

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NEW ENGLAND BIOLABS, INC.,

Plaintiff and Counterclaim Defendant,

v.

RALPH T. MILLER,

Defendant and Counterclaim Plaintiff

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

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

**CLASS COUNSEL'S MEMORANDUM
OF LAW IN SUPPORT OF MOTION TO
MODIFY OR RECONSIDER ORDER
GRANTING IN PART AND DENYING IN
PART MOTION FOR
REIMBURSEMENT OF LITIGATION
EXPENSES**

Class Counsel submits this memorandum in support of their motion to modify and reconsider its Order of January 13, 2023 (ECF No. 199), granting in part and denying in part Class Counsel's Renewed Motion for Reimbursement of Litigation Expenses (ECF No. 195), and enter an order awarding an additional \$73,446.81 to Class Counsel in reimbursement for expenses incurred litigating the claims of the Class.

BACKGROUND

Class Counsel filed their initial motion for reimbursement of litigation expenses on December 19, 2022. ECF No. 191. The Court denied this motion without prejudice on December 20, 2022, explaining:

Counsel has not provided enough information for the court to determine whether reimbursement of requested expenses is appropriate. The court accordingly denies the motion, without prejudice to renew upon submission of a more fulsome explanation (*with an itemized breakdown*) of the *specific expenses for which reimbursement is sought, as substantiated by receipts, invoices, and other documentation*.

ECF No. 192 (emphasis added). Class Counsel filed a renewed motion for reimbursement of litigation expenses on January 9, 2023. ECF No. 195. Following the directions by the Court to provide an itemized breakdown and to substantiate expenses with documentation, Class Counsel provided an itemized breakdown for each of the specific expenses for which reimbursement was sought to the extent possible, including receipts and invoices. ECF No. 195-3; 105-19 at ¶ 4.

Where an itemized breakdown and submission of invoices was not possible (e.g., for Westlaw, postage, and copying expenses that are billed on an aggregate monthly basis by case rather than by discrete, receipt-generating events), Class Counsel explained how those expenses were tracked and allocated to the case. ECF No. 195-2 at ¶ 22; ECF No. 195-27 at ¶¶ 6-8. Class Counsel did not seek reimbursement for expenses unrelated to the Class claim. ECF No. 191-2 at ¶ 4.

The Court denied Class Counsel’s renewed motion in part and granted it in part on January 13, 2023. ECF No. 199. The Court awarded the full \$5,000 requested for settlement administration fees. But as to the other expenses, the Court stated that “despite being explicitly instructed to provide a more fulsome explanation of the nature of its requested fees, class counsel fails to provide enough information for the court to assess which portion can be fairly attributed to the class claim rather than the other three pending claims.” *Id.* On that basis the Court awarded one fourth of the requested amount for non-expert expenses, representing how the Court “apportioned” expenses related to the Class claim rather than “prosecution of plaintiff’s two... non-class claims and/or his defense against NEB.” *Id.* The Court also awarded one third of the requested CST-related expert fees because “NEB’s claim and at least one of plaintiff’s individual claims involve the valuation of CST[]stock and thus implicate the expert’s work.” *Id.*

ARGUMENT

Where a court “does not designate an order as final under Rule 54(b), it has the power to modify, revise, or even reverse its decision at any time prior to making such designation or properly closing the entire case.” *In re TelexFree Sec. Litig.*, No. CV 4:14-MD-02566-TSH, 2021 WL 5771730, at *15 (D. Mass. Dec. 6, 2021) (quoting *Willhauck v. Halpin*, 919 F.2d 788, 793 (1st Cir. 1990)). That power... “is not subject to the strictures of Fed. R. Civ. P. 59(e).” *Id.* see *Latin Am. Music Co. Inc. v. Media Power Grp., Inc.*, 705 F.3d 34, 40–41 (1st Cir. 2013) (finding court could revise finding on summary judgment); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 677 F.3d 720, 726 (5th Cir. 2012) (finding successor judge could reverse predecessor’s findings after bench trial before judgment was entered). In light of the Court’s explanation in its Order of January 13, 2023, Class Counsel respectfully requests that the Court reconsider its equitable apportionment of expenses between the Class claim and the other

components of this action. Class Counsel understood the Court's Order of December 20, 2022, to seek an "itemized breakdown" for the requested expense reimbursements, supported by "receipts" and "invoices," which Class Counsel provided. Understanding now that the Court sought additional information regarding the apportionment of expenses between Class claim and other components of the action, Class Counsel provides that additional information, which supports a modification of the Court's litigation expenses award.

I. The Award of Non-Expert Expenses from the Class Settlement Should be Modified.

Of the \$20,318.67 sought in non-expert expenses, the Court awarded a "flat award" of \$5,079.67 representing 25% of those expenses because the Court reasoned that "most, if not all, of the submitted expenses seemingly also relate to prosecution of plaintiff's two (accounting for parallel causes of action) non-class claims and/or his defense against NEB's claim." ECF No. 199. But certain of these expenses would not have been incurred but for the class claim. As such, 100% rather than 25% of those expenses that were incurred solely because of the Class claim should be awarded—namely, the ediscovery expenses and the expenses related to the subpoena issued to Principal Life Insurance Group, Inc. (the NEB ESOP third party plan administrator). But for the addition of the Class counterclaim to this case and the concomitant increase in the scope of discovery required to litigate it, Class Counsel would not have engaged an ediscovery vendor. Barton Decl. ¶ 2. In other individual non-class cases, Miller's counsel has typically not engaged a third-party ediscovery vendor or document review platform provider, but instead has maintained document productions by opposing parties and non-parties locally or on firm cloud storage. *Id.*; Feigenbaum Decl. ¶ 2. All of the ediscovery expenses in this case are thus attributable to the Class claim and are properly recoverable from the Settlement Fund.

Similarly, the subpoena to Principal sought information exclusively relevant to the Class claim: Class data, ECF No. 191-3 at No. 1, communications with Class members, *id.* at Nos. 2-3,

documents related to communications related to the Plan as a whole and/or practices that applied on a Class-wide basis, *id.* at 4-7, and documents necessary for a contemplated deposition that Plaintiff would have sought of Principal or an appropriate employee on issues related to the Class claim. *Id.* at Nos. 8-11. Without the Class claim, Miller's Counsel would not have subpoenaed Principal and would not have needed to engage local counsel to litigate Principal's motion to quash that subpoena. Barton Decl. ¶ 3. These expenses are thus also attributable to the Class claim and are all properly recoverable from the Settlement Fund.

Together, these modifications would result in an award of an additional \$6,780.14 to Class Counsel from the Settlement Fund, summarized as follows:

Requested Modification to Non-Expert Expense Award					
Expense	Firm	Support	Request	Award	Additional Request
eDiscovery	Block & Leviton	ECF No. 195-7	\$2,527.59	\$ 631.90	\$ 1,895.69
eDiscovery	Feigenbaum	ECF No. 195-7	\$2,527.59	\$ 631.90	\$ 1,895.69
Service of Subpoena	Block & Leviton	ECF No. 195-12	\$ 70.00	\$ 17.50	\$ 52.50
S.D. Iowa Local Counsel Costs	Block & Leviton	ECF No. 191-2 ¶ 11	\$3,915.00	\$ 978.75	\$ 2,936.25
			\$9,040.18	\$ 2,260.05	\$ 6,780.14

II. The Award of Expert Expenses from the Class Settlement Should be Modified.

The Court awarded only \$33,333.33 in reimbursement of expert expenses because it appears to have believed both that (1) Class Counsel's estimate that \$100,000 of the expert expenses were related to the claims of the Class did not take into account that the analysis of the value of CST was also related to Miller's defense and (2) the analysis of the value of CST stock was related to Miller's individual claims. That is not correct.

First, Class Counsel's proposed allocation of \$100,000 in expert fees to the Class claim accounted for an allocation between the role of the CST analysis in litigating the Class claim and in litigating Miller's defense. The total expert expenses in this case were \$252,230.00. *See* ECF No. 191-2 at n.1; ECF No. 195-19 at ¶ 4. The allocation of \$100,000 of those expenses to the

claims of the class – approximately 40% of the total expert costs – reflected Class Counsel’s estimate of the portion of these expert fees that were “necessary to bring” the Class claim “to a climax.” *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st. Cir. 1999) (vacating district court’s order denying expense reimbursement). This expert expense was necessary to pursue the Class claim and these expenditures on behalf of the Class would have been necessary whether or not Miller was also required to defend himself against NEB. Thus, the full \$100,000.00 should be awarded from the Settlement Fund.

Class Counsel’s apportionment is also reasonable considering the relative value of the claims. The Class claims had an aggregate value of approximately \$1,531,287.00. ECF No. 180-2 at ¶ 6. By contrast, NEB sought \$164,580.17 from Miller, or approximately 9.7% of the combined value of the Class claims and the claim against Miller. *See* ECF No. 1 at 1. But Class Counsel allocated only 40% of the total expert expense to the Class claims. To the extent that equitable apportionment should only apply to the \$100,000.00 sought to by Class Counsel to be necessary to litigate the claims of the Class, that apportionment should be based on the reality that the economic value of the Class claims significantly outstripped that of Miller’s defense. An equitable division would reflect that 90.3% of the economic motivation to engage an expert stemmed from the need to effectively litigate the claims of the Class and would thus result in a reimbursement of \$90,300.00 rather than \$33,333.33.

Second and separately, the Court apportioned the \$100,000 in expert expenses by discounting them by two thirds, representing a three-way division between the Class claim, Miller’s defense, and Miller’s individual claims. ECF No. 199. But the expert’s opinion on CST’s value was *not* relevant to Miller’s other claims – Counts II, III and IV of the Amended Counterclaim, ECF No. 124 at ¶¶ 110-31, or the parallel, substantively identical surviving claims

of the Third Party Complaint. ECF No. 73 at ¶¶ 104-27. Miller's remedy on his individual claims under Count II and Count III of the Amended Counterclaim, *see* ECF No. 124 at ¶¶ 110-24, would have principally been monetary relief in the amount of what Miller could have earned had he been timely cashed out and allowed to achieve a market rate of return on his funds. *See* ECF No. 92 at 15, 17. That did not require a calculation of the value of CST stock. And the monetary recovery for Count IV would have been in the amount of Mr. Miller's losses due to his being subject to this retaliatory lawsuit, an amount that likewise would have no relationship to the value of CST stock. *See id.* at ¶¶ 125-31. As Miller's individual claims did *not* require an expert analysis and only his defense did, under the Court's allocation rationale, the amount of expert expenses should at a minimum be allocated evenly—that is, Class Counsel's request for reimbursement in the amount of \$100,000.00 should have been reduced to no less than \$50,000.00 rather than \$33,333.33.

Finally, Class Counsel's allocation of only 40% of the expert expenses to be awarded from the Class Settlement was not counsel's attempt to engage in "carte blanche" spending but rather was Class Counsel's attempt to fairly allocate necessary expenditures required to bring the class claim to conclusion. Despite the disparity in value between the Class claim and the amount sought by NEB from Miller, Class Counsel believed its allocation of just 40% of the expert expense to the Class claim and 60% to Miller's defense was not only reasonable, but fair to the Class. Additionally, Class Counsel's request for reimbursement of the expert expenses from the Settlement Fund was limited to a portion of the expenses that it incurred in this litigation. Even as to the overall expenses that were common to both the Class claim and the defense of Miller, less than half of the overall expenses were allocated to the Class. And unlike the vast majority of

class action settlements, Class Counsel agreed to settle these claims in a manner that ensured payment to the Class without any deduction of that amount in attorneys' fees.¹

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court modify its Order of January 13, 2023, and award an additional \$6,780.14 as reimbursement of solely Class-related, non-expert litigation expenses as well as either the full \$100,000 in expert expenses or some additional amount to reflect the equitable considerations. To the extent that expenses are not awarded of the Class settlement, then they should be awarded as part of Miller's motion against NEB. *See* ECF No. 14 at 14.

Date: January 27, 2023

Respectfully submitted,

/s/ Colin M. Downes

R. Joseph Barton (admitted *pro hac vice*)
Colin M. Downes (admitted *pro hac vice*)
BARTON & DOWNES LLP
1633 Connecticut Ave NW, Ste. 200
Washington, DC 20009
Tel: (202) 734-7046
Email: jbarton@bartondownes.com
Email: colin@bartondownes.com

Jonathan M. Feigenbaum, Esq.
B.B.O. No.546686
184 High Street
Suite 503
Boston, MA 02110
Tel. No.: (617) 357-9700
FAX No.: (617) 227-2843
jonathan@erisaattorneys.com

*Counsel for Defendant, Counterclaim Plaintiff, and
Third-Party Plaintiff Ralph T. Miller and the Class*

¹ Class Counsel also notes that the deadline to object has passed and no Class member has filed an objection to the settlement or the requests for fees or expenses.