IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TIM P. BRUNDLE, on behalf of the Constellis Employee Stock Ownership Plan, *Plaintiff*, v. WILMINGTON TRUST N.A., as successor to Wilmington Trust Retirement and Institutional Services Company, *Defendant*.	Case No. 1:15-cv-1494 (LMB/IDD)

MEMORANDUM OF DEFENDANT WILMINGTON TRUST, N.A. IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS, AND TO PLAINTIFF'S COUNSEL'S MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

COMES NOW Defendant, Wilmington Trust, N.A. (hereinafter referred to as "Wilmington Trust"), by counsel, and submits this Opposition to Plaintiff's Motion for Attorneys' Fees and Costs and Plaintiff's Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses.

I. Introduction

Plaintiff filed suit under ERISA on behalf of the Constellis Employee Stock Ownership Plan ("ESOP") to recover "losses suffered by the ESOP" and seeking "an order that Wilmington [Trust] make good to the ESOP . . . the losses resulting from its breaches. . . ." Second Amended Complaint, Para. 1; Prayer for Relief, Para. D. Following a six day trial, the ESOP was awarded $29,773,250.00 by the Court. Pursuant to 29 U.S.C. § 1132(g) and Local Rule 54(d), Plaintiff now seeks attorneys' fees under the fee shifting provision of ERISA. Plaintiff's counsel also seeks attorneys' fees, under the common fund doctrine, from the Court's award to the ESOP plan assets, as well as reimbursement of expenses claimed to be reasonably incurred in prosecuting this action to judgment.

As will be explained, infra, Plaintiff has not met his burden of establishing that his fees under 29 U.S.C. § 1132(g) are reasonable under applicable case law. Moreover, a "common fund" claim is barred 1) by the anti-alienation provisions of 29 U.S.C. § 1056(d)(1), 26 U.S.C. § 401(a)(13), and Section 12.16 of the ESOP plan and 2) because ERISA provides for a reasonable fee under 29 U.S.C § 1132(g).

II. Neither Plaintiff Nor Its Counsel Has Met Its Burden Of Proof for Fees Or Expenses.

A. Plaintiff Is Not Entitled To Any Expenses For Neither He Nor His Counsel Has Met Their Burden Of Proof.

Plaintiff's counsel has submitted a Declaration contending that Plaintiff has incurred $642,584.50 in expenses related to this case. Neither this Declaration, nor any other document that Plaintiff or his counsel has filed with this Court or served upon counsel for Defendant, contain any itemization of any of these expenses, any supporting invoices, or any basis at all for this Court to conclude that these expenses are reasonable and were related to Plaintiff's efforts in this case. This Court has repeatedly held the party seeking recovery of these expenses, bears the burden of proving that these expenses were reasonable and necessary. See Integrated Direct Mktg., LLC v. Drew May & Merkle, Inc., No. 1:14cv1183, 2016 U.S. Dist. LEXIS 87376, at * 8 (E.D. Va. June 28, 2016) (Brinkema, J.) (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009) (citing Grissom v. Mills Corp., 549 F.3d 313, 320 (4th Cir. 2008)). Plaintiff has failed to provide any supporting documentation or proof that these expenses were reasonable and incurred in this litigation; Plaintiff has not met its burden of proof and the expenses must be disallowed.

B. Plaintiff Has Not Met Its Burden of Proof To Establish That It Is Entitled To Attorneys' Fees Under 29 U.S.C. § 1132(g)(1).

Plaintiff is correct when it notes that the fee shifting provision of ERISA normally entitles a successful plaintiff to recovery of at least a portion of his attorneys' fees. Plaintiff is also correct that it has satisfied many of the factors contained in Quesinberry v. Life Ins. Co. N. Am., 987 F.2d 1017, 1029 (4th Cir. 1993). Plaintiff fails to note that while the Court determined that Wilmington Trust imporperly handled some aspects of the valuation of the ESOP transaction, the Court specifically found that Wilmington Trust did not act in bad faith. (Op. at 55). This conclusion by the Court diminishes the impact of the first Quesinberry factor.

Defendant does not contest Plaintiff's analysis of the remaining Quesinberry factors, and acknowledges that Plaintiff is entitled to some attorneys' fees.

III. Plaintiff Has Clearly Not Met Its Burden of Proof Establishing That The Requested Attorneys' Fees And Expenses Are Reasonable And Appropriate.

Case law in this Circuit and this Court is crystal clear about the level of proof necessary to establish that a plaintiff is entitled to the attorneys' fees requested in any case with a fee shifting provision. Surprisingly, for a firm that touts itself as a national leader in ERISA litigation (which presumably would mean that they have sought fees under 29 U.S.C. § 1132 on many occasions), Plaintiff's Petition fails to satisfy almost every criteria of this Court's requirements.

As this Court has repeatedly held:

> To calculate an appropriate attorneys' fee award, 'a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate.' *Citation omitted*. To demonstrate the reasonableness of the hourly rates, the applicant must 'produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award.' *Citation omitted*. The applicant should [also] exercise 'billing judgement' with respect to the hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.' *Citation omitted*.

> 'Where the documentation of hours is inadequate, the district court may reduce the award accordingly.'

Integrated Direct Mktg., LLC, 2016 U.S. Dist. LEXIS 87376, at *8-9. See also Salim v. Dahlberg, Case No. 1:15cv468, 2016 U.S. Dist. LEXIS 70128 (E.D. Va. May 18, 2016) (Brinkema, J.).

As this Court noted earlier this year, a plaintiff's burden is "establishing by clear and convincing evidence the amount of a reasonable fee in the circumstances." BMG Rights Mgmt. (US) LLC, et al. v. Cox Communs., Inc., No. 1:14cv1611, 2017 U.S Dist. LEXIS 21001, at *29 (E.D. Va. Feb. 14, 2017). As detailed below, Plaintiff has not met his burden.[1]

The Court must also weigh the twelve factors from Barber v. Kimbrell's Inc., 577 F.2d 216, 226, n.28 (4th Cir. 1978), in exercising its discretion. These twelve factors do not need to be individually discussed by the Court and, in many instances, are subsumed by the evidence offered to support the lodestar calculations. See Hensley v. Eckerhart, 461 U.S. 424 (1983). Plaintiff's arguments on most of these factors are conclusory and unsupported by anything other than the argument of counsel, and none of these assertions lift this case out of the realm of the traditional ESOP cases to justify the fee sought. While Plaintiff did obtain a sizeable verdict, it was less than 30% of the amount claimed by its expert, Mr. Messina, and it was unsuccessful on two of its claims, and its attempt to certify a class. Furthermore, as for factors (*as delineated in his Declaration)* (d) (opportunity costs); (e) (customary fee); (g) (time initiative); (i) (experience and reputation); (j) (undesirability); and (l) (awards in similar cases), Plaintiff provides only counsel's self-serving conclusion, which this Court has held to be insufficient. See Seoul Broad, Sys. Int'l v. Ro, No. 1:09cv433, 2011 U.S. Dist. LEXIS 109584, at *22 (E.D. Va. Sept. 26, 2011) (Brinkema, J); Jackson

[1] As explained infra, the block billing used by counsel will unnecessarily hamper the Court's determination of a reasonable fee.

v Estelle Place, No. 1:08cv984, 2009 U.S. Dist. LEXIS 39837, at *5 (E.D. Va. May 8, 2009 (Brinkema, J.)(citation omitted), aff'd, 391 F. App'x 239 (4th Cir. 2010).

Plaintiff seeks $2,815,729.50 for eleven (11) timekeepers. Excluding the three paralegals and the "business analyst" for which Plaintiff seeks reimbursement, the hours worked establish the lack of billing discretion and that Plaintiff over-litigated the case. Over eighty percent of the remaining hours were recorded by partners and, as will be detailed below, there are many instances of duplicate work, unnecessary work, associate level work performed by partners, administrative work performed by paralegals, and a substantial amount of time spent on matters upon which Plaintiff was not successful, among other deficiencies.

The insufficiency of Plaintiff's proof could not be better established than by the "Report of Prof. Charles Silver." Professor Silver is not a member of either the Bar of this Court or the Bar of the Commonwealth of Virginia. There is no indication in his "Report" that he has ever tried a case. There is no evidence in his "Report" that he has ever handled an ERISA case. There is no evidence he has ever appeared in any court.

While he asserts that the fees sought by Plaintiff are "reasonable" (Rpt. at 4) and that he finds "it hard to imagine that this lawsuit could have been managed more efficiently" (Rpt. at 4), the Report establishes that Professor Silver never looked at a single time entry or timesheet in this case.[2] Without reviewing the 200 pages of block-billed time entries, it is impossible for Professor Silver to

[2] Defendant also notes that Plaintiff was required to file and serve all of the documentation in support of his Fee Petition on April 10, 2017. (See Dkt. No. 301, Order entered March 23, 2017). As of the date of the filing of this Opposition, Plaintiff has still not filed any time records or other supporting documentation with the Court and did not timely serve the time records upon Defendant, contrary to the Declaration of Mr. Porter. (See Decl. at 5). It was only when counsel for Defendant sent an email, four days after the Petition was filed, to Mr. Porter inquiring about the time records that they were eventually provided. On this basis alone, Plaintiff's request for Attorneys' Fees should be denied.

establish that the amount of time spent by counsel was "reasonable" and "necessary." Dahlberg, 2016 U.S. Dist. LEXIS 70128, at *8. On this basis alone, Plaintiff has not met his burden of proof.

Professor Silver, the only expert Plaintiff offered, "fails to provide any evidence demonstrating that counsel had been awarded similar fees in the past for similar types of litigation in this district . . . ." Integrated Direct Mktg., LLC, 2016 U.S. Dist. LEXIS 87376, at *14. The conclusory Report provided by Professor Silver suffers from the same deficiencies as the declaration offered in support of the fee petition in Integrated Direct Mktg., 2016 U.S. Dist. LEXIS 87376. As this District Judge noted in her analysis of that fee petition, the testimony provided by the "expert" (who at least was a member of the Bar of this Court) was "conclusory," and the Petition was marked by "the lack of evidentiary support for the requested hourly rates . . . ." Id. at *13. This Court also held that:

> Mook's declaration does not engage in any detailed analysis of the attorneys' backgrounds or for the work performed on the Motion for Sanctions, and instead summarily concludes that the rates charged are reasonable and consistent with regional rates. Such unsupported conclusions are unpersuasive.

Integrated Direct Mktg., LLC, supra, at *14.

Since Plaintiff has failed to provide competent evidence that the rates charged reflect the rates charged by lawyers in this District, Plaintiff has failed to meet its burden of proof for this reason as well.

Instead of providing the proof required by this Court, Professor Silver offers rambling paragraphs detailing his prior testimony in other courts, his opinion that this kind of litigation is complicated and therefore justifies a very high fee award, and that rates charged by Plaintiff's counsel "are comparable to those charged by other lawyers and legal assistants with similar experience and qualifications who practice in urban areas." (Rpt. at 8.) Setting aside for a moment

that Professor Silver provides no commentary on the "similar experience and qualifications" of Plaintiff's lawyers, not to mention those "who practice in urban areas," such testimony has been repeatedly rejected by this Court. See Signature Flight Support Corp. v. Landow Aviation L.P., 730 F. Supp. 2d 513, 526 (E.D. Va. 2010); Associated Gen. Contractors of Am. v. Stokes, No. 1:11cv795 (GBL/TRJ), 2012 U.S. Dist. LEXIS 186972 (E.D. Va. Nov. 20, 2012); In re: Outsidewall Tire Litig., 178 F. Supp. 3d 300, 309 (E.D. Va. 2016); and Am. Bird Conservancy v. U.S. Fish & Wildlife Serv., 110 F. Supp. 3d 655 (E.D. Va. 2015). Neither the voluminous national report of surveys of hourly rates nor cases from other Circuits and courts provide any basis for this Court to conclude that the fees sought are reasonable. Ibid.

The reliance by Plaintiff's counsel in his Declaration on the fees that were awarded in Vienna Metro LLC v. Pulte Home Corp., 786 F. Supp. 2d 1090 (E.D. Va. 2011), is misplaced. Plaintiff provides no basis for this Court to conclude the Vienna Metro rates are appropriate other than the declaration of counsel. This Court has held that a declaration from counsel of record that his fees and rates are reasonable does not satisfy the burden of proof. This conclusory argument by Plaintiff's counsel suffers from the same infirmities as the declaration used in Integrated Direct Mktg., supra. See also Robinson v. Equifax Info. Servs., LLC, supra; In re Outsidewall Tire Litig., supra.

Mr. Porter's professed "regular" rate of $750.00 an hour is not supported by any evidence and is contradicted by a Declaration he submitted under oath two months before this trial started. He swore his "regular rate[s] for services in similar litigation to this one . . . [is] $650.00." Dennard v. Transamerica Corp., et al., No. 1:15cv00030-EJM (N.D. Iowa, Sept. 19, 2016; Dkt. 107). Counsel has provided no explanation how his "regular" rate increased by 15% in two months and how it could be both $650.00 an hour and $750.00 an hour at the same time and this discrepancy raises concerns about the credibility of Plaintiff's submission.

A review of the actual billing records conclusively establishes that Plaintiff has not met his burden of proof. For ease of the Court's consideration, these deficiencies will be itemized by section. As will be evident from these charts, some time entries appear on more than one chart. Defendant is not trying to mislead the Court or suggest that amounts be deducted twice (or more), but the block billing used by Plaintiff's counsel requires Defendant to proceed this way to fully support its arguments about these deficiencies. The charts are simply guidelines designed to help the Court.

Defendant incorporates into its argument on the reasonableness of Plaintiff's fees the Declaration of David E. Constine, III, a well-respected member of the Bar of this Court, dated May 11, 2017 (see **Exhibit K** attached).

IV. Specific Deficiencies in the Billing Records

A. Block Billing

All two hundred pages of the billing records submitted by Plaintiff are "blocked billed." As this Court recently held in Dahlberg, 2016 U.S. Dist. LEXIS 70128, block billing and vague descriptions do not provide the basis for the Court to determine what time was spent on matters for which fees may be recoverable and what portion of that time was spent on matters for which fees are not recoverable.

> Where . . . descriptions do not apportion the time and do not demonstrate how much time was attributable to recoverable work, none of the time will be awarded.

Dahlberg, supra, at *42. See also Carahsoft Tech. Corp. v. Janus Consulting Partners, LLC, No. 1:13cv1575, 2015 U.S. Dist. LEXIS 181217, at *12 (E.D. Va. Jan. 26, 2015) (Brinkema, J.); Humphreys & Partners Architects, L.P. v. Lessard Design, Inc., 152 F. Supp. 3d 503, 517-18 (E.D. Va. 2015). Given Plaintiff's unapportioned descriptions, it is impossible to determine how much work on any day, by any timekeeper, was for work that should be reimbursed under ERISA and,

therefore, all of the time in these block billed entries that contain any time that is not reimbursable must be eliminated. A chart including all of the block bills would be a reproduction of counsel's and would unnecessarily add to the Court's burden in reviewing these bills. Instead, Defendant offers several pages of Plaintiff's counsel's bill to exemplify this fatal deficiency in these bills. See **Exhibit A** attached. The Court should exercise its discretion and at the outset reduce the fees sought by one-third. Dahlberg, supra. It should then make further reductions for the infirmities described below.

B. Unsuccessful Claims.

Plaintiff did not prevail on his Motion for Class Certification, Plaintiff's Claim under 29 U.S.C. § 1106(b) (prohibited transactions), and his claim under 29 U.S.C. § 1106(a)(1)(B) (prohibited loan between the Plan and an interested party). Plaintiff recovered less than thirty (30) percent of the damages it sought. See Op. at 1-2. See **Exhibit B** attached. The law in this Court is clear that a party cannot recover for unsuccessful claims and this Court should exercise its discretion to determine this amount. See Integrated Direct Mktg., supra, at *10; Dahlberg, supra, at *31.

C. Unsuccessful Motions

Plaintiff was unsuccessful on several motions either because Plaintiff did not prevail on a motion that he filed or Plaintiff unsuccessfully opposed a motion by Defendant that was eventually granted. Examples of this include the Motion for Class Certification, Motion for Leave to File two Dunn v. Aclairo Pharm. Dev. Grp. Briefs, referenced at Oral Argument and Related Sur-Reply, the Opposition to Defendant's Motion to Compel Mr. Halldorson to appear for deposition, and the Opposition to Defendant's first Motion for Summary Judgment. As noted above, Plaintiff is not entitled to recover for motions upon which he took an unsuccessful position. Dahlberg, supra, at *31; Cox v. Reliance Std. Life Ins. Co., 179 F. Supp. 2d 630, 636 (E.D. Va. 2001) (Brinkema, J.).

Charts of the time entries reflecting time recorded to these unsuccessful motions is included in **Exhibits C-1 through C-5**. All of these entries are blocked billed. Plaintiff's Petition must be reduced by $460,680.00.

D. Too Many Lawyers

Plaintiff's time records establish that there were multiple instances where the number of lawyers engaged on a project, attending an event, or attending a hearing was excessive. This was u unnecessary.

For example, having four lawyers attend the pre-trial conference on July 21st, having five or six lawyers attend every day at trial, having twice a week "team meetings" attended by as many as seven or eight timekeepers, to having multiple partners work on preparation for the same depositions, attend the same witness meetings, or research the same project.

> Where a task does not require the use of multiple attorneys, the Court should 'award fees for the time of one attorney.'

CertusView Techs., LLC v. S&N Locating Servs., LLC, No. 2:13cv346, 2015 U.S. Dist. LEXIS 116499, at * 18 (E.D. Va. Sept. 1, 2015) (citing Cox v. Reliance Std. Life Ins. Co., 179 F. Supp. 2d 630, 636 (E.D. Va. 2001) (Brinkema, J.)). See also Rum Creek Coal Sales v. Caperton, 31 F.3d 169 (4th Cir. 1994).

As this Court has held, such "time is duplicative and will be deducted . . . ." Dahlberg, supra, at * 53, n.21. See also Personhuballah v. Alcorn, No. 3:13cv678, 2017 U.S. Dist. LEXIS 34979, at *51 (E.D. Va. Mar. 3, 2017); BMG Rights Mgmt. (US) LLC, supra, at *30:

> Although Attorneys Strassburger and Rose no doubt wished to be at the argument to witness the culmination of their efforts on this case, the client would not ordinarily pay for their presence. *Tanco v. Haslam*, No. 3:13-cv-1159, 2016 U.S. Dist. LEXIS 39403, 2016 WL 1171058, at *7 (M.D. Tenn. Mar. 25, 2016) ("While perhaps desirable, it was not necessary for so many attorneys to travel to and participate in meetings, moots and oral arguments. An excellent

> result was achieved for the client, but one that at times could likely have been achieved with the billing discipline that a fee-paying client would have demanded."); *Roe v. Saenz*, No. 97-cv-529, 2000 U.S. Dist. LEXIS 19377, 2000 WL 33128689, at *2 (E.D. Cal. Nov. 20, 2000). As such, a reduction is warranted for this duplicative billing.

Exhibits D-1 through D-6 are samplings of entries reflecting some of the events or tasks for which Plaintiff used too many lawyers. Due to the block billing, the total amount of fees is well over $1,000,000.00 and the Court should exercise its discretion to determine an appropriate reduction.

E. Travel

Plaintiff's lead counsel is in Washington, D.C.; however, they chose to staff this case with lawyers from other offices. This decision resulted in substantial unnecessary travel time and costs. Plaintiff seeks to recover fees for time spent traveling from various offices to this Court, or to various meetings or depositions. Plaintiff appears to seek payment of fees for purely local travel. Plaintiff seeks reimbursement for time spent sitting on a plane, sitting in an airport or sitting in a cab, at the full hourly rate.

While a number of timekeepers seek recovery for travel time, the most enthusiastic timekeeper in this regard is Thanos Basdekis. Mr. Basdekis seeks reimbursement not only the time that he spent actually on a plane or in a cab, but the time that he spent at various airports or was inconvenienced because of travel delays. This request for reimbursement by Mr. Basdekis is particularly egregious in light of the fact that this Court in Cox v. Reliance Std. Life Ins. Co., 235 F. Supp. 2d 481 (E.D. Va. 2002) (Brinkema, J.), found that Mr. Basdekis' time entries for travel were excessive and should not be included in a fee petition in an ERISA case. See also Hair Club for Men, LLC v. Ehson, et al., No. 1:16cv236, 2017 U.S. Dist. LEXIS 51370, at *28-29 (E.D. Va. Apr. 3, 2017).

The entries containing improper billing for travel are attached as **Exhibit E**. Again, because of the block billing, all of the fees sought in each of these time entries must be excluded, and the total to be deducted from Plaintiff's Petition is $398,075.00.

F. Lawyers Performing Paralegal Work

Work was repeatedly done by a lawyer that should have been done by a paralegal. **Exhibit F**, yet another compilation of block billing entries, describes work done by a lawyer that could have easily been done by a paralegal, Patrick Muench, a senior associate billing $400.00 an hour, is preparing a witness folder on September 12, 2016. Contrast this with the entry of Denise Milhoan, a paralegal billing $175.00 an hour on September 29, 2016, who prepared a hearing binder. Both are administrative tasks as well. See Hair Club for Men, LLC, supra, at *27-28. There are many other similar entries and, as indicated by **Exhibit F**, the reduction for work of this type is $215,360.00

G. Paralegals Doing Clerical Duties

The entries of several of the paralegals on Plaintiff's team, most particularly Melissa Kestner-Clay, establish that she spent a substantial amount of time doing secretarial or clerical work that should not result in reimbursement of her time. There are too many examples to delineate on a specific chart, so **Exhibit G** is a sample of those kinds of entries. Hair Club for Men, LLC, supra, at *25-26; Abusamhadaneh v. Taylor, No. 1:11cv939 (JCC/TCB), 2013 U.S. Dist. LEXIS 7451 (E.D. Va. Jan. 17, 2013).

An example of this kind of time entry, which clearly evidences secretarial work, is on February 2, 2016 for Ms. Kestner-Clay:

> Receiving, reviewing, and profiling Paperless Order, setting deadlines for hearing on Defendant's Motion for Summary Judgment; Adding deadlines for response and hearing to team calendars. (.30 hrs.)

While this is a relatively small amount of time, the Plaintiff's paralegals charged for this kind of administrative work on a virtually daily basis.

All of these entries are block billed, and producing a specific exhibit for the entries would be unnecessarily voluminous. The Court has the discretion to reduce the amount of time billed by the paralegals by a flat percentage. See Auto. Fin. Corp. v. EEE Auto Sales, Inc., No. 1:10cv1407, 2011 U.S. Dist. LEXIS 86049, at *19 (E.D. Va. Aug. 3, 2011) (Brinkema, J.). In light of these entries, and the fact that they are block billed, Defendant suggests that a deduction of fifty percent (50%) of the paralegal time would be appropriate.

H. Time Charged By Mr. Budhdev

Plaintiff seeks reimbursement of over $27,000 for the time of Pratik Budhdev, who Plaintiff asserts is a "business analyst." As will be discussed in the general overview of the vague and ambiguous entries contained in the billing records, Mr. Budhdev's entries do not provide any basis for the Court to conclude that his work was on any reimbursable matter. For instance, on November 7, 2016, he has an entry for "Data Collation from various competitors' annual reports for Brian." (2.5 hrs. for $750.00 at $300.00 an hour). There is no basis for the Court to conclude that this is a reimbursable expense. The chart attached as **Exhibit H** containing all of his time entries establishes that Plaintiff has not met his burden of proof that the work performed by Mr. Budhdev is reimbursable and, all of it totaling $27,552.00, must be deducted.

I. Time Spent On the Appeal to the Fourth Circuit.

Contrary to Mr. Porter's Declaration (see P. 5, Para. 9), Plaintiff is now seeking reimbursement in this case for a substantial amount of time spent on Andrew Halldorson's appeal to the Fourth Circuit. Plaintiff's appeal was placed in abeyance on April 3, 2017, and Plaintiff has not

been a prevailing party in that appeal. Moreover, Plaintiff Tim Brundle is not even a party to that appeal. Andrew Halldorson, not Plaintiff Brundle, is the appellant in that case.

The time reflected on the billing records for the appeal is attached as **Exhibit I** and all of this time must be excluded. All of the time for each entry reflecting any work on the appeal must be deducted and, as established by **Exhibit I**, that total is $14,027.50.

J. Vague or Stock Entries

Almost as egregious as the use of the block billing is the almost universal use of vague or stock entries. For instance, on November 1, 2016, Mr. Basdekis has an entry for 8.5 hours "Preparation for trial. Calls, email traffic, et cetera." He has this same exact entry for the next 8 days, totaling 68.4 hours. Such entries have been uniformly condemned by this Court as insufficient. BMG Rights Management (U.S.), supra, at *31-32; Hair Club for Men, LLC, supra, at *23-24; and Dahlberg, supra. Preparing a chart of all of the vague, ambiguous, or stock entries would basically duplicate the 200 page billing record provided by Plaintiff, and **Exhibit J** is just a representative sampling of some of these entries from various timekeepers.

This Court has previously held that vague entries such as "discussing strategy," "reviewing records" or "revising responses" are insufficient to establish that such time is reimbursable. See Auto. Fin. Corp., supra, at *18. Similarly in Dahlberg, this Court held a time entry for "trial prep" was insufficient to establish that such time was reimbursable. Dahlberg, supra, at *36. See, e.g., time entries for Brian Glasser on November 15, 16, 20, 21, 26, and 27, 2016 ("Prepare for trial") and December 4, 2016 ("Prepare for last two trial days"). Finally, in Personhuballah, supra, this Court held that an entry such as "research," "letter to client," "revise discovery" did not meet the plaintiff's burden of proof and did not allow for time spent for those entries.

It is difficult to calculate how many hours are impacted by this type of timekeeping, but this Court has held a percentage reduction from 20 to 90% of the fees impaired by these entries should be applied. See Humphreys & Partners Architects, supra, at *28-29; Signature Flight Support Corp., supra, 730 F. Supp. 2d at 527; and Outsidewall Tire Litig., supra, at 313-314. Defendant proposes the Court determine whether a percentage adjustment of the entire fee sought is appropriate, given Defendant's other proposed reductions.

K. Multiple Timekeepers at Trial

Plaintiff had five or six attorneys at trial every day and generally two paralegals. With the exception of Mr. Glasser and Mr. Porter, none of the attorneys attending the trial (including two partners) played any major role in the case. Mr. Basdekis conducted the examination of one witness and Mr. Jenny conducted 16 pages of examination of Plaintiff on the first morning of trial. Mr. Jenny then asked two questions of Mr. Randall, both of which were objected to and the objections were sustained. There is no reason for Defendant to pay for more than two lawyers at trial. See Personhuballah, supra, at *51. As this Court held in that case:

> While perhaps desirable, it is not necessary for so many attorneys to travel to and participate in meetings, moots and oral arguments. An excellent result was achieved for the client, but one that at times could have likely been achieved with the billing discipline that a fee-paying client would have demanded.

Id., at *52, citation omitted. BMG Rights Management (U.S.), supra, at *30.

Exhibit D-1 and D-4 reflects the time that multiple timekeepers attended trial and other court appearances, including the four attorneys that attended the pre-trial. See also Cox, 235 F. Supp. 2d 481, (E.D. Va. 2002) (Brinkema, J.). This Court should consider these charts in making an appropriate deduction.

L. Multiple Lawyers Working on a Brief

The time entries establish that there were many times when several lawyers were working on one brief at the same time. This again does not indicate any billing discretion or judgment, and should not result in fees for "over-lawyering" being assessed against Defendant. See generally Personhuballah, supra, at 61-62 (it was excessive to have seven lawyers work on a brief and the preparation for an oral argument). This Court found that the efforts of one partner and one other lawyer were appropriate, but held 'without any explanation as to why the remaining time billed was reasonable, we will deduct the other time entries from the lodestar figure." Ibid. See also BMG Rights Management (U.S.), supra, at *31. A representative sample of these entries is attached as **Exhibit D-3**, and should guide the Court in determining an appropriate reduction.

V. Plaintiff Has Not Carried Its Burden Establishing That Counsel's Hourly Rate Is Reasonable.

As noted above, Plaintiff has not provided any of the evidence this Court traditionally requires to determine whether the fees sought is reasonable: "[T]he applicant must 'produce satisfactory specific evidence that the prevailing market rates in the relevant community for the type of work for which he seeks an award.'" Integrated Direct Mktg., supra, at *8, citations omitted. It is undisputed that Plaintiff has not provided any evidence to satisfy this burden. There has not been any explanation why counsel testified under oath in Iowa that his "regular rate" was $650.00 an hour for the same time counsel swore in this case that his "regular rate" for the same period of time was $750.00 an hour. See Page 7, supra.

This failure places the Court in a dilemma. Obviously, Plaintiff's counsel did work very hard on this case and achieved a partially successful result. Faced with similar situations, this Court has reverted to using the rates approved by the Fourth Circuit in Grissom v. The Mills Corp., 549 F. 3d 313 (4th Cir. 2008). See Porter v. Elk Remodeling, Inc., No. 1:09cv446, 2010 U.S. Dist. LEXIS

89037, at *20 (E.D. Va., Aug. 27, 2010) (highest rates for a partner with 19-plus years of experience is $380.00). In fact, this Court in Dahlberg noted less than a year ago that "the Fourth Circuit has characterized the rate of $585.00 for lead counsel as "excessive" and even "exorbitant." Dahlberg, 2016 U.S. Dist. LEXIS 70128, at *16 (citing McAfee v. Boczar, 738 F.3d 81, 91 (4th Cir. 2013)).

This Court should set rates for Plaintiff's counsel no higher than those used by the Fourth Circuit in Grissom, adjusted for inflation. After establishing reasonable rates, this Court must reduce the amount sought for the deficiencies identified, supra. Additionally, as will be established, infra, this failure to meet his burden of proof is yet one more reason why this Court should not reward Plaintiff for its inflated and deficient Fee Petition by awarding his lawyers the windfall they seek under the common fund doctrine. Plaintiff has not established his fees were reasonable, and cannot object to any number that the Court selects in its discretion.

VI. The Common Fund Claim Is Barred by the Anti-Alienation Provisions of the Plan and ERISA and Because 29 U.S.C. § 1132(g)(1) Affords Plaintiff Counsel a Reasonable Attorney Fee.

Without notice to ESOP participants, Plaintiff's counsel petitions for one-third of the award to the ESOP, constituting benefits awarded by the Court, but not yet distributed to participants. Plaintiff's counsel's attempt to acquire ESOP plan assets intended to fund benefits violates ERISA's strict rule that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). See also 26 U.S.C. § 401(a)(13) (precluding a plan from qualifying for tax-exempt status in the absence of an anti-alienation provision). Section 12.16 of the ESOP Plan document expressly prohibits alienation or assignment of ESOP benefits:

> **Assignment and Alienation of Benefits** Except as may otherwise be permitted under Code §401(a)(13)(C), or as may otherwise be permitted under a Qualified Domestic Relations Order as provided in Section 8.10, no right or claim to, or interest in, any part of the Trust Fund, or any payment therefrom, will be assignable, transferable, or subject to sale, mortgage, pledge, hypothecation, commutation, anticipation, garnishment, attachment, execution, or levy of any kind, and the Trustees will not recognize any attempt

> to assign, transfer, sell, mortgage, pledge, hypothecate, commute, or anticipate the same, except to the extent required by law.

Constellis Employee Stock Ownership Plan, DTX 120, p. 60-61.

For this reason alone, the common cund claim must be denied. Carlson v. HSBC-N. Am. (US) Ret. Income Plan, 542 F. App'x 2 (2d Cir. 2013) ("parties cannot recover attorney's fees pursuant to the common fund doctrine from vested, but undistributed, ERISA benefits"); Kickham Hanley P.C. v. Kodak Ret. Income Plan, 558 F.3d 204, 213 (2d Cir. 2009). See also US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (the express terms of an ERISA benefits plan cannot be overridden by a claim for common fund attorneys' fees).

In addition, common fund claims are not allowed, in the absence of agreement, where a fee-shifting statute like 29 U.S.C. § 1132(g)(1) is available to permit an award of reasonable attorneys' fees. Pierce v. Visteon Corp., 791 F.3d 782 (7th Cir. 2015). There is no justification for taking benefits from ESOP participants when Plaintiff's counsel has the opportunity to obtain a reasonable fee under 29 U.S.C. § 1132(g)(1). Id. Since 29 U.S.C. § 1132(g)(1) allows recovery of a reasonable fee, if Plaintiff's counsel "were to pocket substantially more than that, his compensation would by definition be unreasonably high." Id. at787. See Burlington v. Dague, 505 U.S. 557 (1992).

Plaintiff's counsel cite no cases allowing a common fund award in these circumstances. Plaintiff's counsel and "expert" rely on non-ERISA, class action settlement cases, which are inapposite here. This is an ERISA case, where the purported "common fund" is comprised of ESOP plan assets specifically protected by anti-alienation rules and where a fee-shifting statute is available to provide a reasonable fee to Plaintiff's counsel.

A. The Anti-Alienation Provisions of the Plan and ERISA Bar the Common Fund Claim.

ERISA's anti-alienation provision mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Treasury Department Regulations further prohibit involuntary transfers of benefits from qualified plans by requiring that "benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. "26 C.F.R. §1 401(a)-(13)(b)(1). The anti-alienation provisions of the ESOP Plan expressly extends this protection to the Constellis ESOP benefits. ESOP Plan Section 12.16 (DTX 120 at 60-61).

The Fourth Circuit has recognized a "strong public policy against the alienability of an ERISA plan participant's benefits." Smith v. Mirman, 749 F.2d 181, 183 (4th Cir. 1984). The Supreme Court has held that it is not "appropriate to approve any generalized equitable exception--either for employee malfeasance or for criminal misconduct--to ERISA's prohibition on the assignment or alienation of pension benefits." Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990). In Guidry, the Supreme Court refused to allow ERISA pension benefits to be used to effectuate the remedial goals of the Labor Management Reporting and Disclosure Act because such use would imply that "ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protections of [ERISA]." Id. at 375. The Honorable T.S. Ellis, III of this Court observed:

> ERISA's anti-alienation and assignment provision bars the forfeiture of pension plan benefits in the absence of a specific congressional exception. Given that Congress has not provided such an exception, it is not proper for a court to create such an exception on equitable or other grounds.

United States v. Herrmann, 910 F. Supp. 2d 844, 848 (E.D. Va. 2012).

A principal rationale behind ERISA's anti-alienation provision is "the prohibition of involuntary levies by third party creditors on vested plan benefits." Ellis Nat'l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466, 470 (2d Cir. 1986). Such a prohibition supports Congress's primary objective of ensuring through ERISA that, "if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit . . . he actually receives it." Id. at 471 (alteration in original) (internal quotation marks omitted) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981)).

Plaintiff's counsel's common fund claim cannot override the anti-alienation provisions of ERISA and the Plan. Section 1056(d) "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . , even if that decision prevents others from securing relief for the wrongs done them." Guidry, 493 U.S. at 376. "[E]ven a strong claim of legal or equitable title to undistributed pension funds is not a sufficient basis to avoid the application of § 1056(d)(1). Kickham Hanley, P.C. v. Kodak Ret. Income Plan, 558 F.3d 204, 213 (2d Cir. 2009).

In Kickham, the Second Circuit reversed the District Court for allowing a common fund recovery of 15% of the enhanced pension benefits of a class of participants awarded vested benefits through the efforts of counsel for plaintiff in the administrative claims process. The district court had justified the common fund award because no recovery of attorneys' fees was available under 29 U.S.C. § 1132(g)(1) since the benefit to the class had occurred during the initial administrative claims procedure without the filing of a lawsuit. Peterson v. Cont'l Cas. Co., 282 F.3d 112, 121 (2d Cir. 2002).

Even though no fee was available under 29 U.S.C. § 1132(g)(1). The Court of Appeals denied the common fund claim because it violated ERISA's anti-alienation prohibition:

> We can discern no meaningful distinction between the claim to undistributed pension funds that *Kickham* asserts and other claims indisputably barred by § 1056(d)(1). *See, e.g.*, *Guidry*, 493 U.S. at 372 (concluding that placing constructive trust on pension benefits was prohibited by § 1056(d)(1)); *Ellis Nat'l Bank of Jacksonville*, 786 F.2d at 469-72 (ruling that constructive trust could not be imposed on pension funds, despite party claiming entitlement to the funds under common law principles of equity, state common law of trusts, and state criminal restitution statutes). Regardless of how *Kickham* describes 'the unique facts this case presents,' . . . it cannot avoid the statutory protection ERISA extends to pension benefits while they are held by the plan administrator.

558 F.3d at 211.

The Court in Carlson v. HSBC-N. Am. (US) Ret. Income Plan, 542 F. App'x 2 (2d Cir. 2013), likewise refused to permit a common fund attorney fee award against amounts recovered in litigation for ERISA pension plan participants, distinguishing common fund settlements providing for payment by third parties not out of pension plan assets:

> While the statute does not bar collecting attorney's fees from funds created by the settlement of contested pension claims that plan participants may secure only by releasing potential claims, it does bar garnishing plan participants' pension entitlements. Kickham at 213-14. Here, Carlson seeks to recover attorney's fees from the money the Plan has pledged to pay to the members of the proposed class. But the plan participants are entitled to these payments under the terms of the Plan and are not required to release any potential claims to receive the funds. 'That [Carlson] allegedly helped bring about [defendants'] recognition that plan participants were entitled to their pension benefits does not alter the conclusion that these are pension entitlements' protected by ERISA's anti-alienation provision. *See id.* at 214. Because the funds are pension entitlements, no common fund was created, and the claim for fees fails as a matter of law, at least under the common fund theory.

542 F. App'x at 10

The United States Supreme Court held in US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013), that the express terms of an ERISA benefits plan could not be overridden by common fund attorney fee claims asserted by a participant who had received a tort recovery that benefited the

ERISA plan. The Court emphasized that "the ERISA plan's terms govern. Neither general principles of unjust enrichment nor specific doctrines reflecting those principles . . . such as the double-recovery or common-fund rules—can override the applicable contract." 133 S. Ct. at 1541.

Neither Plaintiff's counsel nor Professor Silver explain how their common fund claim to Constellis ESOP plan assets can be justified under anti-alienation provisions of ERISA and the ESOP Plan. They rely on class action settlements only, most of which are non-ERISA cases, and all of which involve agreements by third parties to provide the "common fund" without using plan assets intended to fund pension benefits for participants. . The common fund claim against ESOP assets clearly violates ERISA's anti-alienation rules; it must be rejected.

B. A Common Fund Claim for Fees is Not Available Because ERISA's Fee-Shifting Statute Is Available to Provide a Reasonable Fee.

The common fund claim also fails for a second, independent reason: common fund claims are not available, in the absence of agreement, where ERISA's fee-shifting statute is available to provide a reasonable attorneys' fee.

In Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), the Supreme Court warned that courts should be "especially 'reluctant to tamper with [the] enforcement scheme' embodied in [ERISA] by extending remedies not specifically authorized by its text." See also Rego v. Westvaco Corp, 319 F.3d 140, 150 (4th Cir. 2003). Courts should not apply common law principles to alter ERISA's complex statutory scheme "[a]bsent some evidence that Congress intended otherwise." See Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 375 (2nd Cir. 2006); United States v. Smith, 499 U.S. 160, 167, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991) ("Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); Greene v. United States, 79 F.3d 1348, 1355 (2d Cir. 1996) ("The ancient maxim *expressio unius est exclusio alterius* (mention of one

impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statutory scheme]."} "For the courts [t]o create additional federal common-law [types of liability] is not to 'supplement' this scheme, but to alter it." Gulino, 460 F.3d at 375 (quoting O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994).

The common-fund theory derives primarily from principles of unjust enrichment. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 note 4; see also Boeing Co. v. Van Gemert, 444 U. S. 472, 478 (1980). ("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"). Those considerations are not present in this case, where Plaintiff's counsel has the ability to obtain a reasonable fee under ERISA's fee-shifting statute, and there is no need to violate the benefits of ESOP participants to provide a reasonable attorney fee.

In a case where ERISA anti-alienation rules were not implicated, the Seventh Circuit held that common-fund attorney fee claims are never proper, in the absence of agreement, where the claim provides for a fee-shifting statute. Pierce v. Visteon Corp., 791 F.3d 782, 787 (7th Cir. 2015)(no common fund allowed against district court's award of $1.85 million in COBRA penalties because a reasonable fee was available under 29 U.S.C. under § 1132(g)(1)). The Court of Appeals reasoned that availability of fees under § 1132(g)(1) precluded a common fund award because

- "the common-fund doctrine is part of the common law, devised by courts as a matter of necessity when there was no other way to compensate the lawyers for work that bestowed a substantial benefit on the class." 791 F. 3d at 787.

- "fee-shifting statutes are designed to ensure that the victims retain full compensation, while the wrongdoer pays the lawyers. That interest would be disserved by transferring some of the class's money to its lawyer in lieu of, or on top of, the award under the fee-shifting statute." 791 F. 3d at 787.

- "§ 1132(g)(1), like most other fee-shifting statutes, provides for the award of a 'reasonable' fee, which the district judge fixed at $303,000 . . . . If [plaintiff's counsel] were to pocket

substantially more than that, his compensation would by definition be unreasonably high." 791 F.3d at 787.

The court in Pierce noted that agreed settlements, like the class action settlements relied upon by Plaintiff's counsel and Professor Silver, are not authority for permitting "common fund" recoveries when a reasonable fee is already available under 29 U.S.C. § 1132(g)(1). Pierce, 791 F.3d at 787.

In Van Orman v. American Ins. Co., an ERISA case, the Third Circuit held that courts should not "fashion a federal common-law doctrine of unjust enrichment when such a right would override a contractual provision." 680 F.2d 301, 312 (3rd Cir. 1982) (noting that "Where Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, federal courts will not lightly create additional rights under the rubric of federal common law." Id. (citing Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, 285 (1952)). The Second Circuit has also held that it is inappropriate to supplement "specific statutory sections with an ERISA common law of unjust enrichment." Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1419 (2nd Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986).

In this case, ERISA Section 502(g) expresses Congressional intent that courts analyze fee petitions in ERISA cases that proceed to judgment under a fee-shifting analysis. Plaintiff's counsel should be required to carry their burden under a Section 502(g) analysis, and if they cannot, they should not be permitted a windfall under the common fund doctrine.

C. Plaintiff's Counsel Has Not Met The Burden Of Demonstrating Entitlement To A Common Fund Fee Recovery.

Plaintiff's counsel devotes only a little over three pages (and one long footnote) to their common fund argument, and one paragraph to their entitlement to the fee award. No court in the Fourth Circuit has ever awarded fees under the common fund doctrine in an ERISA case that has gone to verdict.

The Supreme Court has held that, in calculating a reasonable fee under a fee-shifting statute, a district court should not include a multiplier that will effectively compensate counsel for the risk of loss. Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992). "Adding a common-fund award to a statutory 'reasonable' fee would undercut if not countermand Dague and similar decisions." Pierce, 791 F.3d at 787. Awarding Plaintiff's counsel's fees under ERISA Section 502(g), and then additional fees pursuant to the common fund doctrine, would be inappropriate and result in an improper windfall to Plaintiff's counsel. Pierce; see, e.g., Saizan v. Delta Concrete Prods. Co., 448 F.3d 795, 800 (5th Cir. 2006) (finding "District Court did not abuse its discretion in refusing to depart from the adjusted lodestar amount" and noting that "[t]here exists a strong presumption of the reasonableness of the lodestar amount"); Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 859–60 (S.D. Tex. 2011) (collecting cases); Richardson v. Tex-Tube Co., 843 F. Supp. 2d 699, 708 (S.D. Tex. 2012) ("there is a strong presumption that the lodestar amount is reasonable and should be modified only in exceptional cases").

ERISA's statutory scheme for awarding of attorneys' fees eliminates the equities that support a common fund recovery, as the Seventh Circuit noted in Pierce. As the Supreme Court explained in McCutcheon, the common fund doctrine cannot be used to override the express terms of an ERISA plan. In cases where a fee award is made under § 1132(g)(1), the "successful litigant" incurs no

expense, as the attorneys' fees are paid by the unsuccessful party, and not taken from pension plan assets intended to fund benefits for participants.

Accordingly, in ERISA cases litigated to judgment, courts have concluded that an award of common fund attorneys' fees from the judgment is inappropriate due to ERISA's fee-shifting provision. See Pierce; Humphrey, 802 F. Supp. 2d at 859–60; Brytus v. Spang & Co., 203 F.3d 238, 244 (3d Cir. 2000) (affirming district court decision to award fees under Section 502(g) and deny additional fees under the common fund doctrine; reasoning that allowing recovery under both would be "to award counsel duplicative recovery, a goal not contemplated by either the fee-shifting provision or the common fund theory."); Carrabba v. Randalls Food Markets, Inc., 191 F. Supp. 2d 815, 823–24, 826–27 (N.D. Tex. 2002) (fee shifting award more than adequate to compensate counsel for their work, including risk of loss); United States ex rel. Bogart v. King Pharms., 493 F.3d 323, 331 (3d Cir. 2007) ("'there is no inequity to redress' because the defendant, rather than the plaintiffs, ultimately bore the entire cost of litigation under ERISA's statutory fee provision."). As the Second Circuit, the Seventh Circuit, and other courts have found, agreed class action settlements may permit a common fund recovery where the common fund is paid by agreement by a third party defendant and not out of plan assets. See Kickham, 558 F.3d at 213, Carlson, 542 F. App'x at *6, Pierce 791 F.3d at 787; Humphrey, 802 F. Supp. 2d at 859–60; Section 502(g)(2). As the Second Circuit noted in Kickham, the cases identified involved class action suits in which settlement negotiations resulted in the creation of a common fund:

> These common funds were all financed by parties other than the plans at issue, and the funds themselves were never designated as vested pension benefits--rather, these were general settlement funds that allowed for (and, often, specifically provided for) payment of attorney's fees out of the common fund.

558 F.3d at 213.

In this case, to the extent that the Court awards fees under § 1132(g)(1), there will be no inequity to redress, as neither Brundle nor the ESOP Plan assets will be required to bear the cost of this litigation. Rather, that burden will be borne by Wilmington Trust, and this Court will have determined a reasonable fee to counsel under ERISA's fee-shifting provision, and any additional amount awarded would be a windfall to counsel. Likewise, awarding a common fund recovery of $10M when the lodestar number under the fee shifting analysis is so much lower would provide a windfall for counsel not contemplated by the statute. See, e.g., Pierce; Brytus, 203 F.3d at 242-44; Carrabba, 191 F. Supp. 2d at 823–24, 826–27; King Pharms., 493 F.3d at 331.

In support of their argument that any fee award under the lodestar method should be increased by a further award under the common fund doctrine, Plaintiff's counsel cites one case, Dijkstra v. Carenbauer, No. 5:11-cv-152, 015 WL 12750449, at *7 (N.D. W. Va. July 29, 2015), a class action diversity case under the West Virginia Consumer Credit and Protection Act. Id. at 6. Under West Virginia law, a contingent fee "is not a ceiling with regard to the fee awards that an attorney can receive where statutory fee-shifting is involved." Id., at *4 (quotation marks and citations omitted).

Moreover, the decision cited by Plaintiff's counsel was appealed to the Fourth Circuit and was eventually settled before the Fourth Circuit ruled, with notice to class members and approval of the agreed settlement by the district court. Dijkstra v. Carenbauer, No. 15-1994, Doc: 35-1 (4th Cir. May 9, 2016); Dijkstra v. Carenbauer, et al., No. 5:11-cv-00152-JPB, Doc. 326, Filed 07/12/16 (approving class action settlement). It is telling that the only case cited by Plaintiff's counsel where a court awarded fees under both a fee-shifting statute and a lodestar was not an ERISA case, did not permit a "common fund" claim from ERISA pension assets, and was a class action settlement where the defendant agreed to provide the common fund. The case provides no support for the common fund claim made in this case.

Finally, the Court should disregard the thirty pages of legal argument presented to the Court in the form of the "Report Of Professor Charles Silver On Plaintiff's And Plaintiff's Counsel's Request For A Statutory Fee Award And A Common Fund Fee Award." This "report" is nothing if not an attempt by Plaintiff's counsel to make an end run around this Court's requirement that briefs be thirty or less pages. Local Civil Rule 7(F)(3). It is unclear from his "report" whether Professor Silver is barred in this state, or has ever practiced before this Court. Professor Silver fails to address ERISA's anti-alienation rule or the Kickham, Pierce, Carlson and McCutcheon cases, and relies on class action settlements, which are completely irrelevant to the issues here.

Despite being very experienced ERISA counsel, Plaintiff's lawyers have not met any of the standards required by this Court to entitle them to the fee award they claim under the fee shifting provision of ERISA. They have also failed to provide any legal or factual basis for the windfall they seek under the common fund doctrine. While counsel is entitled to some fee as a result of the verdict in this case, as described above, any award must be substantially reduced from the amount sought.

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I hereby certify that on May 11, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all registered counsel of record in this action listed below:

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