IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

EDWIN J. RUST, Plaintiff, v. ELECTRICAL WORKERS LOCAL NO. 26 PENSION TRUST FUND, *et al.*, Defendants.	)	Case No. 3:10-cv-00029 (NKM/BWC)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
PETITION FOR ATTORNEY'S FEES AND COSTS

Plaintiff Edwin J. Rust ("Rust"), by counsel, submits this memorandum in support of his Petition for Attorney's Fees and Costs.

INTRODUCTION

This petition, as allowed by the Court, follows an action by Rust to recover pension plan benefits governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA") that were improperly and arbitrarily terminated by Defendants the Electrical Workers Local No. 26 Pension Plan Trust Fund (the "Plan") and the Trustees of the Electrical Workers Local No. 26 Pension Trust Fund (the "Trustees") (collectively, the "Union"). Rust's claims also included multiple violations of ERISA by the Union, which failed to provide him with crucial Plan documents, despite repeated requests by Rust and his counsel. On September 29, 2011, the Court issued a Memorandum Opinion and Order ruling in Rust's favor on *every major issue* in the case. *See Rust v. Electrical Workers Local No. 26 Pension Trust Fund*, No.

3:10-CV-00029, 2011 U.S. Dist. LEXIS 111618 (W.D. Va. Sept. 29, 2011).[1] The Court's Opinion also took the Union to task for the unfair manner in which they treated Rust and conducted the litigation. In the Opinion and Order, the Court directed Rust to file the instant petition for attorney's fees and costs. (*See* Docket No. 73.)

BACKGROUND

A. Troutman Sanders Undertakes Representation of Rust

Rust and lead counsel Anthony F. Troy had a personal friendship, which resulted in Rust's request that Troutman Sanders LLP ("Troutman Sanders" or the "Firm") help him with legal matters resulting from the failure of his company, NSR Electrical, Inc. The Firm agreed to handle Rust's claim against CommerceFirst Bank. This led to a lawsuit in the Circuit Court of Nelson County, Virginia, which was removed to this Court. Declaration of Anthony F. Troy ("Troy Decl."), at ¶ 15; *Rust v. CommerceFirst Bank*, Case No. 3:07cv52 (W.D. Va.).

The dispute with the Union arose when, relying on the outcome of the *CommerceFirst Bank* lawsuit, the Union claimed that Rust had profited at the Union's expense and therefore they had a right to a "set-off" against Rust. Because the Firm already was familiar with and had represented Rust in the *CommerceFirst Bank* case, Rust asked Mr. Troy if Troutman Sanders could represent him in his claim against the Union, which had misrepresented the outcome of the *CommerceFirst Bank* case in an attempt to avoid paying his benefits. (The Court ultimately recognized that this claim by the Union had no basis in law or fact. *See generally* 2011 U.S. Dist. LEXIS 111618 at *22-*34.) The Firm agreed to take Rust's case and filed a Complaint against the Union on Rust's behalf. Troy Decl., at ¶¶ 16-17.

---

[1] The Court found that even Rust's Motions to Strike that were not granted were well-founded. *Id.* at *2 & *92.

B. Preliminary Conduct of Litigation

The Union's mistreatment of Rust did not stop once litigation was filed. Instead, this case has been marked by intransigence, incompetence and bad faith on the part of the Union and their counsel, necessitating extra work by Rust's counsel. The following are just some relevant examples:

- At the very beginning of the lawsuit, Rust gave the Union the benefit of waiving service of summons, thereby granting additional time to file responsive pleadings to the original Complaint. The Union, however, ignored the deadline. Rather than moving for default judgment, Rust stipulated to extending the response deadline, thereby giving the Union even more time to respond. *Id.*, at ¶ 15.

- Just as they failed to timely respond to the original Complaint, the Union failed to timely respond to Rust's Amended Complaint. Rather than once again contacting the Union and alerting them to the potential default, this time Rust moved for default judgment against the Union. *Id.*, at ¶ 16.

- Although redaction of personal information and filing under seal is the responsibility of counsel for the party filing documents, *see* Local Rules 8 and 9, to ensure that the Union filed under seal the purported administrative record in order to protect Rust's confidential information, Troutman Sanders had to provide the forms and advice to the Union's counsel on proper local procedures for filing documents under seal. *Id.*, at ¶ 17.

- As the Court has ruled, the copy of the purported administrative record filed by the Union's counsel with the Court was clearly incomplete and included hundreds of pages that the Union did not and could not have relied upon in making their decision to terminate Rust's pension benefits. *Id.*, at ¶ 18 (citing *Rust v. Electrical Workers Local No. 26 Pension Trust Fund*, No. 3:10-CV-00029, 2011 U.S. Dist. LEXIS 111618, at *26 n.9, *28 ns. 10-15, *49-*50 ns. 23, 24 (W.D. Va. Sept. 29, 2011)).

- Rust successfully moved for leave to amend his original Complaint in order to assert additional claims against the Union for their multiple failures to produce Plan documents

upon written request – failures which in some cases still have not been remedied. *Id.*, at ¶ 19.

- Rust had to prepare objections and responses to the Union's interrogatories and requests for production of documents, all of which violated the Court's Amended Scheduling Order (Docket No. 18) and the law of ERISA, in that the discovery requests sought information and documents relating to the Union's decision to terminate Rust's pension benefits, and, therefore, were outside the very limited scope of discovery for claims for ERISA benefits. *Id.*, at ¶ 20.

C. Conduct Surrounding Summary Judgment Proceedings

- At the settlement conference on January 19, 2011,[2] the Union alluded to a new defense based on the assertion that the Union's counsel, McChesney & Dale PC ("McChesney & Dale"), did not represent the Plan Trustees during the administration of Rust's benefit claim. In briefing their motion for summary judgment, the Union for the first time made the claim to the Court, and argued on this basis that the Trustees could not be held liable for their failure to produce Plan documents upon request from Rust. Rust successfully showed that the Union's defense was (1) barred by judicial estoppel based on Defendants' Answer, (2) factually "false," and (3) contradicted by the information and documents included in the purported administrative record submitted by Defendants to the Court. *Id.*, at ¶ 21 (citing 2011 U.S. Dist. LEXIS 111618, at *76-*80 n. 29).

- Next, the Union raised for the first time in their opposition to Rust's Motion for Summary Judgment the defense that the Trustees, as a group, are not *sui juris* and could not be held liable for the violations of ERISA and the Plan documents. Rust successfully moved for leave to file a Second Amended Complaint to add the names of the individual Trustees to the style of the lawsuit. *Id.*, at ¶ 22 (citing 2011 U.S. Dist. LEXIS 111618, at *3-*4 n.1).

---

[2] The parties failed to resolve the litigation at the settlement conference before Magistrate Judge Waugh Crigler, based, in large part, on the Union's refusal to consider any settlement amount which included an amount attributable to Rust's claim for statutory damages arising out of the Union's failure to provide timely Plan documents.

- In granting Plaintiff's motion, Magistrate Judge Crigler described the Defendants' newly raised defense as "the worst case of sandbagging I have ever seen." Transcript of March 28, 2011 Telephonic Hearing at 10 (relevant portion attached as Exhibit C to Troy Decl.).

- Additionally, the Union's position was belied by the fact that the Trustees, as a group, are actively prosecuting a class action lawsuit currently pending in federal district court in Oklahoma, in which they have asserted that "the Trustees" *are* an entity that may sue and be sued. Troy Decl., at ¶ 22.

- The Union's position also was inconsistent with the Plan documents, which limits the liability of employers and makes clear that the Plan is liable in cases like Rust's. *Id.* (citing 2010 Pension Plan, § 11.3 (just recently provided to Troutman Sanders on October 11, 2011)).

- In their Motion for Summary Judgment, the Union also attempted to rely upon and cite several improper documents, including the Collective Bargaining Agreement and "underlying Trust Agreements" (which had been requested by, but never produced to, Rust). The Union claimed that they had relied on these and other documents in making the decision to terminate Rust's benefits, even though the Union never produced the documents to Rust and neither included the documents in the administrative record the Union submitted to the Court nor attached them as exhibits to the Union's Motion for Summary Judgment. Rust therefore was forced to move to exclude any reference or reliance upon the documents. *Id.*, at ¶ 23.

- Additionally, in their Motion for Summary Judgment, the Union raised several defenses to Rust's claims to recover ERISA pension benefits and statutory damages. The Union, however, cited little, if any, supporting case law for their defenses. Indeed, in support of the Union's central claim that they were legally entitled to terminate Rust's benefits, when pressed for the grounds for this theory, the Union could offer nothing but an analogy to the purchase of a meal at the Olive Garden – an analogy the Court deemed to be "rather dopey." *Id.*, at ¶ 24 (quoting 2011 U.S. Dist. LEXIS 111618, at *57).

- In their Reply in Support of their Motion for Summary Judgment, the Union also attempted to submit and rely on improper testimony from individuals not disclosed in discovery and not included in the administrative record. Of course, Rust could not ignore these affidavits, but had to both address and move to strike them. *Id.*, at ¶ 25. Though the Court denied the Motion to Strike, ruling on the issue on the merits, it held that Rust was entitled to the relief requested. 2011 U.S. Dist. LEXIS 111618, at *2 & *92.

- The Union further argued that, as a matter of law, Rust's requests for Plan documents did not meet the "clear notice" rule, could not be made by a plan participant's counsel and could not be made to a plan administrator's attorney. Rust rebutted each of these contentions and the Court rejected the Union's defenses and awarded statutory damages against them. Troy Decl., at ¶ 26.

D. Misrepresentations by the Union

- Perhaps most egregiously, counsel for the Union submitted a sworn affidavit to the Court that included testimony from the Union's counsel that was "false" and "rife with statements that the record clearly indicates are inaccurate." 2011 U.S. Dist. LEXIS 111618, at *92 n.36. These statements, each of which Rust had to research and disprove, included the following:

  - Counsel for the Union, Eric Wexler, Esquire, inaccurately claimed that he had not seen Rust's July 27, 2008 letter until Rust filed his motion for summary judgment. Rust had produced a copy of the letter with his Supplemental Initial Disclosures. Wexler received the document, as confirmed by a FEDEX receipt in Troutman Sanders' possession. The Court ultimately rejected Wexler's testimony on this point, and awarded Rust statutory damages based on his July 27, 2008 letter. Troy Decl., at ¶ 27(a).

  - Wexler inaccurately claimed that he did not forward to the Trustees the three letters from Rust requesting Plan documents. As the Court ruled, this statement is contradicted by the inclusion of the documents in the Trustees' administrative

recorded submitted by Mr. Wexler to the Court. *Id.*, at ¶ 27(b) (citing 2011 U.S. Dist. LEXIS 111618, at *76-*80 n. 29).

- Wexler inaccurately claimed that his law firm, McChesney & Dale, represented the Plan, not the Trustees, in attempting to collect delinquent contributions from employers. This statement is contradicted by multiple lawsuits personally filed by Mr. Wexler in the U.S. District Court for the District of Maryland on behalf of the Trustees, not the Plan. *Id.*, at ¶ 27(c).

- Wexler inaccurately claimed that the Plan incurred attorneys' fees and costs in a lawsuit they filed against Rust. This statement is contradicted by the fact that the lawsuit at issue was filed by Mr. Wexler on behalf of the Trustees, not the Plan. This point is especially important because, at the very same time he made this claim, Mr. Wexler was submitting sworn testimony to this Court stating that he represented the Plan, and not the Trustees. *Id.*, at ¶ 27(d).

Rust ultimately prevailed in his motion for summary judgment on all three claims asserted against the Union, including the claim to recover ERISA pension benefits, and Rust successfully opposed the Union's cross-motion for summary judgment.

ARGUMENT

I. Legal Standard for Award of Attorney's Fees and Costs.

Under ERISA, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). The U.S. Court of Appeals for the Fourth Circuit has stated that a three-step framework applies to fee petitions under ERISA. *See Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 633-34 (4th Cir. 2010); *Bd. of Trustees for the Hampton Roads Shipping Assoc. v. Ransone-Gunnell*, No. 2:09cv165, 2011 U.S. Dist. LEXIS 4614, at *8 (E.D. Va. Feb. 25, 2011). In determining whether to award attorney's fees a court "must . . . bear in mind the remedial purposes of ERISA to protect employee rights and to secure effective

access to federal courts." *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993). As such, "a prevailing individual beneficiary should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Id.* (internal citation omitted).

First, a party seeking attorney's fees "must show 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2158 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). The success shown need not be "substantial" nor must it be on a "central issue" in the case, but it must be more than "purely procedural" success, or "trivial success on the merits." *Id.*

Second, once the requisite degree of success has been shown, the Court must determine whether an award of attorney's fees is appropriate. To make this determination, the Court must consider five factors set forth in the Fourth Circuit's decision in *Quesinberry*:

(1) The degree of opposing parties' culpability or bad faith;
(2) The ability of opposing parties to satisfy an award of attorneys' fees;
(3) Whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;
(4) Whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
(5) The relative merits of the parties' positions.

987 F.2d at 1029. The five-factor approach in *Quesinberry* "'is not a rigid test,' but instead provides 'general guidelines'" to the Court deciding whether to award attorneys' fees. *Williams*, 609 F.3d at 635 (4th Cir. 2010) (quoting 987 F.2d at 1029).

Third, once the Court has concluded that the *Quesinberry* factors weigh in favor of granting attorney's fees, the Court must determine whether the fees sought by the plaintiff are reasonable. "In calculating an award of attorney's fees, a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Servs.*, 560 F.3d 235, 243 (4th Cir. 2009). To determine what

constitutes a "reasonable" number of hours, the Court must be guided by twelve factors, known as the "*Johnson* factors." *Id.* at 243-44. These factors are:

(1) the time and labor expended;
(2) the novelty and difficulty of the questions raised;
(3) the skill required to properly perform the legal services rendered;
(4) the attorney's opportunity costs in pressing the instant litigation;
(5) the customary fee for like work;
(6) the attorney's expectations at the outset of the litigation;
(7) the time limitations imposed by the client or circumstances;
(8) the amount in controversy and the results obtained;
(9) the experience, reputation and ability of the attorney;
(10) the undesirability of the case within the legal community in which the suit arose;
(11) the nature and length of the professional relationship between attorney and client; and
(12) attorneys' fees awards in similar cases.

Id. (citing *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978)).[3]

Additionally, in the Fourth Circuit, a thirteenth factor is also appropriate; specifically, the opposing party's ability to pay may be considered by the Court. *See Porter v. Elk Remodeling, Inc.*, No. 1:09-cv-446, 2010 U.S. Dist. LEXIS 89037, at *9 n.4 (E.D. Va. Aug. 27, 2010) (citing *Chaplin v. DuPont Advance Fiber Sys.*, 303 F.Supp.2d 766, 775-76 (E.D. Va. 2004)); *see also Arnold v. Burger King Corp.*, 719 F.2d 63, 67 (4th Cir. 1983) (in addition to the *Johnson* factors, "[i]n appropriate circumstances, the district court should give weight to the relative financial positions of the litigants").

II. Rust Achieved a High Degree of Success on the Merits.

The first factor considered by the Court in determining whether to award attorney's fees is the degree of the plaintiff's success on the merits. In this case, there can be no argument that Rust was anything but overwhelmingly successful.

---

[3] The name for this test comes from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in which the factors were first set forth.

The Court granted Rust's motion for summary judgment in its entirety, and denied the Union's motion for summary judgment. The Court concluded, "I have considered the entirety of Defendants' submissions, and I find Defendants' arguments wholly unpersuasive." 2011 U.S. Dist. LEXIS 111618, at *2 and *92. As shown in the proposed order, recently filed (Docket No. 79), Rust is entitled to receive $385,219.20 in damages, past-due benefits, continuing future benefits, statutory penalties and interest, because of the Union's failure to comply with the requirements of ERISA.

In light of Rust's complete success on the merits, Rust is eligible for an award of attorney's fees. As the U.S. Court of Appeals for the Fourth Circuit held in *Williams*, where a plaintiff's motion for summary judgment was granted and the plaintiff was awarded the benefits she sought, "the degree of her success was very high" and she was therefore "eligible for an award of attorneys' fees" under applicable law. 609 F.3d at 634-35.

III. The *Quesinberry* Factors Support Awarding Rust Attorney's Fees.

In ordering that Rust submit a petition for attorney's fees, the Court already has implicitly found that Rust has met the five *Quesinberry* factors. This finding was correct, as explained in the analysis below.

1. The degree of opposing parties' culpability or bad faith (*Quesinberry* Factor No. 1)

The first factor considered by the Court under *Quesinberry* is the degree of the opposing party's culpability or bad faith. This factor weighs heavily in favor of granting Rust his attorney's fees. The Court already has found that the Union acted in bad faith.

Specifically, the Court found that Rust made four requests for various categories of documents that were necessary for Rust to understand the basis for the Union's decisions and to challenge those decisions. The Court then found that the Union failed or refused to respond to

these requests. The Court held that "Defendants continued failure — or refusal — to produce documents upon which they based their adverse benefit determinations demonstrates *bad faith*, and they cannot claim ignorance or mistake." 2011 U.S. Dist. LEXIS 111618, at *76 (emphasis added). The Court also found that the Union's decision to revoke Rusts' benefits was unjustified and that the Union and their counsel took positions in litigation that were not supported by the law and the facts.

In short, the Court already has found that the Union acted in bad faith. This finding satisfies the first *Quesinberry* factor, supporting Rust's request for attorney's fees.

2. The ability of opposing parties to satisfy an award of attorneys' fees (*Quesinberry* Factor No. 2)

As of 2009, the Electrical Workers Local No. 26 Pension Trust Fund's annual Form 5500 report to the Department of Labor and Internal Revenue Service listed assets of nearly *$334 million*. *See* Troy Decl., at ¶ 31. The form is required by law to be filed by the Union, is public information and is available at http://freeerisa.benefitspro.com/. The fees sought by Rust in this petition would represent less than *1/1,800th* of the Trust Fund's total assets. Thus, there can be no doubt that the Trustees and the Trust Fund will be able to satisfy any award of attorneys' fees, and this factor, too, weighs in Rust's favor.

3. Whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstance (*Quesinberry* Factor No. 3)

In addressing Rust's request for an award of penalties for the Union's failure to product documents in response to Rusts' repeated requests, the Court found that an award of statutory penalties was necessary "to provid[e] Defendants with an incentive to meet requests for information in a timely fashion, and [to] punish[] Defendants for their undisputed non-compliance with ERISA." 2011 U.S. Dist. LEXIS 111618, at *80. The same reasoning is true

with respect to Rust's claim for attorney's fees.

An award of attorney's fees to Rust would deter not only the Union, but others that are similarly situated, from ignoring their obligations under ERISA and from taking positions in litigation that are not well-grounded in law and fact.

Finally, an award will also inure to the benefit of others by sending a message that those entitled to benefits should be treated fairly – and that they will not have to pay out-of-pocket for enforcement of their rights when those rights are egregiously abused by pension fund managers.

4. Whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself (*Quesinberry* Factor No. 4)

The fourth *Quesinberry* factor also favors an award of attorney's fees.

First, as already noted, the penalty imposed in this case, "provid[es] Defendants with an incentive to meet requests for information in a timely fashion." *Id.* The incentive created by this penalty benefits not only Rust, but all beneficiaries of the Trust who in the future seek information from it.

Second, this litigation required Rust to address significant legal questions regarding ERISA. Because the Union lacked any coherent legal theory to support their actions, Rust was forced to brief very complex legal theories and principles regarding ERISA and ERISA administrators and further illustrate how the underlying ERISA principles and jurisprudence did not and could not support the Union's decision to terminate Rust's benefits. Thus, Rust was forced to explain the limited circumstances in which a plan administrator may file suit against a participant pursuant to the U.S. Supreme Court's decisions in *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and why none of those circumstances applied in his case.

Similarly, Rust was forced to respond to and rebut the Union's novel argument based on the common law concept of "set-off." After researching the issue, counsel for Rust advised the Union in writing prior to the litigation that there was no mutuality of parties and therefore a set-off theory could not apply. Nonetheless, the Union continued to advance the theory, forcing Rust to brief the issue. The Court ultimately agreed with Rust that "Defendants cannot setoff or recoup Plaintiff's pension benefits against NSR's alleged debts because the two claims lack mutuality of parties." 2011 U.S. Dist. LEXIS 111618, at *63.

Finally, Rust successfully addressed the question of the appropriate remedy for improper termination of benefits by an administrator that has breached its fiduciary duties by first awarding benefits, and then terminating the benefits, while failing to comply with the procedural requirements of ERISA and the Plan. This was a question of first impression in the Fourth Circuit. The Court answered this question by concluding that the proper remedy is retroactive reinstatement of benefits. *See id.* at *87.

In sum, the case involved complicated questions of law related to ERISA – questions which were resolved in Rust's favor – and resulted in a judgment that will benefit all Union's beneficiaries. Under these circumstances, an award of attorney's fees is justified.

5. The relative merits of the parties' positions (*Quesinberry* Factor No. 5)

The fifth *Quesinberry* factor also favors awarding attorney's fees. The Court already has concluded that the Union's position in this case was meritless. For example, the Court held that the Union's "decision to terminate and rescind [Rust's] benefits was neither reasoned nor principled," *id.* at *42, and the Union's refusal to provide documents "support[ed] a finding of bad faith on the part of Defendants," *id.* at *75. The Court summed up the treatment of Rust by the Union as follows:

> Defendants have prevented Plaintiff from obtaining a 'reasonable opportunity' for a 'full and fair review' of the termination of his benefits. The cited violations disclose no mere series of procedural or ministerial errors; on the contrary, the record indicates that Defendants, by deliberately and repeatedly and continually ignoring and violating the claim and appeal procedures under ERISA and the Plan, are in breach of their fiduciary duties. . . .

Id. at *86.

On the other hand, the Court rejected any suggestion by the Union that Rust was responsible for any misconduct during the administration of his claim. As the Court held in its opinion, "Contrary to Defendants' assertions, the record does not indicate that Plaintiff made any inconsistent or fraudulent statements during the administration of his claim. . . . Defendants asserted rationale for the termination thus fails." *Id.*, at *90-*91 n.34.

In sum, the Court has found that the Union's termination of Rust and the positions taken by the Union during this litigation were meritless, and the Court has rejected any suggestion that Rust was culpable in the termination of his benefits. Thus, an award of attorney's fees is appropriate.

IV. The *Johnson* Factors Support an Award of All of Rust's Attorney's Fees.

Once the Court has found that the *Quesinberry* factors have been met, it must then analyze the *Johnson* factors. Not only, as indicated, do the five *Quesinberry* factors support an award of fees to Rust (a finding the Court effectively already made by asking Rust to submit the instant fee petition), but the twelve *Johnson* factors – as well as the additional factor of the defendant's ability to pay – support an award of the full value of the fees sought by Rust.

1. The time and labor expended (*Johnson* Factor No. 1)

As explained in the accompanying affidavit of Mr. Troy, Troutman Sanders expended over 450 hours litigating this case. Troy Decl., at ¶ 4. The time expended was reasonable in

order to address the numerous issues presented in this litigation and to respond to the machinations of the Union.

First, as explained *supra* at 11-12 (discussing *Quesinberry* Factor No. 4) and in the following section, this case should have involved a simple request for benefits. Instead due to the recalcitrance of the Union, it evolved into a complex case in which novel legal theories were asserted that had to be researched and rebutted.

Second, to the extent that more labor was expended in this case than in typical ERISA litigation, this work was necessitated by the Union's conduct in the case. As shown in the recitation of the background of the case above, the Union made every effort to frustrate Rust, withholding key documents, resisting at almost every turn and forcing Rust to win a hard-earned victory.

When defendants engage in tactics like those employed by the Union, they can expect to pay a higher price when those tactics fail. The Court already recognized this fact when it awarded significant statutory damages to Rust. 2011 U.S. Dist. LEXIS 111618, at *80 n.30 (holding that "Defendants' egregious actions in this case are substantially worse than the defendants' actions in" other cases in which statutory damages had been awarded). As held in *Lipsett v. Blanco,* 975 F.2d 934, 941 (1st Cir. 1992), a defendant should not be heard to complain about the fees incurred by a plaintiff when the defendant has engaged in, "what we have referred to as the 'Stalingrad defense.' While this hard-nosed approach to litigation may be viewed as effective trench warfare, it must be pointed out that such tactics have a significant downside. The defendants suffer the adverse effects of that downside here."

Even though the Union bears the responsibility for the length and breadth of this litigation, Rust has nevertheless made "a good faith effort to exclude from the fee request, hours

that are redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Troutman Sanders therefore has reviewed the time records to determine what, if any, hours should be written off in the same manner as the firm would handle a bill for a regularly paying client. The Firm has made an effort to remove all time associated with work that could be considered unnecessary, duplicative, or perhaps not reimbursable under ERISA.

Thus, even though such time reasonably could be considered related to the litigation, Troutman Sanders has eliminated some time related to: (a) requests for key documents from the Union and their counsel prior to drafting the Complaint; (b) research and advice related to the bankruptcy of Rust and the failure and takeover of his company, NSR, by CommerceFirst Bank; and (c) research assistance by our research librarian. *See* Troy Decl., at ¶¶ 9, 12 & 14, and accompanying footnotes. As a result, the hours and labor expended represent only those hours reasonably necessary to effectively represent Rust and have been narrowed to three individuals – a partner, an associate and a paralegal.[4] *Id.*, ¶ 35; Affidavit of William R. Rakes (cited as "Rakes Aff."), at ¶¶ 11, 12, 15, 16.

2. Novelty and difficulty of the questions raised (*Johnson* Factor No. 2)

It is well-recognized that "ERISA, in particular, is a very complicated statute, and understanding its intricacies usually requires specialization in the field." *Porter*, 2010 U.S. Dist. LEXIS 89037, at *12. This case, in particular, required delving into these intricacies. As explained *supra* at 12-13, this was not a simple dispute over non-payment of benefits. Instead, this case required Rust to address significant legal questions regarding ERISA, including:

---

[4] This does not include time spent on the "fee-on-fee" petition, for which the involvement of additional attorneys and staff was necessary, and for which a separate application will be made, as explained below.

- Why the plan administrator could not file suit against a participant, based on the Supreme Court's decisions in *Sereboff* and *Knudson*;

- Why the Union's argument that they were entitled to a "set-off" against Rust was flawed because of a lack of mutuality of parties;

- Why the appropriate remedy for improper termination of benefits by an administrator that has breached its fiduciary duties by first awarding benefits, and then terminating the benefits, is retroactive reinstatement of benefits; and

- Why the Union's assertions regarding the purported non-applicability of any penalty provisions were frivolous.

The fact that this was a complicated case involving a number of questions of first impression regarding ERISA law in the Fourth Circuit, with significant ramifications for all similarly situated persons, supports the award of fees requested by Rust. *See id.* (when a case "dealt with some issues which have not been widely addressed in the Fourth Circuit," the second *Johnson* factor supports a finding that the fees and hours expended were reasonable).

3. The skill required to properly perform the legal services rendered (*Johnson* Factor No. 3)

Successful prosecution of an ERISA case "call[s] for an attorney with a background in employment law, and more specifically, in ERISA litigation." *Id.* at *12; *see also O'Bryhim v. Reliance Std. Life Ins. Co.*, 997 F. Supp. 728, 734-35 (E.D. Va. 1998) (ERISA case "involved issues appropriately addressed by counsel experienced in ERISA and ERISA litigation"). In this case, the Firm properly staffed the case with an associate, Jon Hubbard, an associate with significant ERISA experience. The expertise of Mr. Hubbard and the confidence placed in his abilities are set out in Mr. Troy's Declaration. *See* Troy Decl., at ¶¶ 8, 10, and Exhibit B.

At the same time, as litigation became contentious, it became necessary for the more senior counsel overseeing the case, Mr. Troy, to become more active in the case.[5] Troy Decl., at ¶ 11. This was particularly important, given Rust's need to counter the misleading positions taken by counsel for the Union. Mr. Troy's background and reputation are well known to the Court and are detailed in his Declaration and the Affidavit of William R. Rakes. Mr. Rakes is a partner with Gentry Locke Rakes & Moore, LLP who has opined on the reasonableness of fee petitions in the past to this Court. Both of these declarations are submitted with this Petition.

Together, Mr. Troy and Mr. Hubbard handled Rust's case skillfully and achieved exceptional results. Thus, the third Johnson factor, too, supports an award of the full fees requested by Rust.

4. The attorney's opportunity costs in pressing the instant litigation (*Johnson* Factor No. 4)

As established in Mr. Troy's declaration, he typically logs 1800 hours per year or more in billable, firm management and client development time. Mr. Hubbard typically bills in excess of 2000 hours per year. Troy Decl., at ¶ 33. This is consistent with the accompanying affidavit of Robert D. Seabolt, Troutman Sanders' Chief Operating Officer, which establishes that average billable hours for attorneys in labor and employment law are in excess of 1800 hours. Seabolt Decl., at ¶ 4.

The 450 hours expended in representing Rust, largely on a contingent, fee-shifting basis, has necessarily impacted the ability of Messrs. Troy and Hubbard to seek out and take on additional work from clients willing and able to pay Troutman Sanders' full rates. *See* Troy Decl., at ¶¶ 33, 34. Thus, this factor, too, supports an award of attorneys' fees.

---

[5] Even then, Mr. Troy's time constituted only approximately twenty percent of the hours expended, demonstrating that a proper delegation of work occurred.

5. The customary fee for like work (*Johnson* Factor No. 5)

Another factor contributing to the analysis is the reasonableness of the rates employed. Mr. Rakes has reviewed the rates charged by Troutman Sanders throughout this litigation and compared them to rates charged by other firms in the market.[6] Mr. Rakes concluded that the rates charged by Troutman Sanders were in line with typical rates charged by similar firms and are reasonable. Rakes Aff., at ¶¶ 9, 11 & 16. Additionally, Troutman Sanders' COO, Mr. Seabolt, has explained how the rates set by the Firm are market-driven, are based on competitive data, and are actually charged to and paid by Troutman Sanders' regular clients. Seabolt Decl., at ¶ 2.

Troutman Sanders' principal lawyer on the matter, Mr. Troy, a former Attorney General of Virginia and an experienced attorney who has been practicing for over forty-five years, with thirty-three years spent at the Firm, charged an hourly rate of $585. Troy Decl., at ¶ 14. Appropriately, a significant portion of the work in this case was done by Mr. Hubbard, an associate who, as explained above, has significant ERISA experience and who charges an hourly rate of $365. Additionally, to the extent reasonably as possible, work was handled by paralegal Melissa Aikman who charges an hourly rate of $190. *Id.*

The rates charged are below many of the prevailing rates for such work in Richmond, Virginia, and they are *significantly* lower than those charged in neighboring Washington, D.C. The Adjusted Laffey Matrix, which reports customary fees in Washington, D.C., and which was relied upon by the court in *Porter*, 2010 U.S. Dist. LEXIS 89037, at *19, lists average fees for attorneys with more than twenty years of experience, such as Mr. Troy, at $734 per hour, and

---

[6] As permitted by the Supreme Court of the United States in *Missouri v. Jenkins*, 491 U.S. 274 (1999), the hourly rates for the time requested are Troutman Sanders's currently prevailing rates that we charge our regularly billed clients. Troy Decl., at ¶ 3.

attorneys with between four and seven years of experience, such as Mr. Hubbard, at $374 per hour. *See* Adjusted Laffey Matrix, *available at* www.laffeymatrix.com/see.html (reporting average fees and collecting cases in which matrix has been applied). The rates sought in this case thus compare favorably with rates charged by similar firms.[7]

The Union also should not be heard to complain that Richmond rates, and not local rates in Charlottesville, Virginia, have been applied. Rust had to obtain counsel with a national practice and reputation, to counter the Union's reliance on their own national counsel, McChesney & Dale, which represented them in the case. McChesney & Dale is based just outside Washington, D.C., and, according to its website, caters to clients in the "greater Washington, D.C. area." *See* Website of McChesney & Dale, P.C., *available at* http://www.dalelaw.com. Indeed, the Union relied on their national counsel *exclusively*, even to the point that local counsel did not sign and were not served with pleadings, despite the requirements of Local Rule 6. 2011 U.S. Dist. LEXIS 111618, at *29 n.16. In short, the Union treated this case as though it had been filed in Washington, D.C., rather than in the Western District of Virginia. The rates sought by Troutman Sanders attorneys based in the Firm's Richmond office therefore are more than reasonable. *See also Quesenberry v. Volvo Group N. Am., Inc.*, No. 1:09cv00022, 2010 U.S. Dist. LEXIS 91884, at *25-*27 (W.D. Va. July 20, 2010), aff'd 651 F.3d 437 (4th Cir. 2011) (looking to locations where attorneys practiced – in that case, Washington, D.C. and North Carolina – rather than at local rates to determine whether

---

[7] Additionally, Mr. Hubbard's secretary has the skills and organizational abilities of a paralegal and performed numerous tasks in this case that ordinarily would have been assigned to a paralegal. Her time is not being charged.

the hourly rates sought were within the range of rates for "lawyers experienced in federal lawsuits").[8]

Finally, Troutman Sanders' then-current fees have been found to be appropriate and reasonable in other cases in the Western District of Virginia, *see, e.g.*, *Unnamed Citizens v. White,* No. 7:09-cv-00057*,* Dkt. No. 161 (W.D. Va. Feb. 18, 2011) (granting attorney's fees of $576,334 plus costs at full rates), and *Sales v. Grant*, No. 96-0027-L, Dkt. No. 124 (W.D. Va. March 12, 2002) (granting attorney's fees of $814,893 plus expenses at full, then-current rates), the Eastern District of Virginia, *see, e.g.*, *Saleh v. Virginia State University*, No. 3:97-cv-460, Dkt. No. 329 (E.D. Va. May, 12 2000), and in Virginia state courts, *See, e.g*, *Troy v. Va. Dept of State Police*, Cl08-4305-8, (Richmond City, Dec. 29, 2008) (in a FOIA case, the Circuit Court of the City of Richmond accepted as reasonable then current rates but rejected those of Troy since he was the petitioner). Troy Decl, at ¶ 13.

In light of the rates charged, the declarations of Mr. Rakes and Mr. Seabolt, the reported rates in nearby markets, and the awards of fees by this Court and other courts, the hourly rates of the attorneys working on the matter were reasonable.

6. The attorney's expectations at the outset of litigation (*Johnson* Factor No. 6)

As part of the "attorney's expectations" factor, courts focus on whether the fee arrangement in a case is fixed or contingent. *See Johnson*, 488 F.2d at 718 (listing the sixth *Johnson* factor as, "[w]hether the fee is fixed or contingent"). Except for a payment of $200 by Mr. Rust, the fees and costs sought in this petition were for work performed by Troutman Sanders on a contingency fee-shifting basis. In other words, Troutman Sanders would not be

[8] An additional factor supporting the use of Troutman Sanders' usual Richmond rates is its prior relationship with Mr. Rust and representation by the Firm in related litigation. This history is discussed as part of the eleventh *Johnson* factor.

paid its attorney's fees or receive reimbursement for its costs unless Rust was deemed the prevailing party under the standard articulated in *Quesinberry*. Troy Decl., at ¶ 34. Thus, there was a substantial downside in this case. Courts often increase an award of attorney's fees when a prevailing party's counsel has provided representation on a risky contingency basis. *See, e.g., Harper v. BP Exploration & Oil, Inc.*, 3 Fed. Appx. 204, 206 (6th Cir. 2001); *Colbert v. Furumoto Realty*, 144 F. Supp. 2d 251, 263 (S.D.N.Y. 2001). However, no such enhancement is sought here. The requested award of attorney's fees for the work performed here therefore is especially reasonable.

7. The time limitations imposed by the client or circumstances (Johnson Factor No. 7).

Time considerations played a role in this case in two ways:

On the one hand, Rust is an individual without significant resources who relied on his pension for his monthly income. Rust had to eke out a living during the nearly three years of this litigation. This also explains his inability to pay out-of-pocket any more than $200 toward his fees for this case. Troy Decl., at ¶ 34. As counsel for Rust, Troutman Sanders was motivated to achieve a prompt result for him. This was not a case in which long periods of time could be allowed to elapse; instead, Troutman Sanders had to move the litigation forward toward a recovery for its client.

On the other hand, the Union sought to thwart Rust's efforts at every turn, as explained in the "Background" section above, repeatedly refusing to produce crucial documents to Rust and taking positions in litigation that were not supported by law or the facts.

The combination of these factors necessarily led Rust to incur more fees than would otherwise have been necessary. The seventh *Johnson* factor therefore supports a full award of the attorney's fees requested.

8. The amount in controversy and the results obtained (*Johnson* Factor No. 8)

This litigation began as a dispute over a claim for a $441 monthly pension, plus a small $95 per month benefit. Due to the Union repeated failure to comply with their obligations under ERISA, Rust succeeded in recovering $385,219.20 in statutory damages, back pay and interest, *plus* the monthly pension and benefit, as well as an award of attorney's fees and costs as set forth in the instant Petition. By any measure, the results of this litigation exceeded expectations.

9. The experience, reputation and ability of the attorney (Johnson Factor No. 9)

The attorneys and paralegal that represented Rust have significant civil litigation and trial experience and ability.

Mr. Troy, a former Attorney General, is a renowned and respected attorney throughout the Commonwealth of Virginia and beyond. In addition to his years of experience as counsel for both individual litigants and national corporations, he regularly advises government officials at all levels of federal, state and local government and appears in federal courts throughout the country, including the Supreme Court of the United State. Despite his stature in the legal community, Mr. Troy is known for handling "David and Goliath" cases like this one, and his able assistance led to the vindication of Rust, an individual with few resources, over the well-funded Union and its labor pension plan. *See* Rakes Aff., at ¶ 13.

Mr. Hubbard has significant expertise litigating ERISA cases. Troy Decl., at ¶¶ 8 & 10. This is a specialized area of practice where courts have recognized that such expertise is valuable. *See, e.g.*, *Porter*, 2010 U.S. Dist. LEXIS 89037, at *12-*13 (finding that ERISA cases "called for an attorney with a background in employment law, and more specifically ERISA litigation" and that the attorney's "specialization was of particular importance in this case").

Rust's successful results in this case are directly attributable to the combination of Mr. Hubbard's expertise and Mr. Troy's stature and experience.

Thus, the ninth *Johnson* factor supports an award of the fees requested by Rust.

10. The undesirability of the case within the legal community in which the suit arose (*Johnson* Factor No. 10)

As explained in Mr. Troy's affidavit, except for a small payment of $200, Rust paid no fees or expenses to the Firm during the course of the litigation. Troy Decl., at ¶ 33. This arrangement was attributable directly to the fact that Rust had extremely limited financial resources and was not receiving the pension rightfully owed to him by the Union. The hours in this petition therefore were for work performed by Troutman Sanders on a contingency fee-shifting basis, whereby the Firm had to wait and would not receive its attorney's fees or expenses unless Rust was deemed the prevailing party under the standard articulated in *Quesinberry*. Troy Decl., at ¶ 33.

Additionally, before the case was filed the Union adopted a strategy of refusing to provide key documents to Rust that were critical for prosecuting his claims. The first such instance took place more than three years ago, with respect to Rust's request for documents on July 27, 2008. *See* 2011 U.S. Dist. LEXIS 111618, at *68-*69. This repeated stonewalling led this Court to find that "the facts in this case support a finding of bad faith on the part of the Defendants in their refusal to produce documents." *Id.*, at *75. Thus, it was clear from the beginning that this was a case that would require a substantial time commitment, As Mr. Troy put it, "[W]e were litigating with 'one hand tied behind our back.'" Troy Decl., at ¶ 32.

The inherent risk in the fee arrangement, necessitated by Rust's limited resources combined with the prospect that the litigation would not be quickly resolved, made this case extremely undesirable in the legal community.

11. The nature and length of the professional relationship between attorney and client (*Johnson* Factor No. 11)

The eleventh Johnson factor – the nature and length of the professional relationship between attorney and client – favors an award of fees in the amount sought by Rust.

Rust and Mr. Troy had a personal friendship, which resulted in Rust's request that the Firm help him with legal matters resulting from the failure of his company, NSR Electrical, Inc. Troutman Sanders agreed to handle Rust's claim against CommerceFirst Bank. Troy Decl., at ¶ 15. This led to a lawsuit in the Circuit Court of Nelson County, which was removed to this Court. *See Rust v. CommerceFirst Bank*, Case No. 3:07cv52 (W.D. Va.).

Erroneously relying on the outcome of the *CommerceFirst Bank* lawsuit, the Union claimed that Rust had profited at the Union's expense and therefore they had a right to a "set-off" against Rust. Because the Firm already was familiar with and had represented Rust in the *CommerceFirst Bank* case, Rust asked Troutman Sanders to represent him in his claim against the Union and its misrepresentation of the outcome of the *CommerceFirst Bank* case, which was done in an attempt to avoid paying Rust's benefits.[9] Troy Decl., at ¶¶ 16-17. (The Court ultimately recognized that this claim had no basis in law or fact. *See generally* 2011 U.S. Dist. LEXIS 111618 at *22-*34.) Troutman Sanders' familiarity with Rust and its representation of Rust in the case that formed the basis for the Union's denial of benefits made it appropriate for Rust to seek representation by Troutman Sanders, rather than by a smaller local firm. This relationship justifies an award of fees at the rates sought in the fee petition.

---

[9] It would not be unfair to suggest that the Union intentionally misinterpreted the decision for their own ends. *See* 2011 U.S. Dist. LEXIS 111618, at *32-*34.

12. Attorneys' fee awards in similar cases (*Johnson* Factor No. 12)

As explained above, the Firm's then-current fees have been found to be appropriate and reasonable in other cases in the Western District of Virginia, *see, e.g.*, *White,* No. 7:09-cv-00057, Dkt. No. 161 (W.D. Va. Feb. 18, 2011), and *Sales*, No. 96-0027-L, Dkt. No. 124 (W.D. Va. March 12, 2002), the Eastern District of Virginia, *see, e.g.*, *Saleh*, No. 3:97-cv-460, Dkt. No. 329 (E.D. Va. May, 12 2000), and in Virginia state courts, *see, e.g*, *Troy*, Cl08-4305-8, (Richmond City, Dec. 29, 2008). Troy Decl., at ¶ 13.

Another factor weighing in favor of awarding fees at the rates requested is the fact that, as a number of courts have recognized, in today's economic climate, ERISA work commands premium rates. In *Holmstrom v. Metro. Life Ins., Co.*, No. 07-CV-6044, 2011 U.S. Dist. LEXIS 58766 (N.D. Ill. May 31, 2011), the court awarded the full rates submitted by counsel for the plaintiffs, based in part on the fact that "the economic downturn actually increased demand for his work, and consequentially supported a rate increase." *Id.* at *21 n.7 (citing *Langston v. N. Am. Asset Dev. Corp. Group Disability Plan*, No. C 08-02560 SI, 2010 U.S. Dist. LEXIS 35594, at *2-*3 (N.D. Cal. April 12, 2010) (wherein counsel explained that "the economic downturn has actually resulted in a greater number of denials of ERISA participants' claims for disability benefits, increasing ERISA attorneys' caseloads and consequentially their rates.")). Rather than seek a premium, Troutman Sanders instead seeks an award of fees *below* the average rates billed by the Firm for similar work. *See* Seabolt Decl., at ¶ 4; Rakes Aff., at ¶ 11.

Moreover, to the extent that the Union attempts to argue that fees in this case should be reduced based on cases in which lower fees are awarded, that argument should not be countenanced. In its Opinion and Order, this Court compared this case to a number of other cases in the U.S. Court of Appeals for the Fourth Circuit, including *Underwood v. Fluor Daniel*,

Inc., 1997 U.S. App. LEXIS 1410 (4th Cir. 1997), *Brooks v. Metrica, Inc*., 1 F. Supp. 2d 559 (E.D. Va. 1998), and *Freitag v. Pan American World Airways*, 702 F. Supp. 128, 132 (E.D. Va. 1988). *See* 2011 U.S. Dist LEXIS 111618, at *80 n.30. The Court found that "Defendants' egregious actions in this case are substantially worse than the defendants' actions in [those cases]." *Id.* As explained above, the amount of Rust's fees is directly attributable to these egregious actions. Thus, the Court already has found that other ERISA cases involving similar claims are not comparable to this case and Rust's fees therefore should not be cut simply because fees in other cases may have been lower.

13. Ability of Opposing Party to Pay (Supplemental Fourth Circuit Factor)

Finally, courts in the Fourth Circuit consider a thirteenth factor when determining whether the lodestar amount requested by a prevailing party is reasonable: the opposing party's ability to pay. *See Porter*, 2010 U.S. Dist. LEXIS 89037, at *9 n.4. In this case, as explained in the analysis of the second *Quesinberry* factor, the fees sought by Rust are dwarfed by the Union's reported assets of nearly $334 million. *See* Troy Decl., at ¶ 31. The Union's vast resources stand in marked contrast to Rust's, whose pension the Union denied for nearly three years, and who, consequently, was able to pay only $200 toward the prosecution of his case. *Id.*, at ¶ 34. This factor thus weighs in favor of finding that the fees sought by Rust are reasonable. *See Arnold*, 719 F.2d at 67 (holding that, in addition to the Johnson factors, "the district court should give weight to the relative financial positions of the litigants").

V. Plaintiffs Are Entitled to Recover the Reasonable Expenses Incurred in This Litigation

Rust also seeks an award of $2,329.40 in costs. The requested expenses include, *inter alia*, the filing fee, deposition transcript costs, legal research costs, meal and transportation costs, all of which were billed to Rust (though he was unable to pay all but a token amount, Troy Decl.,

at ¶ 34) and were necessary to the successful resolution of the case. They were incurred as set forth in Exhibit A to Mr. Troy's Declaration.

For Troutman Sanders, some of the costs typically charged by law firms are not charged separately but are included in the firm's customary hourly rates. Examples include in-house copying, long-distance telephone, postage and Federal Express charges. Because Troutman Sanders does not charge these costs to clients, no further reimbursement is sought by this petition. This fact again underscores the reasonableness of the fees sought by the Firm.

VI. "Fee on Fee" Award

It is well-established that "[t]ime spent defending entitlement to attorney's fees is properly compensable. . . ." *Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir. 1986); *Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995) (recognizing that fees incurred in preparing fee petition are appropriate). Such an award is consistent with this Court's ordinary practice in ERISA cases. *See, e.g.*, *Quesenberry v. Volvo Group N. Am., Inc.*, No. 1:09cv00022, 2010 U.S. Dist. LEXIS 91880, at *4 (W.D. Va. Aug. 17, 2010) (granting an award of fees-on-fees based on a supplemental motion for attorney's fees, after finding "that approximately four weeks of legal time was reasonably expended in the preparation and prosecution of the motion for attorneys' fees").[10]

It is appropriate and consistent with local practice to await the end of proceedings on the initial fee petition before attempting to quantify the time involved in litigating that petition. Rust therefore asks that the Court permit him to file a "fee-on-fee" petition. *See id.* These fees will

---

[10] Such an award and procedure also are consistent with practice in other jurisdictions. *See, e.g.*, *Holmstrom v. Metro. Life Ins. Co.*, No. 07-CV-6044, 2011 U.S. Dist. LEXIS 58766, at *23-*24 (N.D. Ill. May 31, 2011) (awarding fees incurred in negotiating and litigating fee petition under ERISA); *Steward v. Sears, Roeback & Co.*, No. 02-8921, 2008 U.S. Dist. LEXIS 34971, 16-19 (E.D. Pa. Apr. 29, 2008) (same).

include all fees and costs following entry of the Court's Memorandum Opinion and Order on September 29, 2011, both fees and costs incurred in calculating and drafting the Court's Order regarding benefits and statutory penalties and those incurred in work done on the instant fee petition.

CONCLUSION

WHEREFORE, Plaintiff Edwin J. Rust respectfully requests that the Court grant his Petition for Attorney's Fees and Costs, allow for the filing of a "fee-on-fee" petition and award whatever other legal or equitable relief the Court deems appropriate.

Respectfully submitted,

EDWIN J. RUST

By: /s/ Stephen C. Piepgrass
Counsel

Anthony F. Troy
Virginia State Bar No. 05985
Stephen C. Piepgrass
Virginia State Bar No. 71361
TROUTMAN SANDERS LLP
Counsel for Plaintiff Edwin J. Rust
1001 Haxall Point
P.O. Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1320
Facsimile: (804) 698-5147
tony.troy@troutmansanders.com
jon.hubbard@troutmansanders.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Eric J. Wexler, Esquire
McChesney & Dale, P.C.
4000 Mitchellville Road
Suite 222
Bowie, MD 20716
(301) 805-6080
(301) 805-6086 (facsimile)

John E. Davidson, Esquire
David & Kitzmann, PLC
211 East High Street
Charlottesville, VA 22902
(434) 972-9600
(434) 220-0011 (facsimile)

Counsel for Defendants

/s/ Stephen C. Piepgrass
Anthony F. Troy
Virginia State Bar No. 05985
Stephen C. Piepgrass
Virginia State Bar No. 71361
TROUTMAN SANDERS LLP
Counsel for Plaintiff Edwin J. Rust
1001 Haxall Point, P.O. Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1320
Facsimile: (804) 698-5147
tony.troy@troutmansanders.com
stephen.piepgrass@troutmansanders.com