correctness, rather than *Victor*’s  
23 “substantial benefit” test, properly applies in the circumstances here,

1 where a fee request emanates from non-lead counsel for work  
2 completed after lead plaintiff's appointment and lead plaintiffs  
3 advocate for non-lead counsel to receive a portion of a previously-  
4 capped percentage-of-the-fund award.

5 *Cendant II's* approach recognizes that lead plaintiffs and their  
6 counsel are better positioned than the court to "determine how  
7 much non-lead counsel's efforts, as opposed to lead counsel's  
8 independent work, contributed to the final work product" and to  
9 "attach a dollar value to that contribution." *Id.* at 201 n.17; *see Victor*,  
10 623 F.3d at 90 ("[L]ead counsel is typically well-positioned to weigh  
11 the relative merit of other counsel's contributions . . ."). *Cendant II's*  
12 approach also aligns with the PSLRA's conception of the lead  
13 plaintiff as the driver of and decisionmaker for the class action. *See*  
14 *Cendant II*, 404 F.3d at 197 (noting the responsibility the PSLRA  
15 places on the lead plaintiff to select and retain representation for the  
16 entire class); *see also* S. Rep. No. 104-98, at 10 (1995) (explaining that  
17 the lead plaintiff "should drive the litigation").

18 To be sure, the circumstances of this case are different from  
19 those in *Cendant II* because *Cendant II* involved a lead plaintiff's  
20 contention that non-lead counsel was not entitled to fees. *Id.* We  
21 adopt the standard articulated in *Cendant II* in the circumstances of  
22 this case (where lead plaintiffs and lead counsel seek to compensate  
23 other counsel as part of a capped percentage-of-the-fund recovery).

1 We need not decide whether that standard applies in this Circuit  
2 under the circumstances presented in Cendant II (where class  
3 representatives and class counsel argue that other counsel is not  
4 entitled to fees that, if paid, would diminish class members'  
5 recovery) or under any other post-appointment circumstances (for  
6 example, where lead plaintiffs and counsel advocate payment of fees  
7 to other counsel that would be expected to reduce payments to class  
8 members; or where they seek to deny fees to other counsel and those  
9 fees would come out of class counsel's pockets).<sup>1</sup>

10 Here, Lead Plaintiffs and Lead Counsel argued that  
11 Flanagan's contributions merited the fee denied by the district court.  
12 A lead plaintiff is unlikely to argue in favor of a fee award to an  
13 undeserving attorney, given that the fee award reduces the lead  
14 plaintiff's recovery.

15 Moreover, Lead Plaintiffs and Co-Lead Counsel included  
16 Flanagan in a request for a capped percentage of class recovery –  
17 one to which all Lead Plaintiffs and all counsel had agreed *ex ante*.  
18 Had Flanagan (and its hours of work) not been included in such

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<sup>1</sup> We expressly reject *Cendant II*'s suggestion that one reason for deferring to the discretion of lead plaintiffs and lead class counsel is that they will often be "repeat players in the securities class action business" and will therefore seek to "maintain good relations with the rest of the securities plaintiffs' bar." *Cendant II*, 404 F.3d at 199. This seems to be backwards. These considerations should not bear upon the decisions of a fiduciary and invite corruption.

1 request, it seems highly likely that Co-Lead Counsel would have  
2 applied for the same 6.56% of the settlement fund, in accordance  
3 with the retainer agreements. The lodestar multiplier used as a  
4 check on the percentage recovery would have been slightly higher,  
5 but Co-Lead Counsel presumably would have expected the district  
6 court to award the requested fee nonetheless given the relatively low  
7 overall percentage and the result obtained for the class. In these  
8 circumstances, the request that a portion of the percentage be  
9 awarded to Flanagan is best viewed as one that was expected to  
10 diminish *Co-Lead Counsel's* recovery, as opposed to that of class  
11 members. It is therefore unlikely that Co-Lead Counsel would have  
12 argued in favor of this fee award had Flanagan been underserving.<sup>2</sup>  
13 Furthermore, lead plaintiffs and lead counsel are also bound by a  
14 fiduciary duty to the class and would breach that duty by arguing  
15 that the class's recovery should be reduced by undeserved  
16 attorneys' fees.

17 The presumption of correctness is also rebuttable. We agree  
18 with *Cendant II* that even when the presumption of correctness

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<sup>2</sup> Because the district court excised the portion of the percentage fee request that it attributed to Flanagan, an award to Flanagan at this juncture would effectively diminish class recovery vis-à-vis the result of the district court's orders, but this should be disregarded because the expectations of lead counsel and lead plaintiffs at the time the request was made matter in determining whether deference to that request was appropriate.

1 applies, it may be refuted through a prima facie showing that the  
2 proposed fee is either procedurally improper, because the lead  
3 plaintiff (a) breached fiduciary duties by proposing an allocation  
4 motivated by an interest other than the best interest of the class or  
5 (b) breached fiduciary duties by failing to “carefully consider and  
6 reasonably investigate” non-lead counsel’s fee request, or that the  
7 proposed fee allocation is substantively improper because it was  
8 clearly excessive in light of the actual contributions and reasonable  
9 expectations of non-lead counsel. *Id.* at 200. As to the latter  
10 question—whether the fee is clearly excessive—we note that the  
11 common-fund inquiry from *Victor*, whether non-lead counsel  
12 conferred “a substantial benefit on the class,” *Victor*, 623 F.3d at 87,  
13 remains highly relevant. Further, we note in passing that failure to  
14 file a notice of appearance can indeed be relevant to this latter  
15 inquiry: the filing of a notice of appearance serves to keep a district  
16 court apprised of which counsel are contributing to the litigation of a  
17 class action suit, which in turn facilitates the court as serving as a  
18 “guardian of class rights.” *In re “Agent Orange,”* 818 F.2d at 221.

19 We further highlight an important distinction between  
20 *Cendant II* and this case that bears on the process of rebutting a  
21 presumption of correctness. In *Cendant II*, in which lead plaintiffs  
22 sought to *deny* a fee award to non-lead counsel, non-lead counsel  
23 served as a natural party to seek to rebut the presumption: thus, the

1 adversarial process could serve to protect the interests of the class  
2 and ensure that fee awards reflected the contribution of the relevant  
3 parties. In contrast, in this case, where non-lead counsel, lead  
4 counsel, and lead plaintiffs all seek the same outcome, there is no  
5 natural party with incentive to make a prima facie showing  
6 rebutting the presumption of correctness.

7 In *Cendant I*, the Third Circuit addressed a similar situation,  
8 noting that “there is an arguable tension between the presumption  
9 of reasonableness accorded the arrangement between the Lead  
10 Plaintiff and properly selected counsel and the duty imposed on the  
11 Court by the Reform Act, 15 U.S.C. § 78u-4, to insure ‘[t]hat total  
12 attorneys’ fees and expenses awarded by the court to counsel for the  
13 plaintiff class shall not exceed a reasonable percentage of the  
14 amount of any damages and prejudgment interest actually paid to  
15 the class.’” *In re Cendant Corp. Litig.*, 264 F.3d 201, 283 (3d Cir. 2001)  
16 (“*Cendant I*”).

17 In light of this tension, we observe that the district court must  
18 be mindful that it must act “as a guardian of the rights of absent  
19 class members,” *Goldberger*, 209 F.3d at 52, in assessing whether a  
20 presumption of correctness has been properly refuted and then, if  
21 indeed it has, determining on its own the appropriate fee allocation.  
22 That role may require more where, as here, no natural party may

1 step forward seeking to rebut a presumption of correctness or argue  
2 against a fee allocation.

3 In this case, the district court should have afforded a  
4 rebuttable presumption of correctness to Lead Plaintiffs' proposed  
5 allocation of fees to Flanagan. Lead Plaintiffs consistently  
6 maintained, in submissions before the court and through statements  
7 made by Co-Lead Counsel, that Flanagan's fee was reasonable both  
8 with respect to the amount of work done and in light of the firm's  
9 overall contribution to the class. While the district court is still  
10 tasked with overseeing the compensation decisions of Lead  
11 Plaintiffs, those decisions were nonetheless entitled to greater  
12 deference than they received.

### 13 **III. Sharing Prohibition**

14 We are also troubled by the district court's order prohibiting  
15 Co-Lead Counsel from sharing their fees with Flanagan. While we  
16 appreciate the district court's understanding of its role as guardian  
17 of class rights, we note that if Lead Counsel were to share with  
18 Flanagan a portion of their own awarded fee, such an arrangement  
19 would not reduce class recovery at all. Where, as here, there has  
20 been no suggestion of corruption or collusion by class counsel, we  
21 can see no reason to interfere in any decision Co-Lead Counsel  
22 might make to share their own portion of fees with a law firm that  
23 produced work at Co-Lead Counsel's behest.

