

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Pro Shares Trust Securities  
Litigation

09 Civ. 6935 (JGK)

MEMORANDUM OPINION  
AND ORDER

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**JOHN G. KOELTL, District Judge:**

The plaintiffs in this action sought to represent a class of investors who purchased shares in exchange traded funds ("ETFs"). They brought suit against various defendants, alleging violations of the Securities Act of 1933 and breach of contract. In an Opinion and Order dated September 7, 2012, this Court granted the defendants' motion to dismiss. See In re ProShares Trust Secs. Litig., 889 F. Supp. 2d 644 (S.D.N.Y. 2012), aff'd, 728 F.3d 96 (2d Cir. 2013).

The defendants now move pursuant to Section 11(e) of the Securities Act of 1933 for an award of reasonable attorneys' fees and costs in defending the action. This Court has the discretion under Section 11(e) of the Securities Act to award reasonable attorneys' fees and costs to a party litigant if the original suit was without merit. See 15 U.S.C. § 77k(e). The Court of Appeals for the Second Circuit has construed the term "without merit" to mean claims that were "brought in bad faith or at best bordered on the frivolous." Healey v. Chelsea Res.

Ltd., 947 F.2d 611, 622 (2d Cir. 1991) (citation omitted).

Although the plaintiffs were unsuccessful in their suit, there is no basis to conclude that their claims were brought in bad faith or were frivolous. Both this Court and the Court of Appeals rejected the plaintiffs' claims only after a careful analysis, and nothing in those opinions indicates that the claims were brought in bad faith or were frivolous.

#### CONCLUSION

The defendants' motion for an award of attorneys' fees is **denied**. The plaintiffs have requested leave to file a surreply brief in connection with this motion. This request is **denied as moot**. The Clerk is directed to **close Docket Nos. 213 and 226**.

**SO ORDERED.**

**Dated: New York, New York  
March 5, 2014**

\_\_\_\_\_/s/\_\_\_\_\_  
**John G. Koeltl**  
**United States District Judge**