UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND BIOLABS, INC.,

Plaintiff and Counterclaim Defendant,

v.

RALPH T. MILLER,

Defendant and Counterclaim Plaintiff

RALPH T. MILLER

Third-Party Plaintiff,

v.

COMMITTEE OF NEW ENGLAND BIOLABS, INC. EMPLOYEES' STOCK OWNERSHIP PLAN, PERSONAL REPRESENTATIVE OF DONALD COMB, JAMES V. ELLARD, RICHARD IRELAND, and BRIAN TINGER,

Third Party Defendants,

and

NEW ENGLAND BIOLABS, INC. EMPLOYEE STOCK OWNERSHIP PLAN & TRUST

Nominal Defendant

Case No. 1:20-cv-11234-RGS

DEFENDANT, COUNTERCLAIM PLAINTIFF, AND THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES EXPENSES & COSTS

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Exhibit 2: Excerpts of the deposition of Miller taken October 15, 2021.

Exhibit 3: Excerpts of the deposition of Third Party Defendant James Ellard ("Ellard") taken October 21, 2021.

Exhibit 4: Excerpts of the deposition of Third Party Defendant Brian Tinger ("Tinger") taken October 5, 2021.

Exhibit 5: Confidential Mutual Settlement Agreement between Miller, New England Biolabs, Inc., Ellard, Third Party Defendant Richard Ireland, Tinger, the Personal Representative of Donald Comb and the New England Biolabs, Inc. Employees' Stock Ownership Plan dated October 21, 2022 (filed under seal).

Exhibit 6: Valuation of Cell Signaling Technology, Inc. as of December 31, 2016, produced by the NEB Parties in this litigation and bearing Bates number NEB0000019 (filed under seal).

Exhibit 7: Valuation of New England Biolabs, Inc. as of September 30, 2020, produced by the NEB Parties in this litigation and bearing Bates number NEB0000829 (filed under seal).

Exhibit 8: Chubb Fiduciary Policy No. 8209-0708 (filed under seal);

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Exhibit 10: Summary of fees prepared by Steptoe & Johnson LLP in connection with *Goldman v. Barrent*, Case No. Case 1:15-cv-09223-PGG (SDNY) and dated September 10, 2018.

Exhibit 11: Excerpts of the deposition of Third Party Robert S. Kamanitz ("Kamanitz") taken October 19, 2021.

INTRODUCTION

This litigation began when New England Biolabs, Inc. ("NEB") sued Ralph Miller under the Employee Retirement Income Security Act ("ERISA"). Miller worked as a clerical employee at NEB for 17 years. NEB alleged that the New England Biolabs, Inc. Employees' Stock Ownership Plan & Trust (the "Plan") had overpaid Miller by $164,000, although Miller had received the amount (calculated by NEB) reflected on his last Plan statement. NEB sued Miller shortly after he contacted the Department of Labor ("DOL") to inquire whether NEB's decision to liquidate his Plan account was proper.

Miller filed a counterclaim and third-party complaint alleging that he and other Plan participants had been *underpaid* for their stock in the Plan when their accounts were liquidated. Miller also alleged the Plan's fiduciaries breached their duties, made misleading disclosures, and unlawfully retaliated against him for contacting the DOL. After surviving the attempt by NEB and other fiduciaries to dismiss his counterclaims and third-party claims, Miller engaged in fact discovery, hired an expert and took four fact depositions. After Miller disclosed his valuation expert's report, the Parties engaged in settlement discussions that resulted in a settlement that provides 49% of what Miller's expert calculated as their losses and which will provide on average about $11,000 per participant. Unlike most class settlements, no fees will be paid out of the Class Settlement (just out-of-pocket expenses). In addition, Miller achieved total victory as NEB's claim against him will be dismissed with prejudice and he [redacted]

Class Counsel expended significant time prosecuting this action and securing a settlement for the Class, as well as defending Miller from NEB's claims. As part of the settlement, the Parties agreed that the amount of any attorneys' fees to be paid (whether for the Class claim or

defending Miller) and any expenses not awarded out of the Class Settlement would be decided by the Court. After eliminating certain hours, Miller seeks an award of $992,989.25 for 850.1 hours and reimbursement of $150,442.64 in expenses that related to defending Miller against NEB's claims.

There are two independent bases for awarding fees (and costs) to Miller. First, having recovered a significant amount for the Class and for defeating NEB's claim against him, Miller is entitled to fees under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). Second, Miller is entitled to fees and expenses from NEB and its insurer who were obligated to pay for his defense because the Court accepted NEB's argument that Miller was a fiduciary under the Plan. *New England Biolabs, Inc. v. Miller*, 2020 WL 6871015, at *5 (D. Mass. Nov. 23, 2020). As a result, both NEB and its insurer became obligated to indemnify him and pay for his defense. The insurer initially agreed to pay some fees and expenses that Miller incurred in defense of NEB's claim.

Miller achieved total victory on the claims asserted by NEB against him. NEB never should have sued him for a purported mistaken calculation that was the responsibility of the Plan fiduciaries. NEB's suit was likely motivated by Miller's inquiry to the DOL. As to the Class claim, Miller's counsel has obtained a settlement for the class that will provide 49% of their losses (based on the analysis by Miller's expert) without any deduction of legal fees. This is an exceptional result. To achieve that recovery, Miller's counsel expended significant time and out-of-pocket expenses (primarily on a valuation expert). Proportionality between the recovery to the client and the legal fees and expenses sought is not a factor under a statutory fee award. Statutory fee statutes are designed to incentivize lawyers to vindicate rights where the monetary amount is far smaller than the cost to litigate the case. Given the results achieved and the efforts required to achieve them, the amount sought by Miller is reasonable and should be awarded in full.

BACKGROUND

Miller worked in a clerical role for NEB for 17 years until he retired on September 29, 2017. ECF No. 124 at ¶ 1 ("ACC"). During his employment, he participated and vested in the Plan. *Id*. Since 2013, the Plan's assets (and the participants' accounts) have consisted of NEB stock, Cell Signaling Technology, Inc. ("CST") stock, and mutual funds. *Id*. at ¶ 31.

The summary plan descriptions ("SPDs") issued by NEB to participants consistently stated that NEB had an obligation to repurchase "Company Stock" when an employee left NEB. The Plan defined "Company Stock" to include CST stock. *Id*. at ¶ 102. Count I alleged that the SPD was inaccurate because under the terms of the Plan, NEB was not required to repurchase CST stock. *Id*. at ¶ 103. The valuations of CST stock used by Plan's fiduciaries to determine the dollar value of CST stock never considered this repurchase obligation. Kamanitz Dep. at 104:11-14, 178:9-15. But a repurchase obligation made CST stock more liquid and increased the stock value. Downes Decl. Ex. 1 at ¶¶ 249-51.[1]

In August 2019, Miller learned that NEB intended to force the liquidation of his Plan accounts using a year-old valuation. Miller Dep. at 94:22-98:5. Miller contacted DOL about "[his] options." *Id*. at 38:22. Miller's shares of NEB and CST stock were liquidated and he received $783,823.39 –the amount shown on his 2018 account statement. *Id*. at 94:22-98:5. After learning that Miller had contacted the DOL, NEB's CEO James Ellard and Brian Tinger (both Plan fiduciaries) called Miller. Ellard threatened to hire a lawyer to take away two years of contributions out of Miller's Plan account. *Id.* at 36:15-38:15. NEB then demanded Miller repay

[1] The SPDs also misstated the date on which CST stock was valued. The 2003 SPD defined the valuation date for such stock as September 30 of each year. *Id*. at ¶ 97. But the stock was valued as of December 31 each year. *Id*. at ¶ 101. While the 2019 SPD stated that the valuation date for CST stock was December 31 of each year, this misstated the terms of the Plan Document it purported to summarize, which still provided for a valuation date of September 30. *Id*. at ¶ 100.

$164,580 by asserting the Plan had overpaid Miller, threatening to report the "overpayment" to tax authorities. *Id*. at 139:24-140:10. At their depositions, neither Ellard nor Tinger contradicted Miller's account of their retaliatory threats. Tinger Dep. 203:9-23; Ellard Dep. 121:19-122:4.

NEB sued Miller seeking payment of $164,580.17 (which equated to the increase in value since Miller had retired) by asserting the Plan had overpaid him. ECF No. 1. Miller brought counterclaims and third-party claims against NEB and other fiduciaries of the Plan: Brian Tinger, Richard Ireland, James Ellard, and the late Donald Comb (together with NEB, the "NEB Parties"). ECF Nos. 59, 73. The parties litigated cross motions to dismiss and a motion by Miller to amend his pleadings. ECF Nos. 24, 45, 78, 79, 102. In the summer of 2021, Miller's counsel engaged a valuation expert to review the valuation of CST and NEB stock. ECF No. 191-2 ¶ 8. The Amended Counterclaim, including the Class claim, were based on this expert's analysis. *Id*. In addition, Miller had individual ERISA claims against NEB and the other NEB Parties for breaches of fiduciary duties and unlawful retaliation. ECF No. 73 at ¶¶ 104-27. These claims overlapped with Millers' defenses to NEB's claim against him for alleged overpayment. ECF No. 53 at ¶¶ 41-54.

Miller' counsel engaged in significant discovery. Miller served 35 RFPs, four nonparty subpoenas, and 27 interrogatories, resulting in production of over 4,700 pages of documents. ECF No. 182 at ¶ 2. In October and November 2021, Miller's counsel took the four depositions allowed by the Court: Third Party Defendants Tinger and Ellard, Jeffrey Dunn (who was hired by NEB to value NEB stock) and Robert Kamanitz (who valued CST stock). *Id*. at ¶ 2. After completing the necessary discovery, Miller moved for class certification. ECF Nos. 144, 146. In early December 2021, consistent with the deadline in the Scheduling Order, Class Counsel timely disclosed their valuation expert's report to the NEB Parties.. ECF No. 191-2 ¶ 8.

The parties engaged in mediation and extended negotiations, with the first settlement conference with Magistrate Judge Dein on December 13, 2021, and the last on October 14, 2022. ECF No. 180-2 at ¶ 5. These hard-fought negotiations culminated in a term sheet on July 1, 2022, and Settlement Agreements on October 21, 2022. *Id.* As the parties did not reach agreement on attorneys' fees, the Settlements – the class settlement a[redacted] provides that Class Counsel will seek their fees from NEB, separately from the Settlement fund. ECF No. 180-3 at § VII(3); [redacted] The Court certified the Class and granted preliminary approval of the Settlement on October 26, 2022. ECF No. 185.

ARGUMENT

I. Miller Is Entitled to Fees and Costs Under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1)

A. Miller achieved More Than "Some Success on the Merits"

Under ERISA § 502(g)(1), a litigant need not be a "prevailing party" to be awarded attorneys' fees. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010) (rejecting a prevailing party standard). Instead, a litigant may receive an attorneys' fees award "if the court can fairly call the outcome of the litigation some success on the merits…" *Id.* at 255. As illustrated by *Hardt*, "some success on the merits" is a low bar and is satisfied by an order of remand to the ERISA fiduciary. *Id.; Gross v. Sun Life Assur. Co. of Can.*, 763 F.3d 73, 79 (1st Cir. 2014) (finding award of fees appropriate where only relief was remand). "A plaintiff is entitled to attorney fees under this [ERISA] standard when they obtain relief through a voluntary settlement with the defendant." *Glover v. Hartford Life & Accident Ins. Co.*, 2022 WL 2987130, at *3 (D.N.H. July 28, 2022); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (finding fact that a party "prevailed through a settlement rather than litigation does not weaken her claim to fees.").

1. Miller Achieved Some Success on the Merits for the Class Claim

Miller secured a class settlement that averages $11,000 per plan participant and nearly 49% of the total losses calculated based on the opinion of Miller's valuation expert under Count I of the Amended Counterclaim a total loss of approximately $1,531,287.00. The $750,000.00 Settlement Fund constitutes about 48.98% recovery on that claim. ECF No. 180-2 at ¶ 6. As this Court found, this represents "substantial relief to the Class." ECF No. 185 at ¶ 12; *Templin v. Indep. Blue Cross*, 785 F.3d 861, 866 n.2 (3d Cir. 2015) (reversing district court's holding that recovery of $68,000 on asserted claim of $1.5 million was trivial). This is far more substantial relief than a remand for reconsideration of a benefits claim that this Circuit has held constitutes some degree of success on the merits to support an attorney fee award. *Gross*, 763 F.3d at 79.

2. Miller Achieved Complete Success on NEB's Claim Against Him

When a party settles for the full amount that it sought, that "easily" qualifies as "some degree of success on the merits." *Templin*, 785 F.3d at 867 (finding award of fees justified where party obtained by settlement the full amount they sought). As to his defense of NEB's claims that he was overpaid, Miller achieved *complete* success: under the terms of the [redacted]

B. The Five Factors Also Support an Award of Attorneys' Fees & Costs

Prior to *Hardt*, this Circuit, like most other Circuits, developed the following five-factors to evaluate whether a party should be awarded fees:

> (1) the degree of culpability or bad faith attributable to the losing party; (2) the depth of the losing party's pocket, i.e., his or her capacity to pay an award; (3) the extent (if at all) to which such an award would deter other persons acting under similar circumstances; (4) the benefit (if any) that the successful suit confers on plan participants or beneficiaries generally; and (5) the relative merit of the parties' positions.

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 225 (1st Cir. 1996). In *Hardt*, the Supreme Court explained that because "these five factors bear no obvious relation to § 1132(g)(1)' s text or to our fee-shifting jurisprudence, they are not required for channeling a court's discretion when awarding fees under [ERISA § 502(g)]." *Hardt*, 560 U.S. at 255; *see Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 110 (2d Cir. 2011) (concluding after *Hardt* that a "court may apply—but is not required to apply—the [five] factors in determining whether to award fees "under § 1132(g)(1)"). Whether required or discretionary, not every single factor must be considered and "[n]o single factor is decisive." *Gross*, 763 F.3d at 83; *Glover*, 2022 WL 2987130, at *7 (awarding fees where only the second and fifth factors favored an award). Here, all five factors support an award.

1. NEB Was Culpable and Acted in Bad Faith.

To obtain an award of fees and costs under ERISA, a party need not show the opposing party acted in bad faith or even "a high degree of culpability." *Gross*, 763 F.3d at 83. Showing that the party breached its duties or violated ERISA suffices. *Id.* (finding insurer did not act consistent with its fiduciary duties in evaluating claim); *Urso v. Prudential Ins. Co. of Am.*, 557 F.Supp.2d 208, 215 (D.N.H. 2008) (same); *Severstal Wheeling, Inc. v. WPN Corp.*, No. 10-CIV-954-LTSGWG, 2016 WL 1611501, at *2 (S.D.N.Y. Apr. 21, 2016) (citing *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 48 (2d Cir. 2009)).

NEB initiated this lawsuit against Miller in bad faith. Mr. Ellard and Mr. Tinger did not contest that they telephoned Miller and threatened him after he sought assistance from DOL. Miller Dep. 36:15-38:15, 38:22, 139:24-140:10; Tinger Dep. 203:9-23; Ellard Dep. 121:19-122:4. The closeness in time between Miller's contact with the DOL and the threats supports the inference that both they and the litigation they threatened were retaliatory. *Scalia v. F.W. Webb Co.*, No. 20-CV-11450-ADB, 2021 WL 1565508, at *5 (D. Mass. Apr. 21, 2021) (holding

proximity in time between employees speaking to DOL officials and threatening emails established prima facie case of retaliation); *Dister v. Cont'l Grp., Inc.*, 859 F.2d 1108, 1115 (2d Cir. 1988) (holding four months period between termination and entitlement to benefits gave rise to inference of retaliation under ERISA).

The data produced by NEB proves this point. Other participants remained in the Plan after their mandatory exit date but received a price for the stock in their Plan accounts based on the current valuation, rather than the stale valuation the Plan paid Miller. Downes Decl. ¶ 2. NEB did not take the position these other participants had been overpaid until 2021, the initiation of this lawsuit. That NEB "deviated inexplicably from one of its standard business practices" shows that its asserted basis for this suit was pretextual. *Kouvchinov v. Parametric Tech. Corp.*, 537 F.3d 62, 68 (1st Cir. 2008). These facts support an inference that NEB acted in bad faith for the purpose of retaliating against Miller for asking the DOL about his rights under the Plan. ECF No. 124 at ¶¶ 125-31, This factor thus supports an award of attorneys' fees.

NEB was culpable as to the Class claim. The SPDs conflicted with the Plan terms by erroneously describing CST stock as "Company stock" and promising a "put option" on CST stock. *Compare* ECF No. 107-3 at 4 *with* ECF No. 20-1 at § 2.6. NEB admitted that CST has not been a related employer of NEB since October 2, 2001. ECF No. 134 at ¶ 103. The promise of a put option materially increases the value of CST stock held by Plan participants because the appraiser – who was ignorant of the terms of the Plan or the put option – applied a ■% discount for lack of marketability to CST. Downes Decl. Ex. 6 at 31, 37; Kamanitz Dep.at 104:11-14, 178:9-15. The appraiser of CST stock acknowledged a put option would have decreased that discount. Kamanitz Dep. at 82:4-7. Miller's expert opined that with the put option, the discount

for lack of marketability would have only been [redacted]%, Ex. 1 at ¶¶ 249-51. In the aggregate, Class members were underpaid by $1,531,287.00 for CST stock. ECF No. 180-2 at ¶ 6.

This failure to properly account for the value of a put option on CST stock was not the result of some technical mistake in applying ERISA's rules. The CST valuation that was used by the NEB fiduciaries was only supposed to be [redacted] Downes Decl. Ex. 6 at 1. As a result, the appraiser never reviewed any document about the NEB Plan and never authorized the use of the CST valuation reports for ESOP purposes. Kamanitz Dep. at 169:7-172:4. That also explains why the appraiser valued the CST stock as of a different date ([redacted]) than the date in the SPD (Sept. 30). *Compare*, Ex. 6 at 1 *with* ECF No. 107-3 at 5. Kamanitz Dep. 172:13-173:5. Relying on valuation reports using the wrong date and a different purpose to disregards basic standards of plan administration and culpability.

2. NEB Has Ample Ability to Pay an Award.

An inability to afford attorneys' fees may counsel against an award, but the capacity to pay, by itself, does not justify an award. *Cottrill*, 100 F.3d at 227. The First Circuit uses common sense to assess ability to pay. *Gross*, 763 F.3d at 84 (finding insurance company not claiming financial hardship had ability to pay). Here, the parties agree that NEB will satisfy any award. VII(3); [redacted] NEB has the ability to pay an award of $992,989.25 as its recent valuation report produced to Miller showed that NEB had gross profits in 2020 fiscal year of approximately $[redacted] million. Downes Decl. Ex. 7 at NEB0000848.

3. An Award Would Deter Similar Conduct by Plan Fiduciaries.

This factor "recognize[s] the value of motivating fiduciaries to comply more attentively with their obligations under ERISA." *Hatfield v. Blue Cross & Blue Shield of Mass., Inc.*, 162

F.Supp.3d 24, 45 (D. Mass. 2016) (citing *Gross* to find deterrent effect of motivating fiduciaries to comply with ERISA supported award of fees); *Vescom Corp. v. Merrion Reinsurance Co.*, 283 F.Supp.2d 304, 307 (D. Me. 2003) (holding award of attorneys' fees under ERISA would deter companies from violating fiduciary duties). Here, an award of fees will serve two deterrent purposes: First, it will deter fiduciaries from engaging in retaliatory conduct when participants seek to protect their rights, such as by contacting the DOL. Second, it will encourage fiduciaries to provide accurate ERISA plan disclosures and to advise participants about important facts relevant to the value of their benefits.

4. The Suit Confers a Substantial Benefit on Other Plan Participants.

This factor is satisfied even when there is no immediate or direct benefit to others. *E.g. MacNaughton v. Paul Revere Life Ins. Co.*, No. CV 4:19-40016-TSH, 2022 WL 17253701, at *3 (D. Mass. Nov. 28, 2022) (holding that encouraging defendants to make more proactive ERISA disclosures constituted substantial benefit to others); *Hatfield*, 162 F.Supp.3d at 45 (holding deterrent effect provided benefit to others). When the litigation provides a monetary benefit to participants in the plan, this factor is met. *Severstal*, 2016 WL 1611501, at *2. This Court has already found the settlement confers a substantial benefit on other plan participants because the $750,000 Settlement "provides substantial relief to the Class." ECF No. 185 ¶ 12.

5. The Relative Merit of the Parties' Positions Supports Miller.

The "relative merits of the parties' positions, is, in the final analysis, the result obtained by the plaintiff." *Glover*, 2022 WL 2987130, at *7 (awarding fees where only this factor favored participant because she received everything she sought). As to the defense by Miller of the claim brought by NEB, Miller secured a complete victory: NEB sued Miller, but [redacted] As to the Class Claim, the merits of Miller's position is reflected in this Court's prior observation that the claim, which is "premised on the alleged

misrepresentation of CST stock as being subject to the September 30 valuation date and a put option," and the conclusion that the Plan "does appear to conflict with the 2003 SPD on these points." ECF No. 119. The merits of Miller's position is reflected by the nearly 50% recovery for the Class. ECF No. 180-1 at 11. Class settlements (including in ERISA cases) rarely recover that percentage and recoveries of significantly less (before deduction of attorneys' fees) have been described as "exceptional." *Marshall v. Northrop Grumman Corp.*, 16-CV-6794 AB (JCX), 2020 WL 5668935, *2–3 (C.D. Cal. Sept. 18, 2020) (finding ERISA settlement of 29% of damages was "an exceptional result"); *Hurtado v. Rainbow Disposal Co.*, No. 817CV01605JLSDFM, 2021 WL 2327858, at *4 (C.D. Cal. May 21, 2021) (finding ERISA settlement of between 23.4% and 34.0% of the maximum potential recovery "impressive"). Most ERISA class settlements recover far less (and have fees deducted from the settlement).ECF No. 180-1 at 11-12.

The relative merits of the Class claim is not undermined merely because other claims were dismissed (and were therefore not settled or released). *See Gross*, 763 F.3d at 85 ("Having achieved adequate success under *Hardt* to establish eligibility for fees, [a party] may not be denied a fee award based solely on the fact that she did not have greater success.") Thus, this factor, like the other four, all favor an award of fees and costs.

II. Miller Is Entitled to Indemnity for Fees and Costs For Defense against NEB's Claim

In addition, Miller is entitled to recover his fees and expenses from NEB and the insurer providing fiduciary insurance because the prior Court found, at NEB's request, that "Miller is a fiduciary and may be personally liable to reimburse the plan for the overpayment." ECF No. 36 at 11. This decision was the result of NEB's representations that that Miller was a fiduciary. ECF No. 29 at 8; ECF No. 20 at ¶¶ 55-60. Based on NEB's arguments, the Court denied Miller's motion to dismiss, and NEB obtained a preliminary injunction against Miller. ECF No. 36 at 16.

Thus, NEB is estopped from arguing that Miller was not a fiduciary. *See Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) ("Judicial estoppel applies when 'a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage.'"). This has two consequences regarding fees and costs.

A. NEB is Obligated to Indemnify Miller Under the Terms of the Plan

First, Section 11.10 of the Plan provides that NEB "will indemnify and hold harmless every person serving as a fiduciary (whether a named fiduciary or otherwise)… against all claims, loss, damages, liability, and reasonable costs and expenses, incurred as a result of his service as a fiduciary." ECF No. 20-1 at § 11.10. The Plan is interpreted under Massachusetts law. *Id*. § 14.11. Under Massachusetts law, "when a right to indemnify is conferred by written contract or otherwise, the indemnitee may recover reasonable legal fees and costs incurred in resisting a claim within the compass of the indemnity." *Amoco Oil Co. v. Buckley Heating, Inc.*, 22 Mass.App.Ct. 973, 974 (1986). NEB's claim against Miller arose out of the same facts that rendered him a fiduciary: his possession of a purported overpayment. *Compare* ECF No. 36 at 13. Miller's defense falls within the indemnity.

B. NEB's Insurer Was Obligated to Pay for Miller's Defense to NEB's Claim

Second, Miller is an insured under a fiduciary insurance policy NEB purchased from Federal Insurance Co., a Chubb affiliate. Downes Decl. Ex. 8. The policy insures former employees of NEB and covers claims for breaches of fiduciary duty to the Plan. *Id*. at 2-3. As part of the settlement, NEB agreed to [redacted] After Miller filed a request with Chubb to defend and to indemnify, Chubb acknowledged that Miller was an Insured under the policy and paid some of his attorneys' fees, subject to a reservation of rights.

Feigenbaum Decl. ¶¶ 81-97; Downes Decl. Ex. 9. Under Massachusetts law, "where an insurer is obligated to defend an insured on one of the counts alleged against it, the insurer must defend the insured on all counts, including those that are not covered." *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 76 N.E.3d 204, 210-11 (Mass. 2017). That "some, or even many, of the underlying claims may fall outside the coverage does not excuse [the insurer] from its duty to defend." *Simplex Techs., Inc. v. Liberty Mut. Ins. Co.*, 706 N.E.2d 1135, 1137 (1999). "When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 539 (Mass. 2003). Once NEB amended its Complaint, Chubb refused to pay any further attorneys' fees or defense costs. Downes Decl. Ex. 9. This was not proper under the policy or Massachusetts law.

C. Under Either Theory, Miller is Entitled to Fees & Expense for His Defense

Under either theory Miller may recover reasonable legal fees and expenses for defending against NEB's claim. Miller's counsel have separately identified the amounts of attorneys' fees and expenses incurred in defending against NEB's claim rather than being exclusively expended to pursue Miller's individual claims or the claims of the Class. Barton Decl. ¶ 14; Feigenbaum Decl. Ex. 1. Consistent with the Settlement, [redacted] To the extent that the Court approves reimbursement of the expenses to be paid out of the class settlement, the only expenses not related to the Class claims are (1) $ 3,466.77 expenses incurred to take the deposition of Jeffrey Dunn who prepared the valuation of NEB stock (which after this Court's order on the motion to dismiss the counterclaim was only relevant to NEB's claim against

Miller) and (2) $ 143,509.10 in expert expense that reflect the portion of expense from Miller's valuation expert not relevant to Class Claim. ECF No. 195-2; ECF No. 195-19. To defend against NEB's claim of overpayment, Miller had to depose the person who valued the NEB stock and hired his own valuation expert to determine the fair market value of NEB and CST stock.

Class Counsel sought $100,000 of those expenses from the Settlement Fund, representing Class Counsel's best approximation of the fraction of billed expert fees that were attributable to work valuing CST stock (the only stock relevant to the Class claim). Miller seeks the balance (which related to the valuation of NEB stock and which was thus necessary for Miller's defense) from NEB on this motion.

III. The Requested Fees Are Reasonable

If the court concludes the party is eligible and the factors support an award, it fashions an award based on the lodestar method, which looks to "[t]he product of the hours reasonably worked times the reasonable hourly rate(s)," considering any appropriate upward or downward adjustments. *Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emps. v. Ray Haluch Gravel Co.*, 745 F.3d 1, 5 (1st Cir.2014). The focus of the Court's inquiry in this regard is whether the requested fees are reasonable considering the circumstances of this case. Under the lodestar analysis, the Court "need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

A. The Rates of Miller's Counsel Are Within the Prevailing Market Rate

Complex cases under ERISA, such as this one, "demand[] a quality of service for which relatively expensive representation is to be expected." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F.Supp.445, 477 (E.D. Pa. 1995). "[C]ourts have repeatedly recognized [that] complex ERISA class action litigation, such as this, involves a national market." *Feinberg v. T.*

Rowe Price Grp., Inc., No. CV JKB-17-0427, 2022 WL 2529545, at *9 (D. Md. July 6, 2022) (citing cases); *Cates v. Trs. of Columbia Univ. in City of N.Y., No*. 1:16-CV-06524-GBD, 2021 WL 4847890, at *3 (S.D.N.Y. Oct. 18, 2021) (same).[2] That particularly applies when, as here, opposing counsel is a "national firm with ERISA expertise." *Sweda v. Univ. of Pa.*, No. CV 16-4329, 2021 WL 5907947, at *7 (E.D. Pa. Dec. 14, 2021). "Because ERISA cases involve a national standard," declarations of attorneys from other districts practicing ERISA should be considered. *Mogck v. Unum Life Ins. Co. of Am.*, 289 F.Supp.2d 1181, 1191 (S.D. Cal. 2003). And the hourly rates to be applied are not necessarily those from this district. *Frommert v. Conkright*, 223 F.Supp.3d 140, 151 (W.D.N.Y. 2016); *Severstal*, 2016 WL 1611501, at *4 (same).

Other courts have recognized the ERISA expertise of Miller's counsel and found their hourly rates consistent with the national ERISA market. *Foster v. Adams & Assocs., Inc.*, No. 18-CV-02723-JSC, 2022 WL 425559, at *9 (N.D. Cal. Feb. 11, 2022) (approving Barton's current rate in ESOP case); *Hurtado v. Rainbow Disposal Co.*, No. 17-01605 JLS DFM, 2021 WL 2327858, at *6 (C.D. Cal. May 21, 2021) (approving Barton's hourly rate in ESOP case); *Cunningham v. Wawa, Inc.*, No. CV 18- 3355, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (same); *Holt v. Raytheon Techs. Corp.*, 2022 WL 6819544, at *5 (D. Mass. Oct. 11, 2022) (approving Feigenbaum's rate of $700/hour in ERISA pension case); *Solari v. Partners HealthCare Sys., Inc.*, 1:19-cv-11475-LTS (D. Mass., May 19, 2021) (Doc. No. 54) (entering

[2] *See also Amos v. PPG Indus., Inc.*, No. 2:05-CV-70, 2015 WL 4881459, at *9 (S.D. Ohio Aug. 13, 2015) ("In ascertaining the proper 'community,' district courts may look to national markets, an area of specialization, or any other market they believe is appropriate"); *Boxell v. Plan for Grp. Ins. of Verizon Commc'ns, Inc.*, No. 1:13-CV-089 JD, 2015 WL 4464147, at *9 (N.D. Ind. July 21, 2015) ("ERISA is a specialized field with a limited number of attorneys. . . there is a national market for the services of those attorneys.").

judgment at Feigenbaum's rate of $700 per hour in ERISA long-term disability case). Other ERISA attorneys representing participants confirm these rates are in line with those rates as well as local rates. *E.g.* Feinberg Declaration.[3] Mr. Barton and Mr. Feigenbaum, have had clients pay their then-customary hourly rates. Barton Decl. ¶ 15; Feigenbaum Decl. ¶ 67. Their rates are below what other courts in this District have awarded. *E.g. Ark. Teacher Ret. Sys. v. State Street Bank & Trust Co.*, 513 F.Supp.3d 202, 211 (D. Mass. 2021) (awarding up to $1,000/hr).

An opposing counsel who charges similar rates supports the reasonableness of those charged by the moving party. *Frommert*, 2016 WL 6093998, at *2 (finding defense counsel rates relevant to determine reasonableness of plaintiffs' counsel rates); *see Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 n.18 (7th Cir. 1982) (same). While Miller's counsel could not locate the rates of the particular attorneys representing NEB, in 2018 NEB's counsel Steptoe & Johnson charged $875/hr for a partner who graduated in 2002 and $680/hr for a class of '13 associate. Downes Decl. Ex. 10. The partner's rates were "the minimum" that could be charged without permission from Steptoe's management committee. These rates compare favorably to the $950/hr charged by Mr. Barton (2000 law grad) and the $700/hr charged by Mr. Feigenbaum (1984 law grad).

B. The Hours Expended By Miller's Counsel Were Reasonable.

When a party "has obtained excellent results" the attorney fee should normally "encompass all hours reasonably expended on [the] litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). In analyzing reasonableness of the hours, one factor is "the complexity of the issues." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987); *see Blum v. Stenson*, 465 U.S. 886, 898 (1984) (explaining complexity of issues will be reflected in the

[3] *See* Declarations of Coleman, Gordon, Mantell, Feinberg, Lewis, Porter, Rafik, and Reimer, submitted herewith.

number of hours). "ERISA actions are notoriously complex cases, and ESOP cases are often cited as the most complex of ERISA cases." *Pfeifer v. Wawa, Inc.*, No. CV16-497, 2018 WL 4203880, at *7 (E.D. Pa. Aug. 31, 2018); *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995) (recognizing "unsettled and complex" area of ESOP valuation in evaluating fee award). Essential to both defending against NEB's claim against Miller and the Class claim was whether the privately-held stock in the Plan had been properly valued. This case proceeded expeditiously and by the time settlement was reached, Miller had essentially completed fact discovery and disclosed his expert valuation expert as required by the Scheduling Order. Downes Decl. ¶ 3. The 850.1 hours were reasonably incurred in light of the work required. Barton Decl. ¶ 10. These hours are far fewer than those in other ERISA fiduciary duty class actions that settled before trial. *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) (22,000 hours with a lodestar more than $12 million); *Cates*, 2021 WL 4847890, at *4 (15,000 hours and lodestar of $9 million). .

C. There is No Reason to Reduce The Requested Fees

The Supreme Court has identified twelve factors that can be used to adjust the lodestar. *Hensley*, 461 U.S. at 430 n.3. The time and labor required, the difficulty of the case, the skills required, and the experience, reputation, and ability of Miller's counsel, the customary fee, the amount involved and results obtained have been previously addressed. *Supra* Part I.B. None of those or the remaining factors support reduction of the requested fee.

As both of Miller's firms (particularly compared to the firm's representing NEB) are small, taking this case precluded other employment. Barton Decl. ¶ 18. Both firms represented

Miller on a contingency basis at their normal rates. *Id.*; Feigenbaum Decl. ¶ 80.[4] ERISA cases such as this are not desirable because, as illustrated by the expenses incurred, they are expensive and as previously explained, risky. ECF No. 180-1 at 12-13. Proportionality of the recovery to the amount of fees sought is not consideration for statutory fees. *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986); *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 545 (7th Cir. 2009) (explaining fee-shifting statutes create an incentive to purse claims where the fees will "often exceed the amount in controversy"); *see also Millea v. Metro-N. R. Co.*, 658 F.3d 154, 169 (2d Cir. 2011) (explaining that the purpose of fee shifting statutes is to assure that litigants can secure "competent counsel"). The Court imposed time limitations in the schedule that required Miller's counsel to focus their attention on this case to the exclusion of other work. ECF No. 93. Finally, Miller's counsel had no prior relationship with Miller and they do not anticipate representing him again. Barton Decl. ¶ 19.

While Miller's counsel excluded time that was redundant or administrative,[5] it would not be appropriate to reduce fees "reasonably expended in pursuing" a claim merely because there were some adverse rulings. *Cabrales v. Cnty. of L.A.*, 935 F.2d 1050, 1053 (9th Cir. 1991) ("Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war."); *Casco, Inc. v. John Deere Constr. & Forestry Co.*, 596 F.Supp.3d 359, 377 (D.P.R. 2022) (declining to reduce fees for "failed motions"); *R.I. Carpenters Annuity Fund v. Trevi Icos Corp.*, 533 F.Supp.2d 246, 254 (D.R.I. 2008) (declining to reduce time for work on unsuccessful motion

[4] Feigenbaum initially represented Miller at a contracted rate of $700 per hour to defend him, but the fee agreement changed. Feigenbaum Decl. ¶ 78.

[5] As required, counsel have made "a good faith effort to exclude . . . hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. Where appropriate, tasks were assigned to Colin Downes, an associate, or a paralegal. Barton Decl. ¶ 5. Miller's counsel coordinated to avoid unnecessary duplication of work. *Id.*

because attorneys' fees under ERISA are not " determined on a motion by motion basis"). "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440. Claims are related where they "involve a common core of facts or [are] based on related legal theories," or where counsel's time is "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id*. at 435; *Coutin v. Young & Rubicam P.R., Inc.*, 124 F.3d 331, 339 (1st Cir.1997) (claims unrelated where they "rest on different facts *and* legal theories"). The time expended on claims that the Court dismissed or denied leave to include in Miller's amended pleadings, were related to Miller's defenses and his other counterclaims and third party claims. ECF No. 92, 119. All of Miller's claims and defenses based on a core of common facts about the value of stock in the Plan, the rights of participants under the Plan, and NEB's disclosures. The facts supporting the dismissed claims remained a part of this lawsuit: for example, the Court dismissed Miller's putative class claims regarding the value of NEB stock, but these errors remained a basis for his defense to NEB's claims on which Miller's expert eventually opined. Downes Decl. Ex. 1 at 16-87. Given the closely related character of these claims it impossible to disaggregate the hours expended on ultimately dismissed claims and hours spent on the same issues as they related to Miller's defenses or to his surviving claims. For similar reasons, there is no reason to exclude hours based on motions that Miller lost (or lost in part). *E.g.* ECF No. 100, 131.

IV. Miller Is Entitled to Recover Fees Incurred in Preparing This Motion

The First Circuit has held that "the time reasonably spent in establishing and negotiating [the] rightful claim to the fee" is compensable under a fee shifting statute. *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978). "In statutory fee cases," the Circuits "have uniformly held that time spent in

establishing the entitlement to and amount of the fee is compensable." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) (citing *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659–660 (9th Cir.1985) (citing cases)). Holding otherwise would be inconsistent with the purpose of the statutory fee as it would dilute the fee award. *Id.*; *Lund*, 587 F.2d at 77. This general rule applies to ERISA § 502(g). *Brack v. Blue Water Marina, LLC*, No. CIV. 06-144-P-H, 2008 WL 564651, at *3 (D. Me. Feb. 28, 2008) (awarding fees under ERISA § 502(g) for preparing fee motion). Courts outside this Circuit "allow fees for fee awards that account for between 8 and 24% of the total fee award." *Black v. Nunwood, Inc.*, No. 1:13-cv-7207-GHW, 2015 WL 1958917, at *7 (S.D.N.Y. Apr. 30, 2015) (citing cases).

V. Miller is Entitled To Recover Costs and Expenses

"It is settled beyond peradventure that reasonable expenses, necessary for the prosecution of a case, are ancillary to and may be incorporated as part of a fee award under a prototypical federal fee-shifting statute." *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 17 (1st Cir. 2011). Such amounts are "not limited to items recoverable as court costs under [28 U.S.C. §] 1920]" but "extend to a broad range of other items, including travel expenses, computer time, and the like." *Id.* Costs that "are customarily charged to the client" may be awarded under ERISA § 502(g)(1). *Algie v. RCA Glob. Commc'ns, Inc.*, 891 F.Supp. 875, 898 n.13 (S.D.N.Y. 1994). Such expenses include expert expenses. *Rogers v. Cofield*, 935 F.Supp.2d 351, 385 (D. Mass. 2013) (awarding consulting expert expenses); *Phillips v. Maritime Ass'n v. I.L.A. Local Pension Plan*, 198 F.Supp.2d 838, 848 (E.D. Tex. 2002) (awarding expert expenses under § 502(g)).

CONCLUSION

For the foregoing reasons, Miller's motion for an award of attorneys' fees and costs should be granted.

Date: January 9, 2023

Respectfully submitted,

/s/ Colin M. Downes

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing this day, January 9, 2023.

/s/ Colin M. Downes
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