UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Geraud Darnis, David Hess, Michael Maurer, Richard Sanfrey, Dino DePellegrini, Bradley Hardesty, Roy Dion, Alan Machuga, Theresa MacKinnon, Christopher Doot and David Carter, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Raytheon Technologies Corporation, Carrier Global Corporation, Otis Worldwide Corporation, *et al*.

Defendants.

Civil Action No.:

3:20-CV-1171 (SRU)

OMNIBUS MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS

JANUARY 15, 2021

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I. **INTRODUCTION**

United Technologies Corporation ("UTC") compensated Plaintiffs with awards that were tied to the price of UTC common stock. UTC offered these awards through Long-Term Incentive Plans ("LTIPs") to incentivize Plaintiffs to increase UTC's share price and to have their compensation "linked to shareowner value." Complaint ("Compl."), ¶ 86. To ensure that Plaintiffs would be incentivized to maximize shareholder value even if UTC merged or spin-off a subsidiary that could affect Plaintiffs' jobs (and UTC's stock price), UTC agreed to make "equitable adjustments" to Plaintiffs' awards "to protect the value of [Plaintiffs'] interests" if such a transaction occurred. *Id.* at ¶ 95. UTC also agreed that it would "prevent an increase or decrease in the value of [awards] relative to [UTC] Common Stock." *Id.* at ¶ 96.

These contractual promises were breached when UTC spun-off Carrier and Otis and then merged with Raytheon (the "Transaction") in 2020 and used a formula to convert awards that substantially decreased the awards' value relative to UTC's common stock. As a result, Plaintiffs, many of whom had already retired but had not yet exercised their LTIP awards, were materially harmed.

UTC and its Compensation Committee converted the LTIP awards into awards based on the stocks of Carrier, Otis and Raytheon using a formula that did not match the one used for UTC common stockholders in the Transaction. UTC's common stockholders received 1 share of Raytheon stock, 1 share of Carrier stock and 1/2 a share of Otis stock. *Id.* at ¶ 136. Rather than converting Plaintiffs' awards using this straightforward formula, which would have guaranteed that the employees and retirees' awards were "linked to shareowner value," Defendants instead chose a complex formula that used an average of the Carrier, Otis and Raytheon stock prices four

and five days after the Transaction closed. *Id*. at ¶ 144. Markets are not static and during this lag, new information necessarily would come into the market and affect the companies' stock prices—and it did. Just like a stopped clock that is right twice a day, it would have been sheer coincidence if the value of Plaintiffs' LTIP awards under the conversion formula remained "linked to shareowner value" and did not "increase or decrease . . . relative to [UTC] common stock." *Id*. at ¶¶ 86, 96.

The risk created by the formula materialized as Raytheon, Carrier and Otis' share prices changed over the five days following the Transaction's closing, causing the values of Plaintiffs awards to drop substantially compared to the value received by UTC common stockholders. As a result, Plaintiffs' received only .851 shares of Raytheon, .851 shares of Carrier and .425 shares of Otis, and the price at which they could exercise their awards increased by 17.5%, making them far less valuable. *Id*. at ¶¶ 147-49. This result was a "decrease in the value of the [awards] relative to [UTC] Common Stock." *Id*. at ¶ 96. Defendants' use of a conversion formula that would fail to track shareholder value absent a sheer coincidence deprived Plaintiffs and thousands of others of more than $100,000,000 in the value of their UTC stock-based awards. *Id*. at ¶ 4.

Defendants argue that they had absolute discretion when converting the LTIP awards and could use any formula they wanted. Otis, for example, argues that Plaintiffs were not entitled to fair market value or even reasonable value. Rather, Otis claims that Defendants' only obligation was to ensure that the awards "have value" after the Transaction, necessarily suggesting Defendants could fulfill their contractual obligations by giving Plaintiffs a penny for a dollar. Otis Br. at 16. Raytheon similarly argues that the only duty was to exercise discretion, regardless of how inappropriately or inequitably that exercise might be. Raytheon Br. at 15. The Court should reject Defendants' arguments because they ignore Plaintiffs' specific factual allegations that (1)

Defendants' discretion was bounded by clear promises limiting how the conversion could impact the value of the employees' and retirees' compensation awards; and (2) Defendants violated those promises by using a formula that was inappropriate, and inequitable and that significantly decreased the value of the awards relative to common stock prices.

Contrary to Defendants' arguments, Plaintiffs have identified specific contractual provisions that Defendants violated. *See* Raytheon Br. at 3; *see also* Otis Br. at 10 and Carrier Br. at 2. Among other provisions discussed below, Plaintiffs plausibly alleged that Defendants breached their express promises to keep the awards "linked to shareowner value" at the time of conversion, Compl., ¶ 86; to make adjustments "necessary or appropriate to protect the value of Participants' interests in their Awards," Compl., ¶ 95; to make "equitable adjustments" "to prevent a[] . . . decrease in the value of [Awards] relative to [UTC] Common Stock," *id.* at ¶ 96, to "correlate[] compensation opportunities with shareholder value," *id.* at ¶ 100, and to treat employees and retirees in a "equitable" fashion in the conversion, *id.* at ¶ 95, 101. While Defendants had discretion over how to convert the ***form*** of Plaintiffs' compensation awards, such as, for example, whether to change the kind of shares upon which the awards were based, they did not have discretion to change the ***value*** of those awards in relation to the value that UTC common stockholders received, as required by the contract terms. Plaintiffs have also plausibly alleged that Defendants breached these and other contract terms. *See, e.g., id.* at ¶¶ 178-82.

Indeed, Raytheon ***admitted*** in a Securities and Exchange Commission filing that Defendants acted unfairly, and, therefore, inequitably and inappropriately, by using a conversion formula that, in Raytheon's words, created "material discontinuity" between the pre-merger/spin UTC stock price and the diminished value that Plaintiffs received after the conversion. *Id.* at ¶ 163. Raytheon further admitted that it had to revise the conversion formula for unvested awards

to use the traditional "opening price on the day of the Separation" valuation methodology "to treat employees and retirees ***fairly*** in the conversion process," rather than the delayed, weighted-average formula that harmed Plaintiffs. *Id*. at ¶¶ 162-166 (emphasis added). Raytheon asked Otis and Carrier to revise the inappropriate formula for the vested awards at issue here, but Otis and Carrier refused. *Id*. at ¶¶ 165. Raytheon's words and actions establish the plausibility of Plaintiffs' allegations that Defendants' conversion formula was inappropriate and treated Plaintiffs unfairly and inequitably in violation of the Defendants' promises.

Defendants are also liable under ERISA for their failure to protect the value of Plaintiffs' awards in the Plans that are subject to ERISA. Rather than address the substance of these claims, Defendants adopt a three-step diversion strategy. First, they claim that the Court should not consider Plaintiffs' claim under ERISA § 502(a)(1)(B) because Plaintiffs must first appeal to Defendants under the Plans' administrative procedures. This argument fails because the ERISA Plans' administrative procedures do not apply. Even if the administrative procedures applied, any appeal would be futile because Defendants have already decided that they will not change the formula, as evidenced by Raytheon's securities filing and Carrier's and Otis's communications to Plaintiffs before this case was filed. As the second step in the diversion, Defendants claim that the Court should not consider Plaintiffs ERISA § 502(a)(3) claim because it overlaps with the ERISA § 502(a)(1)(B) claim. This argument fails because it should not be considered on a motion to dismiss. Finally, Defendants claim that Plaintiffs do not have standing, even though they have suffered millions of dollars of harm. The Court should reject Defendants' procedural diversions and allow the case to proceed on the merits.

Determining whether Defendants' exercise of discretion was consistent with the unambiguous promises in the LTIPs and ERISA will require both fact and expert testimony at trial;

it cannot be resolved by bald denials in a motion to dismiss. Accordingly, the Motions should be denied.

II. ARGUMENT

A. The Standard for a Motion to Dismiss

Defendants appropriately recite the standard for a motion to dismiss, including the guiding principle that plausible factual allegations must be accepted as true. *See, e.g.*, Raytheon Br. at 12.

B. Plaintiffs Have Plausibly Alleged a Breach of Contract

Plaintiffs also agree with Defendants' recitation of breach of contract law in Delaware. The law requires (1) contractual terms, (2) a breach thereof and (3) damages. *See, e.g.*, Raytheon Br. at 13 (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)) (reversing dismissal of breach of contract claim).

Each Defendant argues that the Complaint should be dismissed because Plaintiffs did not allege any contractual term that was breached. *See* Raytheon Br. at 3; Otis Br. at 10; Carrier Br. at 2. Defendants are wrong. Plaintiffs alleged numerous, specific contractual provisions that prohibited Defendants from using a conversion formula that decreased the value of Plaintiffs' awards relative to the value of UTC common stock.

1. Plaintiffs Identified the Breached Contract Provisions

The Complaint alleges several contractual provisions that dictated how Defendants could exercise their discretion when LTIP awards were converted in a merger or spin-off transaction. The conversion had to:

> "preserve the value of Awards" (UTC LTIP, ECF 49-3, at § 10(a)), Compl., ¶ 94;
>
> "protect the value of Participants' interests in their Awards" (UTC LTIP, ECF 49-3, at § 10(b)), Compl., ¶ 95;

> "prevent a[] . . . decrease in the value of [Awards] relative to [UTC] Common Stock" (SAR Schedule of Terms, ECF 49-7, at 4; RSU Schedule of Terms at 3-4), Compl., ¶ 96;
>
> be "linked to shareowner value" (UTC LTIP, ECF 49-3, at § 1), Compl., ¶ 86;
>
> be "equitable" (UTC LTIP, ECF 49-3, at § 10(b)), Compl., ¶ 95; (UTC 2018 LTIP, ECF 49-4, at § 3(e)), Compl., ¶ 101;
>
> "correlate[] compensation opportunities with shareowner value" (UTC 2018 LTIP, ECF 49-4, at § 1), Compl., ¶ 100.

The conversion also could not:

> "materially impair the rights of any Participant with respect to a previously granted Award" (UTC LTIP, ECF 49-3, at § 12(c)), Compl., ¶ 98;
>
> "materially impair the rights of any Participant with respect to an Award" (UTC LTIP, ECF 49-3, at § 12(d), Compl., ¶ 97; (UTC 2018 LTIP, ECF 49-4, at § 12(c)), Compl., ¶ 102.

(hereinafter "Contractual Provisions"). Accordingly, Defendants' claim that Plaintiffs failed to identify contractual provisions that limited their discretion is meritless.

a. The LTIPs Expressly Limited Discretion

Interestingly, Defendants quote some of the plan language recited in the Complaint, but they ignore the express limitations on their discretion. For example, Otis quotes from § 10(b) of the UTC LTIP and recites that the conversion formula had to be "***'appropriate and equitable'***" and "***'necessary and appropriate*** to protect the value of participants' interests in their Awards.'" Otis Br. at 11-12 (emphasis in original); *see also* Raytheon Br. at 6-7. Otis highlighted some language that supports Plaintiffs' claims that the formula had to be "equitable," yet it failed to highlight the limiting language that the conversion formula had to "protect the value of participants' interest in the Awards."[1] Similarly, Carrier recognizes that the conversion formula

[1] Raytheon quotes some of the same language, including the requirement that the conversion formula had to be "***'necessary and appropriate*** to protect the value of participants' interests in

had to "'have a ***neutral financial impact*** on the employees—meaning the Intrinsic Value of outstanding equity awards before and after the Spinoffs ***will be equivalent***.'" Carrier Br. at 6 (emphasis added). Plaintiffs have alleged the existence and breach of these limitations that Defendants themselves have quoted. *See, e.g.*, Compl., ¶¶ 95, 101, 126, 178-79.

Raytheon's argument that the LTIPs "do[] not promise that an adjustment will achieve any particular valuation result or objective" is flat-out wrong. *See* Raytheon Br. at 15-16. The UTC LTIP's language and the Schedule of Terms applicable to SARs illustrate Plaintiffs' point. According to the LTIPs, the "result" and "objective" of any adjustment, is to "protect," "preserve" and not "materially impair" the value of the awards. *See* Contractual Provisions. The Schedules of Terms also identified the required "result or objective" of any conversion, stating that the conversion had to "prevent an increase ***or decrease*** in the value of SARs relative to Common Stock," Compl., ¶ 178 (quoting UTC LTIP SAR Schedule of Terms, ECF 49-7, at 4) (emphasis added).[2]

Otis notes that the Schedule of Terms does "not displace the discretion given to the Committee but reinforces it." Otis Brief at 12 n.12. Plaintiffs agree. As alleged in Paragraph 178 of the Complaint, the Schedule of Terms reinforces Defendants' responsibility to ensure that the value of Plaintiffs' awards did not "decrease . . . relative to [UTC's] Common Stock" in the event

their Awards.'" Raytheon Br. at 6 (emphasis in original). Plaintiffs cited the same language in the Complaint, ¶ 95, and paraphrased it in the breach of contract count. ¶ 178. Raytheon even quotes the paraphrase: "'Plaintiffs assert that "the plans and UTC were required to ***protect the value of participants' Awards*** if UTC spun-off a subsidiary or merged.'" Raytheon Br. at 13 (emphasis added). Inexplicably, Raytheon then asserts: "But no such obligation was imposed by the contracts." *Id*. Clearly, there was an express obligation to "protect the value of participants' interests in their Awards."

[2] The Schedule of Terms "describes the material features" of the awards and that states that "[t]he Award is subject to this Schedule of Terms . . . ." SAR Schedule of Terms, ECF 49-7, at 1. Recipients must "affirmatively acknowledge and accept the terms and conditions" in the Schedule of Terms. *Id*. at 2.

of a merger or spin-off. SAR Schedule of Terms, ECF 49-7, at 4; *see also* Compl., ¶ 96 (quoting the RSU Schedule of Terms with identical language).

Raytheon suggests that the Schedule of Terms is subordinate to the LTIP language and that the LTIP language controls if there is an inconsistency. Raytheon at 15. But there is no inconsistency because the LTIP and the Schedule are harmonious. If UTC merged or spun-off a subsidiary, the Committee or UTC's Board could substitute or adjust "the number and kind of Shares" that were the subject to SARs and "the exercise price" of SARs, recognizing that UTC's share price may change because of such a transaction. UTC LTIP, ECF 49-3, at § 10(b). Thus, the Committee and UTC's Board had discretion in ***what*** could be substituted for the shares of UTC stock that were the subject of the SARs and ***how*** participants' SARs would be adjusted if UTC merged or spun-off a subsidiary. Therefore, the Committee or UTC's Board could, for example, substitute the stock of the merged company (*e.g.*, Raytheon) or the spun-off company (*e.g.*, Carrier or Otis), or both. The Committee or Board could also adjust the "strike price" of participants' SARs to reflect the change in UTC's share price or pay participants cash for their unexercised SARs. UTC LTIP, ECF 49-3, at § 10(b).

However, the Committee and the UTC Board ***did not*** have discretion to reduce the ***value*** of the awards relative to UTC's common stock value. To the contrary, any "substitutions or adjustments," had to "protect the value of Participants' interests" as measured by UTC's share price on the date of the Transaction, Compl., ¶ 95; UTC LTIP, ECF 49-3, at §§ 10(b), 2(r), and 12(d), and "prevent an increase ***or decrease*** in the value of SARs relative to Common Stock," Compl., ¶ 178 (quoting SAR Schedule of Terms, ECF 49-7, at 4).

b. <u>Discretion Was Not Unbounded</u>

Each Defendant tries to persuade the Court that they are immune from Plaintiffs' claims because the LTIPs granted them discretion. *See, e.g.*, Raytheon Br. at 16; Otis Br. at 11-13; Carrier Br. at 4, 11. Plaintiffs do not dispute that they had discretion, but Defendants ignore that discretion is not boundless. Raytheon even cites one of the bounds, but then ignores it. Raytheon acknowledges that both LTIPs provided discretion to the Compensation Committee "***unless in contravention of any express term of this Plan***." *See* Raytheon Br. at 6-7 (quoting UTC LTIP, ECF 49-3, § 3(c) and 2018 UTC LTIP, ECF 49-4, § 2(c)) (emphasis added). Interestingly, Carrier and Otis quote plan language around this important limiting provision, but omit the limitation from their quotations. *See* Otis Br. at 11; Carrier Br. at 5.

Otis' argument also contradicts the LTIP's limiting language. Otis boldly asserts that "there is ***no*** limiting language in the UTC LTIPs" and "***nothing*** cabins how the Committee decides to exercise its discretion." Otis Br. at 14 (emphasis added).[3] As even Raytheon recognizes, Otis' contention is not true. Raytheon Br. at 6-7. Defendants' discretion is limited by the LTIP's "express term[s]" that Plaintiffs cite in their Complaint. *See*, *e.g.*, Compl., ¶ 95 (quoting UTC LTIP, ECF 49-3, at § 10(b), conversion must "protect the value of Participants' interests in their Awards"), at ¶ 101 (quoting UTC 2018 LTIP, ECF 49-4, at § 3(e), conversion must be "equitable") and ¶¶ 98 and 102 (quoting UTC LTIP, ECF 49-3, at § 12(c) and UTC 2018 LTIP, ECF 49-4, at § 3(e), conversion could not "materially impair the rights of any Participant with respect to a previously granted Award").

[3] In support of its argument, Otis cites § 10(c) of the 2018 UTC LTIP. Otis Br. at 11. Section 10, including subsection (c), only applies when there has been a "Change of Control" transaction. This merger/spin transaction did not qualify. Employee Matters Agreement, ECF 50-4, § 3.01(d), titled "Not a Change in Control."

Otis also has a curious retort to Plaintiffs' allegations that contractual language protected the value of their awards. Otis argues that "the UTC LTIPs were intended to ensure that the participants' interests in their awards continued to have value after a change in capital structure." Otis Br. at 16. According to Otis, if the conversion left participants with ***any*** value, the Committee's discretion cannot be challenged. That is not what the UTC LTIP or the 2018 UTC LTIP say. The plans clearly state that the value of participants' awards before a merger or spin-off would be preserved, protected and not materially impaired. *See, e.g.*, UTC LTIP, ECF 49-3, at §§ 10(a), 10(b) and 12(d); UTC 2018 LTIP, ECF 49-4, at § 3(e), 12(c) and 12(d).

By Otis' logic, if Plaintiff Darnis' 54,500 SARs with a "strike price" of $74.66 (Compl. ¶ 150), were converted to 10,000 SARs, even with the same "strike price," there would be no breach of contract because the "awards continued to have value," Otis Br. at 16, albeit a fraction compared to the value before the Transaction. Likewise, if the conversion provided Darnis with the same number of SARs, but increased the "strike price" to $200, Darnis' awards would lose value, but Otis claims there would be no breach. Otis is wrong. Such a conversion would not preserve or protect the value of the Darnis' awards; it would materially impair their value, in direct violation of the plan. *See*, *e.g.*, UTC LTIP, ECF 49-3, at § 12(d). Plaintiffs are entitled to have a jury determine whether Defendants' 15% reduction of the number of options and SARs and the 17.5% increase in the "strike price" failed to preserve, protect and not materially impair the value of their awards. *See, e.g.*, Compl., ¶¶ 144-52.

c. <u>Case Law Does Not Support Defendants' Arguments</u>

Raytheon's suggestion that the language in the LTIPs is "diametrically unlike" that in *AT&T v. Lillis*, 970 A.2d 166 (Del. 2009),[4] is wrong too. Raytheon Br. at 16-17. The plan in *Lillis* stated that if the company spun-off a subsidiary, the participants' stock options "shall be appropriately adjusted by the Committee at the time of such event, provided that each Participant's economic position with respect to the Award shall not, as a result of such adjustment, be worse than immediately prior to such event . . . ." *Id.* at 168. After the spin-off, the company cancelled the stock options, but did not compensate certain participants. The trial court held that while the term "economic position" was ambiguous, it included the "full economic value of the options." *Id.* at 169. Thus, the plan required the company to provide participants with the full value of their options, measured "immediately prior" to the spin-off.

The LTIPs' language, including the Schedule of Terms, compels the same conclusion. Here, the Transaction converted a share of UTC common stock to become 1 share of Raytheon, 1 share of Carrier and 1/2 a share of Otis, but the formula used for the LTIPs resulted in participants receiving only .851 shares of Raytheon, .851 shares of Carrier and .425 shares of Otis. That result un-linked the awards from shareholder value – which is the LTIPs' purpose - and is a clear and substantial "decrease" in the value of the awards relative to UTC's common stock, which is improper under the LTIPs and *Lillis*. Compl., ¶ 147.

In *Hilton Hotels Corp. v. Dunnet*, 275 F. Supp. 2d 954 (W.D. Tenn. 2002), decided under Delaware law, the compensation plan at issue also had terms similar to the LTIPs. The committee had "sole and absolute discretion" to make adjustments to awards if there was a change in the

[4] As indicated in the decision, 970 A.2d at 168, n. 1, many of the relevant facts of the case were set forth in prior decisions of the Delaware Supreme Court, 953 A.2d 241 (Del. 2008), and the Court of Chancery, C.A. No. 717, 2007 WL 2110587 (Del. Ch. July 20, 2007).

structure of the company's stock, including replacing the options with securities of another company or purchasing the options for their cash value, but it had to "prevent dilution or enlargement of the benefits." *Id*. at 962. The court in *Dunnet* rejected the company's argument that "sole and absolute discretion" gave it the "unfettered right" to change participant's rights if there was a merger, finding it to be "unlikely that business executives" would have agreed that their "options would be taken away from them without payment or their consent in the event of a merger." *Id*. at 964. The reasoning in *Dunnet* that discretion is not unfettered applies equally here. Indeed, the LTIPs have identical language to that in *Dunnet* limiting the Compensation Committee's discretion: the LTIP Schedule of Terms prohibits "the ***dilution or enlargement*** of rights of recipients" in any conversion. Compl., ¶ 96 (emphasis added) (quoting SAR Schedule of Terms, ECF 49-7, at 4; RSU Schedule of Terms at 3-4).

This case is also like the cases cited in Otis' brief wherein the courts denied motions to dismiss and for summary judgment because there were limitations on the discretionary acts at issue. Otis Br. at 13-14 (citing *Galdieri v. Monsanto Co*., 245 F. Supp. 2d 636, 641 (E.D. Pa. 2002) (denying summary judgment because there was not "unbridled discretion") and *Stewart v. BF Bolthouse Holdco, LLC*, C.A. No. 8119, 2013 WL 5210220, at *17 (Del. Ch. Aug. 30, 2013) (denying motion to dismiss even though company had "sole discretion" in valuation process because the scope of that sole discretion was limited by other contract language)). The Court should similarly deny Defendants' motions to dismiss because Plaintiffs have plausibly cited the contractual provisions that limited Defendants' discretion.

2. Defendants Breached the Contracts

Plaintiffs have plausibly alleged that Defendants breached the Contractual Provisions:

> The UTC LTIP, the UTC 2018 LTIP and UTC breached contractual obligations by *not* protecting the value of participants' Awards, *not* making "equitable

> adjustments" to participants' Awards relative to UTC's common stock and impairing participants' rights to their Awards as alleged above. In particular, UTC LTIP and UTC 2018 LTIP Participants were deprived of substantial value because the EMA valued their Awards in the Transaction on terms that were significantly less favorable than those that applied to UTC's shareowners and option holders.[5]

Compl., ¶ 179. Moreover, Raytheon admitted in an SEC filing shortly after the Transaction (ECF 49-6) that the conversion formula was not "necessary" or "appropriate" and did not provide for an "equitable adjustment" when it changed the formula for vested awards and asked Otis and Carrier to do the same for all unvested awards, including those held by Plaintiffs. Compl., ¶¶ 162-66. Indeed, Raytheon publicly admitted that in exercising its discretion, UTC inappropriately created a formula that caused "material discontinuity" between the pre-Transaction price of UTC stock and the diminished value that the employees and retirees received after the conversion. *Id*. at 162-63. Raytheon further admitted that the inappropriate formula had to be rectified "to treat employees and retirees ***fairly*** in the conversion process," *i.e*., to treat them "appropriately." *Id*. at 163-64 (emphasis added).

Given that Raytheon admitted that the formula was not fair to employees and retirees and had to be rectified, Plaintiffs have plausibly alleged that the formula was not equitable, necessary or appropriate and that Defendants breached the contracts. At the very least, the propriety of the formula is a matter of factual dispute that will require expert evidence at trial. The disputed issue cannot be determined as a matter of law based on denials in a motion to dismiss.

Further, Plaintiffs allege other facts that support their breach allegations, which must be assumed true (and indisputably are). In Paragraphs 3 and 144-59 of the Complaint, Plaintiffs allege in detail that Defendants' flawed conversion formula materially reduced the number of options

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[5] Plaintiffs accept Defendants' arguments that the LTIPs themselves are contracts, not entities, and stipulate that those parties can be dismissed voluntarily. *See, e.g.,* Otis Br. at 10 n.10.

and SARs that Plaintiffs had before the transaction by 15% and increased the "strike price" for the options by 17.5%. In simple terms, the conversion formula was a double-whammy for participants. They received fewer options and SARs and the "strike price" increased.

Plaintiffs describe the harm and provide the math to demonstrate it. Compl., ¶ 146 (narrative), ¶¶ 146, 149, 155 (detailed illustrative charts), ¶¶ 150, 158, 159 (examples showing how breach significantly harmed individual Plaintiffs). A formula that results in 15% fewer awards and a "strike price" that is 17.5% less valuable, particularly for retirees whose retirement decisions and plans were based on the original value of their awards, violates the Committee and the UTC Board's express promises that they would not "materially impair the rights of any Participant with respect to a previously granted Award," *id.*, ¶ 98 (citing UTC LTIP § 12(c)); *see also id.* at ¶ 102 (citing UTC 2018 LTIP, ECF 49-4, at § 12(c)).

The significant diminution in value caused by the formula also breached the express promises to "protect the value of Participants interests in their Awards" Compl., ¶ 95 (citing UTC LTIP, ECF 49-3, at § 10(b)), and to "prevent a[] . . . decrease in the value of [Awards] relative to [UTC] Common Stock," Compl., ¶¶ 96, 176 (citing SAR Schedule of Terms, ECF 49-7, at 4; RSU Schedule of Terms at 3-4). And, the formula certainly did not "have a neutral financial impact," or result in "'equivalent'" value "'before and after the Spinoffs.'" *See* Carrier Br. at 6 (acknowledging that formula had to have a "neutral financial impact"). Moreover, because the conversion formula resulted in participants receiving 15% fewer awards with substantially higher "strike prices" than they had before the transaction, it was not "equitable," Compl., ¶ 95 (citing UTC LTIP, ECF 49-3, at § 10(b)); Compl., ¶ 101 (citing UTC 2018 LTIP, ECF 49-4, at § 3(e)), and the awards were no longer "correlate[d]" nor "linked to shareowner value," Compl., ¶¶ 86, 100 (citing UTC LTIP, ECF 49-3, at § 1 and UTC 2018 LTIP, ECF 49-4, at § 1).

Finally, Defendants have tacitly admitted the underlying facts of their breach. In their briefs, they rightly acknowledge that UTC had absolutely no idea how the price of the stock would move in the four to five days after closing. Raytheon Br. at 2-3, 19-20; Carrier Br. at 15. This was particularly true because Defendants admit that they knew there was "significant market volatility" at the time of the transaction, Raytheon Br. at 10, Heading C. Indeed, Carrier admits that "UTC certainly could not possibly have known" how the volatility would affect the stock prices "in the five days following the spinoff." Carrier Br. at 15; *see also* Raytheon Br. at 20 ("no one could have known" what the prices would do during the volatility). Consequently, it would have been ***impossible*** to formulate appropriate "judgments about the expected movement" of a stock price, as Raytheon claims it did in creating the formula. Raytheon Br. at 1.

Plaintiffs and their expert will testify that employing a delayed valuation formula when there was ***no*** way to predict stock price movement was inappropriate because, absent sheer luck, there was ***no*** way that the formula would result in a conversion that created the same value received by common stockholders and that would not "increase or decrease" the value of the awards. *See* SAR Schedule of Terms, ECF 49-7, at 4. That surely is why Raytheon corrected the formula after the Transaction to use the traditional "opening price on the date of the Separation," rather than the faulty, delayed formula. Compl., ¶ 162.[6] To put this another way, the formula that Defendants

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[6] A formula allowing for new information to impact the stock prices during a period of high market volatility was particularly inappropriate here because, as Carrier acknowledges, "Carrier and Otis common stock began trading on the New York Stock Exchange on a 'when issued' basis on March 19, 2020—two weeks in advance of the actual spinoffs—allowing the market to begin valuing the prices of Carrier, Otis, and the UTC/RTX combined company." Carrier Br. at 7-8. Accordingly, the Committee had an ability to judge the market's assimilation of the Transaction before the closing and there was no reason to employ a delayed formula. The delayed formula unreasonably left open the potential impact from significant market volatility due to the Covid-19 pandemic and the likelihood of the "material discontinuity" that resulted. Complaint, ¶ 163.

selected created a wholly inappropriate, unnecessary and severe risk of loss for Plaintiffs, and the losses that they suffered are a direct consequence of the materialization of that risk.

3. Defendants' Fact-Based Arguments Do Not Support Dismissal

While Defendants couch their arguments as addressing purported legal deficiencies in the Complaint, the real disputes are factual and cannot be resolved at this stage. Among other things, there are factual disputes over whether the formula was "appropriate and equitable" and whether it "was "necessary and appropriate to protect the value of Participants' interests in their Awards." *See, e.g.*, Raytheon Br. at 14 citing UTC LTIP, ECF 49-3, §§ 10(b) & 3(c). For instance, Otis baldly asserts that "[t]he Committee's exercise of its discretion was consistent with the UTC LTIPs' express terms" and that "executive and shareholder interests were always aligned." Otis Br. at 14, 15. Raytheon similarly declares that "defendants acted reasonably and in accordance with the broad discretion the UTC LTIPs granted them." Raytheon Br. at 20; Carrier Br. at 13 (claiming that it exercised "commercially reasonable judgment"). Defendants' fact-bound arguments may be suited for a closing argument at trial, but they cannot be the basis for a motion to dismiss.

Plaintiffs have plausibly alleged that by using the delayed, weighted-average price formula, rather than the traditional "opening price on the day of the Separation" that Raytheon employed to remedy the inequity for unvested options and SARs, Compl., ¶ 162, Defendants' conduct was not "equitable" or "necessary and appropriate to protect the value of Participants' interests in their Awards." Indeed, with supporting facts and formulas, Plaintiffs demonstrate that Defendants "materially impair[ed] the rights of any Participant with respect to an Award" by reducing the number of awards by 15% and increasing the "strike prices" by 17.5%, resulting in more than $100,000,000 in damages. *See, e.g.*, *id.*, ¶¶ 4, 144-52.

Plaintiffs will have an expert testify that the formula that Defendants employed was inappropriate and inequitable and "had no basis under the UTC LTIP or the UTC 2018 LTIP's terms," just as they have alleged. *Id.* at ¶ 186. The expert will testify that the formula was not "necessary and appropriate to protect the value of Participants' interests in their Awards," as Raytheon admitted when it modified the formula for vested shares. *Id.* at ¶¶ 162-66; *see also* Raytheon Br. at 14 (admitting that formula had to be "necessary and appropriate to protect the value"). Because the issue of whether the formula breached the "express terms" of the LTIPs is a disputed fact and will the subject of expert testimony, the Court should not dismiss Plaintiffs' claim for breach of contract in Count I. *See Craig v. City of King City*, No. C-11-04219, 2012 WL 1094327, at * 6 (N.D. Cal. March 29, 2012) (denying motion to dismiss because disputed issue would be subject of expert testimony); *Ulico Cas. Co. v. Clover Capital Management, Inc.,* 217 F. Supp. 2d 311, 314-16 (denying motion for summary judgment because disputed issue would be subject of expert testimony).

Relatedly, each Defendant tries to couch this case as hindsight second-guessing, positing that Plaintiffs could have been better off if the companies' share prices decreased in the days after the Transaction. *See, e.g*., Raytheon Br. at 3; Otis Br. at 1; Carrier Br. at 1-2. Their arguments fail for two reasons. First, Plaintiffs do not rely on hindsight. Plaintiffs' expert will opine that Defendants did not employ a formula that was appropriate at the time of the Transaction because it would have been luck or sheer coincidence if the conversion linked the post-Transaction value of awards to what UTC common stockholders received. Relying on luck or coincidence when dealing with hundreds of millions of dollars of employee and retiree compensation is not appropriate. Indeed, as Raytheon effectively admitted when it revised the formula, Defendants should have and easily could have used the traditional "opening price on the day of the Separation"

valuation methodology "to treat employees and retirees fairly in the conversion process." Compl., ¶ 164.

Second, Defendants ignore reality. The LTIPs required that when the Committee exercised its discretion to develop the conversion formula, that formula had to "protect" and "preserve" the value of the awards and it could not "decrease" or "materially impair" their value. *See, e.g.,* UTC LTIP, ECF 49-3, at §§ 10(b) and 12(c), UTC 2018 LTIP, ECF 49-4, at § 3(e), and SAR Schedule of Terms, ECF 49-7, at 4. By the nature of Defendants' delayed formula, whether those promises were met could not be determined until after the formula was implemented. That is not a matter of hindsight, it is a matter of fact—and it is beyond dispute that that the formula did not protect or preserve the value of Plaintiffs' awards and they each suffered material losses.[7]

Carrier's argument that Plaintiffs do not contend that the formula was selected unreasonably also is wrong. Carrier Br. at 1. Plaintiffs allege that the formula "used" was "inequitable, arbitrary and had no basis under the UTC LTIP or the UTC 2018 LTIP's terms." *See, e.g.*, Compl., ¶ 186. More specifically, Plaintiffs allege, and will prove through expert testimony, that when Defendants implemented the formula in a period of known volatility, they acted inappropriately and inequitably. Plaintiffs' expert will opine that when closing the Transaction in what Raytheon describes as "the midst of significant market volatility," Raytheon Br. at 10, Heading C, a reasonable company would not have used Defendants' formula or would have made an appropriate adjustment to reduce the potential impact of that volatility, just as Raytheon did

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[7] Importantly, even if the awards had increased in value, Defendants ***would still be in breach***, although Plaintiffs would have suffered no harm. To keep the awards linked to shareholder value, and to prevent a windfall to participants in relation to shareholder value, the Schedule of Terms required that any "equitable adjustments" also had to "prevent an ***increase*** . . . in the value of [awards] relative to [UTC] Common Stock." Complaint, ¶ 96 (citing SAR Schedule of Terms, ECF 49-7, at 4).

when it adjusted the formula to base the award of the share price the day after the closing to correct the inequity for those with unvested awards. Defendants' use of a formula that extended the time that the share price could be affected by new information and known market volatility was inappropriate and inequitable on its face.

Plaintiffs have plausibly alleged the contract terms, their breach, harm and causation. Plaintiffs cannot be denied a trial by jury on their breach of contract claim simply because Defendants contest the claim factually.

4. Otis and Carrier Have Successor Liability

The Court only needs to look at Raytheon's brief to confirm that Plaintiffs have plausibly alleged that Carrier and Otis assumed liability for their current and former employees for the harms caused by the inequitable conversion formula. Raytheon states, "In conjunction with the establishment of these plans, Carrier and Otis assumed certain liabilities for benefits payable to their current and former employees." Raytheon Br. at 10. That is exactly what Plaintiffs allege. *See, e.g.*, Compl., ¶¶ 180-81, 190-91.

Otis' filings with this Court confirm its liability. In Exhibit B to its Motion, Otis attached the plan that it established "pursuant to the terms of the Employee Matters Agreement," to pay participants the awards they received under the ***UTC LTIPs***. Otis LTIP, ECF 51-3, at §§ 1(c), 1(t) and 4(a). The new Otis LTIP employs the concept of "Assumed Spin-Off Awards," which are the UTC LTIP awards, and "which award[s] [are] assumed by Corporation [the new Otis Worldwide Corporation]." *Id.* at 1(c).

This successor liability is further confirmed by the fact that Carrier and Otis retained the right to approve (or reject) any post-Transaction adjustment to the conversion formula. *See* Compl., ¶ 165. When Carrier and Otis rejected Raytheon's adjustment proposal "to treat

employees and retirees fairly in the conversion process," they acknowledged their liability to those employees and retirees.

Carrier and Otis's communications to Plaintiffs—before and after the Transaction—also confirm their liability. For example, Carrier told participants before the Transaction that it would "be responsible" for withholding any taxes due on their UTC LTIP SARs or stock options and that it would be the plan administrator after the Transaction. *See* UBS One Source Conversion Guide at 8 (attached as Exhibit A). After the Transaction, Carrier told participants it would not change the formula because doing was would not be "in the best interest of Carrier or [its] new shareholders." *See* Carrier's Letter to Darnis dated June 3, 2020, (attached as Exhibit B). Otis sent participants a nearly identical letter after the Transaction, telling participants that it was "not in the best interest of Otis" to change the formula. *See* Otis Letter to Equity Award Holders (attached as Exhibit C). Accordingly, Carrier and Otis admit they are responsible for changing the formula (or not changing it) and they are responsible to pay Plaintiffs when they exercise their awards. That is successor liability.

Carrier and Otis' attempt to avoid successor liability by claiming a third-party beneficiary carve-out is unavailing. Even if the liability could be considered a third-party liability, it is permissible under these circumstances. Although the EMA contains boilerplate language generically excluding former employees, officers and directors from benefitting under the agreement, Delaware courts "will disregard 'general' or 'boilerplate' provisions excluding third-party beneficiaries to give full effect to more specific provisions to demonstrate an intent to benefit a third party." *Fortis Advisors, LLC v. Medicines Co. & Melinta Therapeutics, Inc.,* C.A. No. 2019-0236, 2019 WL 7290945, at *31 (Del. Ch. Dec. 18, 2019). As discussed above, Carrier and Otis have made statements demonstrating a specific intent to benefit Plaintiffs and other class

members, which supersedes the general language of the "no third-party beneficiaries" clause. *See Branin v. Stein Roe Investment Counsel, LLC,* C.A. No. 8481, 2014 WL 2961084, at *10 n. 69 (Del. Ch. Jan. 28, 2014) (declining to enforce "no third-party beneficiaries" clause where other provisions of agreement "set forth a right in SIRC LLC's employees which would be rendered meaningless if the blanket statement Defendants quote applied").

C. Plaintiffs Have Plausibly Alleged a Breach of the Covenant of Good Faith and Fair Dealing

Each Defendant also moves to dismiss the good faith and fair dealing counts. Their arguments fail. Under Delaware law,

> the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. Thus, parties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms.

Dunlap v. State Farm Fire and Cas, Co., 878 A.2d 434, 440-41 (Del. 2005).[8] In conducting this analysis, the court "must assess the parties' reasonable expectations at the time of contracting" and the covenant "applies to developments that could not be anticipated." *Nemec v. Shrader,* 991 A.2d 1120, 1126 (Del. 2010).

1. Plaintiff Have Alleged the Breach and Supporting Facts

As Raytheon acknowledges, to state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs only need to plausibly allege that "defendant exercised their discretion unreasonably, arbitrarily, or in bad faith, thereby depriving plaintiffs of the fruits of the

[8] Defendants suggest that implied covenant of good faith and fair dealing cases in Delaware are rarely brought. *See* Otis Br. at 17; Carrier Br. at 12. To the contrary, like in most states, implied covenant cases are common and their legal basis is well-settled. *See, e.g.*, *Dunlap v. State Farm Fire and Cas, Co.,* 878 A.2d 434, 440-41 (Del. 2005).

bargain." Raytheon Br. at 18. Raytheon then incorrectly argues that Plaintiffs "allege no facts showing that the Committee acted in a way that the parties would have prohibited at the time of contracting." *Id*.

To the contrary, Plaintiffs have plausibly alleged, and will prove through expert testimony, that the formula was arbitrary, inequitable, and unreasonable. Compl., ¶ 186. As discussed above, there was no appropriate basis for the formula that Defendants used.

Plaintiffs also plead Raytheon's admission that it had to revise the formula because, in Raytheon's words, the delayed formula created "material discontinuity" and did not "treat employees and retirees fairly in the conversion process." *Id*. at ¶¶ 163-64 (citing Raytheon's Form 8-K dated May 29, 2020, ECF 49-6). Plaintiffs also allege Otis and Carriers' unreasonable, arbitrary and bad faith conduct by refusing Raytheon's request to correct the unfair formula for vested Raytheon awards and for all Otis and Carrier awards. *Id*. at ¶ 164. These facts are more than enough to put Defendants on notice that they "exercised their discretion unreasonably, arbitrarily, or in bad faith, thereby depriving plaintiffs of the fruits of the bargain," Raytheon Br. at 18, in violation of the implied covenant of good faith and fair dealing.

Contrary to Defendants' assertions, Plaintiff have pled facts to support the principle that "'had the parties to [plan] specifically addressed the issue at the time of the contract, they would have agreed to preclude' the Committee from exercising its discretion in the manner that it did." *Id*. at 19 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010)). Indeed, the LTIPs and the Schedules of Benefits describe just such a contracting expectation—an expectation that in any conversion the value of the awards would be protected, preserved and not decreased or impaired. *See* Contractual Provisions.

2. **Plaintiffs Are Allowed to Plead the Implied Covenant as Alternative Relief**

Defendants' argument that the good faith and fair dealing claim must be dismissed because it is duplicative of the breach of contract claim ignores the well-established principle of alternative pleading in federal court. *See* Otis Br. at 17; Carrier Br. at 15. Although they are wrong, Defendants argue that there are ***no*** contract provisions that limited their discretion to reduce the value of the vested awards by more than 15%. It is beyond dispute, particularly in light of Defendants' arguments that there are no limitations in the contracts, that Plaintiffs in this federal action can plead for alternative relief under the implied covenant of good faith and fair dealing, even if the remedy would be duplicative. *See, e.g*., *Top Ridge Investments, LLC v. Anichini, Inc*., No. 5:16–cv–76, 2017 WL 3016787, at * 9-10 (D. Vt. July 14, 2017); *see also In re Santa Fe Nat. Tobacco Co. Marketing & Sales Prac. & Prod. Liability Litig.*, 288 F. Supp. 3d 1087, 1258-59 (D.N.M. 2017); *Odom v. District of* Columbia, 248 F. Supp. 3d 260, 269 (D.D.C. 2017); *Property One, Inc. v. USAgencies, LLC*, 830 F. Supp. 2d 170, 181 (M.D. La. 2011).

In *Top Ridge*, the court resolved the precise question here: whether a plaintiff can allege an express breach of contract and a breach of the implied covenant of good faith and fair dealing, even where state law jurisprudence indicates that a plaintiff must choose between the two theories. The court found that alternative pleading under Fed. R. Civ. P. 8(d)(2) "permits a plaintiff to advance two theories of recovery even if they are inconsistent" and "takes precedence over state law providing a more restrictive practice." *Top Ridge,* 2017 WL 3016787, at * 9-10. The court denied the defendants' motion to dismiss, just as this Court should.[9]

[9] Any potentially duplicative remedies can be handled at a later stage in the litigation or at trial. *See Top Ridge*, 2017 WL 3016787, at * 10.

The rationale for alternative pleading in federal court is well-demonstrated in this case. Although it should not, if the Court were to conclude that the Contractual Provisions did not limit Defendants' discretion, the principles underlying the those provisions (*e.g.*, to protect, preserve, not decrease and not materially impair the value of the vested awards) could be used to "fill in the gaps" in the LTIPs through an implied covenant claim. *See Dunlap.*, 878 A.2d at 441. In *Dunlap*, the Delaware Supreme Court stated: "The covenant is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Id.* (citation omitted). That is precisely what Plaintiffs plead as an alternative to their breach of contract claim.

The cases that Otis and Carrier cite also do not stand for the "duplication" principle that Defendants argue. Carrier cites to *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.2d 482, 507 (Del. 2019), but that is a summary judgment decision wherein the court concluded on undisputed facts that express contract terms governed the dispute. *Id.* Here, the Court has not made such a determination and Defendants hotly dispute whether the LTIPs contain ***any*** limitation of their discretion and they apparently dispute whether diminution of the vested awards by more than 15% violates the LTIP requirements to protect, preserve, and not decrease or materially impair the value of the vest awards. While that dispute rages, the implied covenant claim cannot be dismissed because the "duplication" is only theoretical.[10]

[10] In its "duplication" argument, Carrier tacitly acknowledges that Plaintiffs state a cause of action for breach of express contract. Carrier argues that "the alleged breach of the implied covenant—for not appropriately exercising discretion under ***these two contractual terms***—is identical to and duplicative of Plaintiffs' claim for breaching ***these same contractual terms***." Carrier Br. at 16 (emphasis added). The "two contractual terms" are § 10(b) of the UTC LTIP (ECF 49-3) and § 3(e) of the UTC 2018 LTP (ECF 49-4). *Id.* Plaintiffs cite to and rely on those provisions for their breach of contract claim. *See* Contractual Provisions.

Further, while recognizing Plaintiffs' allegation that "these two contractual terms" were breached, Carrier inconsistently argues elsewhere that "Plaintiffs fail to identify ***any*** contractual provision

Otis cites to *Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, C.A. No. 2017–0500, 2018 WL 2727542, at *9 (Del. Ch. June 6, 2018), and *Stewart v. BF Bolthouse Holdco, LLC*, C.A. No. 8119, 2013 WL 5210220, at *1 (Del. Ch. Aug. 30, 2013). The court in *Edinburgh* recognized that that "[t]he implied covenant is available only where the terms to be implied are missing from the contract." *Edinburgh*, at *9. Here, against Plaintiff's allegations that express contract terms limited Defendants' discretion, Otis claims that such limitations are "missing from the contracts," *id.*, arguing that "there is ***no*** limiting language in the LTIPs." Otis Br. at 14 (emphasis added). Otis cannot have it both ways. If it does not concede that the Contractual Provisions limit its discretion, it would be improper to dismiss an implied covenant claim to imply those terms. Plaintiffs are entitled to plead those alternatives at this stage. *See, e.g.*, *Top Ridge*, 2017 WL 3016787, at * 9-10.

In *Stewart*, the court found that Plaintiffs "have not alleged a specific implied contractual obligation that was violated; rather, their Complaint focuses on the express contractual requirement." *Stewart* at *16. Here, Plaintiffs have alternatively alleged both express provisions, *see* Contractual Provisions, and a specific implied contractual provision: "the Compensation Committee could ***not*** use its discretion in a way that decreased the value of the Awards," Compl., ¶ 185. Unless Defendants concede, or until the Court decides, that the Contractual Provisions limit Defendants' discretion, Plaintiffs are entitled to plead these alternative theories. *See, e.g.*, *Top Ridge*, 2017 WL 3016787, at * 9-10.[11]

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that was breached." Carrier Br. at 2 (emphasis added). While Carrier makes these inconsistent arguments, Plaintiffs are entitled to plead in the alternative. *See, e.g., Top Ridge*, 2017 WL 3016787, at *9-10.

[11] Plaintiffs do acknowledge that whether the case proceeds on the cause of action for breach of express contract or breach of the implied covenant of good faith and fair dealing, relief on the fiduciary duty claims would be duplicative of the relief for the express or implied breach. Accordingly, they stipulate that Counts Three and Six can be dismissed voluntarily.

3. Defendants' Disclosure of the Formula is Irrelevant

The fact that Defendants advised Plaintiffs of the formula before implementing it is irrelevant. *See* Raytheon Br. at 19; Carrier Br. at 13. The question for a breach of the implied covenant claim is not whether the defendant announced its breaching conduct in advance, it is whether "at the time of the contract" (*i.e*., when the awards were issued), the parties would have agreed to allow Defendants to adopt a formula that built in a 4-5 day lag in the stock valuation during the "midst of significant market volatility" (Raytheon Br. at 10, Heading C), and, therefore, virtually guaranteed that the values of the awards would no longer be linked to the value of common stock. Plaintiffs and their expert will testify, and common sense dictates, that delaying a valuation point during known market volatility would almost certainly un-link the awards' value from the value of the UTC's stock price at the time of closing, yet the LTIPs required that the awards be "linked to shareowner value," Compl., ¶ 86 (citing (UTC LTIP, ECF 49-3, at § 1); and that they "correlate[] compensation opportunities with shareowner value," *id*., ¶ 100 (citing (UTC 2018 LTIP, ECF 49-4, at § 1).

And again, Raytheon has admitted that the formula created "material discontinuity between the pre-Separation UTC stock price and the post-Separation [RTX] stock price originally chosen in the Agreement." *Id*. at ¶ 163. Raytheon's admission affirms that "'had the parties to [plan] specifically addressed the issue at the time of the contract, they would have agreed to preclude' the Committee from exercising its discretion in the manner that it did." Raytheon Br. at 19 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010)). Raytheon's conduct thereby affirms the plausibility of Plaintiffs' implied covenant allegations that Defendants breached the implied covenant of good faith and fair dealing.

Finally, the fact that Plaintiffs had notice does not mean that they could have protected themselves. For example, they had no power to change the formula to an appropriate one. Accordingly, the notice was useless to Plaintiffs. The Motions to Dismiss the breach of the implied covenant of good faith and fair dealing count should be denied.

D. Plaintiffs Have Plausibly Alleged ERISA Violations

Defendants are also liable under ERISA for their failure to protect the value of Plaintiffs' awards in the ERISA Plans. Rather than even address these claims on the merits, Defendants adopt a three-step diversion strategy. First, they claim that the Court should not consider Plaintiffs' claim under ERISA § 502(a)(1)(B) because Plaintiffs must exhaust administrative remedies by first appealing to Defendants under the ERISA Plans' administrative procedures. This argument fails because the administrative procedures do not apply and because exhaustion would be futile. As the second step, they claim that the Court should not consider Plaintiffs' ERISA § 502(a)(3) claim because it should not be considered on a motion to dismiss. As a final procedural gasp, Defendants wrongly claim that Plaintiffs do not have standing to assert their meritorious ERISA claims. Defendants are wrong on all counts.[12]

1. Defendants' Exhaustion Arguments Are Meritless

Defendants' arguments that Plaintiffs failed to exhaust administrative remedies prior to filing suit are meritless. The Court should reject them and conclude that Defendants are not entitled to duck Plaintiffs' ERISA § 502(a)(1)(B) claim.

[12] The UTC ERISA Plans provide that the conversion will not "decrease the value of any Plan Accounts" (UTC SRP, ECF 49-8, at § 8.1, Complaint, ¶ 106; UTC PSU Deferral Plan, ECF 49-9, at § 6.1, Complaint, ¶ 109; UTC DC Plan, ECF 49-10, at § 7.1, Complaint, ¶ 113; UTC CACEP, ECF 49-11, at § 8.1, Complaint, ¶ 116). This clear limitation on discretion may explain why Defendants do not address the substance of Plaintiffs' allegations.

a. Exhaustion Should Not Be Considered on the Motions to Dismiss

The "exhaustion requirement is 'judge-made' as ERISA itself does not contain [it]." *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 179 (2d Cir. 2013). Exhaustion is "an affirmative defense, subject to "waiver, estoppel, futility, and similar equitable considerations." *Paese v. Hartford Life and Accident Ins.*, 449 F.3d 435, 439 (2d Cir. 2006). It should not be resolved on a Rule 12(b)(6) motion unless a plaintiff's failure to exhaust is "clear from the face of the complaint." *Liverpool v. N.Y.C. Dist. Council of Carpenters Pension Fund*, No. 17-cv-4272, 2018 WL 2561025 * 3 (S.D.N.Y. June 4, 2018); *Amron v. Yardain Inc. Pension Plan*, No. 18-cv-11336, 2019 WL 6619107, at * 6 (S.D.N.Y. Dec. 5, 2019) (denying defendant's motion to dismiss on exhaustion grounds because "it is an affirmative defense."). Because the Complaint does not allege, much less demonstrate, that Plaintiffs "have an administrative remedy to exhaust." *Kirkendall*, 707 F.3d at 179, Defendants' exhaustion arguments fail.

While courts occasionally rule on the exhaustion issue on motions to dismiss, it is only in cases where plaintiffs essentially concede that they were required to exhaust, which Plaintiffs have not done. Otherwise, courts only consider the issue on summary judgment or, at most, a motion for judgment on the pleadings, as shown by cases cited by Defendants. For example, the courts in *Kennedy v. Empire Blue Cross & Blue Shield,* 989 F.2d 588, 592 (2d Cir. 1993), *Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130 (2d Cir. 2001), and *MacLennan v. Provident Life & Accident Ins. Co.*, 676 F. Supp. 2d 57 (D. Conn. 2099), cited in the Raytheon Br. at 27-28, did not consider the exhaustion defense until summary judgment. Judge Hall reached the same result in *Peck v. Aetna Life Ins. Co*., No. 3:04-cv-1139, 2005 WL 1683491, at *3 (D. Conn. July 19, 2005). And, while Judge Eginton considered failure to exhaust at the pleading stage in *Santiago v. Barnes*, No. 3:13-cv-1853, 2015 WL 1897350 * 2 (D. Conn. April 27, 2015), Raytheon Br. at 28, it was on a

motion for judgment on the pleadings, not a motion to dismiss and the plaintiff "asserted no other defenses to the exhaustion requirement." Defendants have not raised the exhaustion affirmative defense in a pleading to which Plaintiffs could respond. Therefore, the Court should not consider the exhaustion defense at this stage of the case.

b. Plaintiffs Are Not Required to Exhaust

Even if the Court considers Defendants' premature exhaustion argument (which it should not), the briefs and exhibits Defendants filed demonstrate that the defense is without merit. First, the ERISA Plans' administrative review provisions do not apply to Plaintiffs' claims. Second, even if they applied, exhaustion would be futile. As a result, if Defendants ultimately assert failure to exhaust as an affirmative defense, they will not be able to meet their burden of proof.

i. The ERISA Plans Do Not Require Exhaustion of Plaintiffs' Claims to Enforce Plan Terms.

The Second Circuit has held that "exhaustion in the context of ERISA requires ***only*** those administrative appeals provided for ***in the relevant plan or policy***." *Kennedy*, 989 F.2d at 594 (emphasis added). "Implicit in the exhaustion requirement is the condition that a plaintiff must have an administrative remedy to exhaust." *Kirkendall,* 707 F.3d at 179. Defendants cannot meet their burden of establishing as a matter of law that the ERISA Plans include a mandatory pre-suit exhaustion requirement that applies to Plaintiffs' claims to enforce their plan rights under ERISA § 502(a)(1)(B).

By way of background, it is important to remember that ERISA § 502(a)(1)(B) allows a participant to bring three types of claims: "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B); *see also Firestone Tire and Rubber Co. v. Burch*, 489 U.S. 101, 108 (1989) (distinguishing between the three parts

of Section 502(a)(1)(B)). Said differently, ERISA § 502(a)(1)(B) provides three different potential avenues for relief, only one of which concerns a denial of benefits due under a Plan.

With that backdrop, Defendants' rely on two separate provisions of the ERISA Plans (although they conflate them in their briefs). *See, e.g.,* Raytheon Br. at 31-32. The first is titled "Plan Administration," which merely provides that a "person claiming a benefit, requesting an interpretation or ruling under the Plan or requesting information under the Plan shall present the request in writing to the Committee . . .," and the Committee's only obligation is "to respond in writing as soon as practicable." *See, e.g.,* UTC PSU Deferral Plan, ECF 49-9, at § 9.1. While the "Plan Administration" could arguably encompass all three types of claims under Section 502(a)(1)(B), it has absolutely nothing to do with "administrative appeals" and, therefore, does not require exhaustion. *Kennedy*, 989 F.2d at 594. Because this provision does not provide an "administrative remedy to exhaust," *Kirkendall*, 707 F.3d at 179, the Court should ignore it.

The second plan section Defendants rely on is titled "Claim Procedures." But, unlike the "Plan Administration" section, this section ***only*** implicates one of ERISA § 502(a)(1)(B)'s three claims; it ***only*** applies when a participant or beneficiary "believes that he or she has been ***denied a benefit*** to which he or she is entitled under the Plan." *See, e.g.,* UTC PSU Deferral Plan, ECF 49-9, at § 9.2 (emphasis added). It therefore does not apply when a participant seeks to enforce his rights under the Plans or clarify his rights to future benefits under ERISA § 502(a)(1)(B). As Otis correctly notes, an unexhausted "***benefits*** claim is premature." Otis Br. at 32. (emphasis added). Accordingly, the "Claims Procedure" section does not apply to Plaintiffs' claims that do not result from a denial of benefits under the ERISA Plans.

The ERISA Plans' terms demonstrate that Count IV seeks to enforce Plaintiffs' rights under ERISA § 502(a)(1)(B), not "to recover benefits due to [them] under the terms of the plan." The

ERISA Plans are each deferred compensation plans. Compl., ¶¶ 29-33. Under the Plans, participants defer the receipt of compensation until a later, specified date. Compl.,¶ 103 (UTC SRP), ¶ 107 (UTC PSU Deferral Plan), ¶ 111 (UTC DC Plan) and ¶ 114 (UTC CACEP). Under the UTC PSU Deferral Plan, for example, participants defer their vested PSUs for at least five years. UTC PSU Deferral Plan, ECF 49-9, at § 4.4. On the future date that they choose, called the "Valuation Date," participants receive the value of their plan accounts in "a lump sum" or the first of up to "fifteen annual installments." UTC PSU Deferral Plan, ECF 49-9, at §§ 1(z), 4.5, 5.1 and 5.2. Participants do not receive their benefits before the Valuation Date unless they apply for an "accelerated distribution . . . upon the occurrence of an unforeseen emergency," UTC PSU Deferral Plan, ECF 49-9, at § 5.8, which none of the Plaintiffs alleged they did in the Complaint. Accordingly, under the clear Plan terms, benefits are not due until the Valuation Date and could not be denied prior to the Valuation Date.

For the benefits that are not even due yet, this case does not and could not concern a denial of benefits covered by the "Claims Procedure" sections of the ERISA Plans. Instead, it concerns a claim to enforce rights under the Plans arising out of a violation of the ERISA Plans. *See Kennedy*, 989 F.2d at 594; *Kirkendall*, 707 F.3d at 179. Judge Nevas denied a motion to dismiss in similar circumstances, explaining:

> defendants do not point to a specific administrative appeal procedure in the ERISA plans which pertains to a situation such as this one where . . . . [t]he plaintiffs are not challenging a denial of a specific claim . . . . Because there does not appear to be an administrative remedy or internal dispute resolution procedure that governs claims for coverage which the plaintiffs should have pursued before instituting this suit, this action should not be dismissed on exhaustion grounds.

Cramer v. Hartford Hosp., No. 3:96CV217, 1996 WL 732552, at *5 (D. Conn. Dec. 6, 1996). *See also Butler v. Aetna US Healthcare, Inc.*, 109 F. Supp. 2d 856, 863-64 (S.D. Ohio 2008) (plan's

administrative claims process did not apply because "Aetna has neither denied Butler's claim for benefits nor terminated those benefits.").[13]

Raytheon contends that this claim concerns a denial of benefits because Plaintiffs' allege that Defendants did not "'protect[] the value of participant's benefits.'" Raytheon Br. at 37. Count IV primarily concerns Defendants' inequitable failure to protect the value of benefits prior to their due date, not a denial of benefits. Contrary to Raytheon's argument, Raytheon Br. at 37, Plaintiffs seek preservation of the value of their future benefits ***when they become due*** on the Valuation Date, which Defendants diminished as a result of the inequitable conversion formula. Because the ERISA Plans' provisions only concern denials of benefits and not claims to enforce rights under the Plan terms, there are no relevant administrative procedures to exhaust.[14]

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[13] Similarly, in *Negron v. Cigna Health and Life Ins. Co.*, 300 F. Supp. 3d 341 (D. Conn. 2018), the plan's administrative procedures applied only to health care "coverage decisions." Because the plaintiffs received their prescription drugs and the pharmacies were paid in full and the claims did not concern "coverage decisions," the court found "that plaintiffs ha[d] plausibly stated that the plan terms do not set forth administrative procedures that unambiguously address plaintiff's claims of being overcharged . . . ." *Id.* at 353. *Accord Smith v. United Healthcare Services, Inc.*, No. CIV. 00-1163, 2000 WL 1198418 *4 (D. Minn. Aug. 18, 2000) ("exhaustion does not apply because plaintiff was never denied a benefit because he was given his prescription medications upon request, just not at the promised cost"); *Berlet v. Berlet*, No. 98 CIV. 3263, 1999 WL 47107, at *3 (S.D.N.Y. Feb. 3, 1999) (denying motion to dismiss for failure to exhaust where "the plan has no exhaustion requirement for suits similar to the present"); *Burris v. IASD Health Servs. Corp.,* No. Civ. 4-94-CV-10845, 1995 WL 843859, at *3-4 (S.D. Iowa. Oct. 2, 1995) ("[P]laintiff is not asserting a claim resulting from a denial of benefits. Rather, plaintiff asserts that Blue Cross' practice of negotiating "secret" discounts inflated plaintiff's coinsurance obligation.").

[14] The Complaint alleges the claim under ERISA 502(a)(1)(B) to enforce rights under the terms of the Plans and for denial of benefits. Compl., ¶¶ 207, 211. The denial of benefits part of the claim concerns benefits calculated using Raytheon, Carrier or Otis stock that became due between when the post-Transaction "Blackout Period" ended in mid-June 2020 (*see* "How the Spinoffs and Merger Affect the UTC Savings Restoration Plan, ECF 51-8 at 4 of 5) and when Plaintiffs filed their Complaint on August 12, 2020. While the Complaint attempted to cover the bases, the Plan language demonstrates that Plaintiffs' claims in this case do not primarily concern a denial of benefits, but instead the enforcement of rights under the Plan language.

Defendants' cases do not support their position. In *Diamond v. Loc 807 Lab Mgmt. Pension Fund*, 595 F. Appx. 22, 25 (2d Cir. 2014), Raytheon Br. at 29, the plan stopped paying the plaintiff's pension benefits and the plaintiff sued "to receive benefits under the Plan that he contended were withheld." The same is true of *Abe v. NY Univ.,* No. 14-cv-9323, 2016 WL 1275661 * 4 (S.D.N.Y March 30, 2016), a case in which the plaintiff alleged he "was deprived of benefits owed to him to raise a claim pursuant to Section 502(a)(1)(B) of ERISA." Raytheon Br. at 30. *MacKay v. Raynier, Inc.*, 25 F. Supp. 2d 47, 50 (D. Conn. 1988), Otis Br. at 33, concerned a claim "to specific Relocation and Severance Plan benefits" that the plaintiff alleged he was entitled to receive after moving from Georgia and voluntarily submitted to the plan's administrative process after filing suit. And, in *Zupa v. General Elec. Co.*, No. 3:16-cv-00217, 2016 WL 3976544 *2 (D. Conn July 22, 2016), Otis Br. at 33, the plaintiff alleged he was entitled to receive pension benefits immediately and did not even argue that the plan's exhaustion provisions did not apply. In contrast, Plaintiffs' claims here are for preserving the value of future benefits.

In *Fernandez v. Wells Fargo Bank*, Nos. 12 Civ. 7193, 2013 WL 3465856 * 6 (S.D.N.Y. July 9, 2013), Raytheon Br. at 29, the exhaustion provision was significantly broader than the ERISA Plans' "Claim Procedures" sections, covering any instance where a "Participant believes there is an error in his or her account or in a distribution, believes he or she is entitled to different benefits from the 401(k) Plan, or disagrees with any determination that has been made reflecting the Participant's benefits under the 401(k) Plan." If the ERISA Plans had exhaustion provisions that similarly covered "any determination that has been made reflecting the Participant's benefits," Defendants might have an argument. But, because the ERISA Plans' exhaustion provisions only concern claims for a denial of benefits, *Fernandez* does not apply.

Even if a reasonable person might argue that the administrative processes in the Plan applied to Plaintiffs' claims – which is not true here – "[i]f a plan claimant ***reasonably interprets*** the relevant statements in the summary plan description as permitting her to file a lawsuit without exhausting her administrative remedies, and as a result she fails to exhaust those remedies, she is not barred by the court-made exhaustion requirement from pursuing her claim in court." *Kirkendall* 707 F.3d at 180 (emphasis added) (quoting *Gallegos v. Mount Sinai Med. Ctr*., 210 F.3d 803, 810 (7th Cir. 2000)); *accord Woerner v. Fram Group Operations, LLC*, 658 Fed. Appx. 90, 96 (3d Cir. 2016) (excusing exhaustion where "[the plaintiff] appear[ed] to have *reasonably* believed she was not bound by the claims procedure"); *Neurological Surgery, P.C. v. Siemens Corp*., No. 17-cv-3477, 2017 WL 6397737, at *9 (E.D.N.Y. Dec. 12, 2017) (excusing exhaustion where "Plaintiffs reasonably interpreted the Plan to not require a second level of appeal").

The plaintiff in *Kirkendall* was told she was no longer eligible for a subsidized pension benefit after her employer entered into a corporate transaction, but the plan sponsor did not specify why the plaintiff's future pension would be lower than she thought. Even though the plaintiff did not intend to retire immediately, she sued to seek a "clarification of future benefits under ERISA § 502(a)(1)(B) . . . ." In reversing the district court's decision, the Second Circuit determined that the plan's exhaustion requirement for "claims for benefits" did not apply to plaintiff's claim that sought a "determination of future benefits." *Kirkendall*, 707 F.3d at 177, 181. The court stated:

> We have doubts whether Kirkendall's inquiry was truly a 'benefit claim' within the meaning of the Plan terms. Regardless, we imagine that if the plan terms are a bit baffling to use, they are equally baffling to plan participants like Kirkendall. . . .As the Eleventh Circuit has observed, exemption from the general exhaustion requirement those plan participants who 'reasonably interpret' their ERISA plan not to impose an exhaustion requirement will have the salutary effect of encouraging employers and plan administrators to clarify their plan terms and, thereby, of leading more employees to pursue their benefit claims through their plan's claims procedure in the first instance.

Id. at 180 (citing *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1209 (11th Cir. 2003).[15]

Here, Plaintiffs reasonably believed the UTC ERISA Plans did not require them to exhaust their claims to enforce plan terms before filing suit. By their own terms, the "Claim Procedure" sections ***only*** applies when a participant "believes he or she has been denied a benefit to which he or she is entitled under the Plan." UTC PSU Deferral Plan, ECF 49-9, at § 9.2. However, Plaintiffs were not "entitled" to their benefits until the Valuation Date and, accordingly, if that date has not yet occurred (or an annual payment become due), Plaintiffs were not "denied a benefit." The reasonableness of Plaintiffs' interpretation is not an issue the Court should decide on a motion to dismiss. *See*, *e.g.*, *Germana v. Reliance Standard Life Ins. Co.*, No. 3:16-cv-1611, 2018 WL 4096632, * 8 (D. Conn. Aug. 28, 2018) (denying motion to dismiss "[b]ecause the Court would benefit from a fuller factual record to determine . . . if [plaintiffs] could have 'reasonably interpreted the plan terms not to require exhaustion'" (quoting *Kirkendall*, 707 F.3d at 181)).

ii. <u>Exhaustion Would Be Futile</u>

Futility is the second independent reason why Plaintiffs were not required to exhaust. "The exhaustion requirement . . . is not absolute." *Kirkendall*, 707 F.3d at 179. Plaintiffs are not required "to exhaust their administrative remedies where they 'make a clear and positive showing that pursuing available administrative remedies would be futile.'" *Id*. (quoting *Kennedy*, 989 F.2d at 594). Under the doctrine of futility, equitable considerations factor into whether Plaintiffs' claims

[15] Raytheon's suggestion that *Kirkendall* is distinguishable because the Plaintiffs seek to enforce the terms of the Plans, "not a clarification of future rights," is meritless. Raytheon Br. at 30, n. 3. The dispute in *Kirkendall* concerned whether the plan would count the plaintiff's service after 2000 when calculating her future pension, a key element of the benefit formula. *Kirkendall*, 707 F.3d at 176-77. Here, in contrast, Plaintiffs do not need a "clarification" of how Defendants converted their benefits in the ERISA Plans because they already have detailed information. *See*, *e.g.*, Compl., ¶¶ 158 and 159 (describing to the thousandth of a unit how the 4/5 WVAP affected Darnis' and DePellegrini's accounts). Instead, they seek to enforce their rights under the Plans.

should be allowed to proceed.[16] *See, e.g.*, *Serrapica v. Long-Term Disability Plan of the Chase Manhattan Bank*, No. 05 CV 2450, 2007 WL 2262878, at *2 (E.D.N.Y. Aug. 3, 2007). Courts consider "whether, in light of both the claimant's and the plan administrator's actions, it is ***fair*** to require the dismissal of the claimant's suit pending compliance with administrative procedures." *DePace v. Matsushita Elec. Corp.*, 257 F. Supp. 2d 543, 560 (E.D.N.Y. 2003) (quoting *Ludwig v. NYNEX Serv. Co.*, 838 F. Supp. 769, 781 (S.D.N.Y. 1993) (emphasis in original).

In particular, a plaintiff demonstrates futility if there is a fixed company-wide policy to deny the claims at issue. For example, in *Peck v. Aetna Life Ins. Co*., No. Civ.A.3:04–CV1139, 2005 WL 1683491, at *3 (D. Conn. July 19, 2005), Judge Hall determined that plaintiff had adequately pled futility by alleging that Aetna had a "fixed company-wide policy . . . of failing to pay for benefits that accumulate[ ] during the Waiting Period." *Id.* at *3. While the Court noted that "[i]t may well be that [plaintiff] cannot produce the requisite facts to make a 'clear and positive showing' upon the conclusion of a period of discovery," *Peck* held that "[s]uch an eventuality is properly dealt with in a motion for summary judgment." *Id.*; *see also, e.g*., *Am. Med. Ass'n v. United Healthcare Corp*., No. 00-Civ.2800, 2002 WL 31413668, at *5 (S.D.N.Y. Oct. 23, 2002) (holding that, while defendants could test allegations in discovery and challenge them at summary judgment, plaintiff's allegations of futility were sufficient to survive a motion to dismiss); *Sibley-Schreiber v. Oxford Health Plans (NY), Inc.,* 62 F. Supp. 2d 979, 988 (E.D.N.Y. 1999) ("[i]n the face of a company-wide promulgation of limited or no coverage unrelated to the personal

[16] Although Plaintiffs must make a "clear and positive showing" that exhaustion should be waived due to futility or other equitable considerations, on a motion to dismiss the Court should still draw all reasonable inferences in favor of the Plaintiffs and assume that the allegations of wrongdoing are true. *Engler v. Cendant Corp.*, 434 F. Supp. 2d 119, 128 (E.D.N.Y. 2006). Because it is an affirmative defense and because Plaintiffs do not have the necessary record on a motion to dismiss, courts have repeatedly waited until the summary judgment stage to decide if exhaustion applies. *See*, *e.g.*, *Germana*, 2018 WL 4096632, at * 8.

circumstances of individual claimants, it is fair to question whether it makes sense to require insureds to jump through procedural hoops on their way to an inevitable denial of coverage."); *DePina v. Gen. Dynamics Corp.*, 674 F. Supp. 46, 51 (D. Mass. 1987).

In this case, Defendants essentially admit that exhaustion would be futile because Raytheon, Carrier and Otis each have fixed policies. After the Transaction closed, Raytheon formed a "special committee of [its] Board of Directors" to determine if it should change the 4/5 WVAP formula that was used to convert participants' plan holdings. Raytheon's Form 8-K dated May 29, 2020, ECF 49-6, at 3. This special committee recognized that the 4/5 WVAP formula was inequitable, so it changed the methodology for awards that consisted solely of Raytheon stock, "using Raytheon's opening price on April 3, 2020, rather than the Day 4/5 VWAP." Raytheon Br. at 11. *See* Compl., ¶¶ 162-164. In other words, Raytheon changed the formula to treat plan participants like UTC's common stockholders as Plaintiffs allege should be done. *Id.* But Raytheon only fixed the problem for certain awards, stating that it could not apply the proper methodology to the awards that are the subject of Count IV because Carrier and Otis refused. Compl., ¶ 165.

Defendants' briefs and filings confirm Plaintiffs' allegations. Raytheon's Form 8-K dated May 29, 2020, ECF 49-6, at 3-4; Raytheon Br. at 11; Carrier Br. at 8-9. Carrier admits it rejected Raytheon's proposal to amend the formula because Carrier had an irreconcilable conflict with Carrier shareholders. Carrier Br. at 28-30. It is therefore apparent that Plaintiffs' claims of injury stem from a "fixed company-wide policy" that cannot be modified because of Otis and Carrier's supposed corporate responsibilities to shareholders. Moreover, if a corporate behemoth like Raytheon could not convince Carrier and Otis to change the formula, there was no chance that individual Plaintiffs could have done so. The inevitability of a denial in this case supports a finding of futility. *See, e.g.*, *Hoffman v. Empire Blue Cross and Blue Shield*, No. 96 Civ. 5448, 1999 WL

782518, at *13 (S.D.N.Y. Sept. 30, 1999); *Arapahoe Surgery Center, LLC v. Cigna Healthcare, Inc.*, 171 F. Supp. 3d 1092, 1110 (D. Colo. 2016). At the very least, Plaintiffs have raised an issue of "fixed company-wide policy" in their Complaint that should be resolved at summary judgment or trial as articulated by Judge Hall in *Peck*.

Indeed, it is hard to conceive of a clearer showing of futility than that presented in this case. In response to Raytheon's request to correct the unfair formula, Otis and Carrier separately told Plaintiffs ***before this case was filed*** that they would ***not*** change the 4/5 WVAP formula. In a letter dated June 3, 2020, Carrier told participants that the Carrier Board had "considered a change to the equity conversion methodology, but concluded that a post-spin amendment was not the right decision" because it was not "in the best interest of Carrier . . . ." *See* Exhibit B (June 3 letter to Darnis). Likewise, Otis told Plaintiffs that a "special committee of [its] Board of Directors evaluated Raytheon's request . . . [but] concluded that was not in the best interest of Otis" to do so. *See* Exhibit C (Otis Letter to Equity Award Holders). Defendants' vigorous defense of their company-wide policies, before and after Plaintiffs filed this case, further supports a finding of futility. *Corsini v. United Healthcare Corp.,* 965 F. Supp. 265, 269 (D.R.I. 1997); *Sibley-Schreiber*, 62 F. Supp. 2d at 987; *Freeman v. MetLife Group, Inc.*, 583 F. Supp. 2d 218, 225 (D. Mass. 2008). Consequently, Plaintiffs have demonstrated a "clear and positive showing that pursuing administrative remedies would be futile." *Kennedy*, 989 F.2d at 594.

2. <u>Plaintiffs Have Standing To Assert Class Member Claims</u>

a. <u>Plaintiffs Have Class Standing With Respect to Participants of All the Plans</u>

While Raytheon is correct that no Plaintiffs were participants in the UTC CACEP and DC Plans, it does not dispute the fact that the Plaintiffs have standing to sue Raytheon because they were participants in other ERISA Plans. Raytheon Br. at 24. But, Raytheon thereafter wrongfully

attempts to conflate the obligation of an individual to have standing with the ability of a class representative who already has standing to pursue a class action on behalf of similarly situated putative class members who rely on their own standing. The Second Circuit has held that where, as here, plaintiffs can establish their own standing, they can represent a class where their own injuries and the injuries to the class "implicate[ ] the same set of concerns." *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,* 693 F.3d 145, 162 (2d Cir. 2012) (internal quotations omitted); *see also Langan v. Johnson & Johnson Consumer Cos., Inc.,* 897 F.3d 88, 94–95 (2d Cir. 2018) (holding that, under *NECA,* "non-identical injuries of the same general character can support standing" for a class). That is clearly the case here.

Plaintiffs' claims concerning Defendants' conduct involving the ERISA Plans in which they personally participate are the same, and thus "implicate the same set of concerns," as the claims of participants in the UTC CACEP and DC Plans. The Complaint alleges that Defendants' formula for calculating the number of "units" of Raytheon, Carrier or Otis that participants received "substantially harmed participants in the UTC SRP, the UTC PSU Deferral Plan, the UTC DC Plan and the UTC CACEP." Compl., ¶ 157. Each of the ERISA Plans contained provisions designed to protect the value of plan accounts from being diminished through plan amendment. *Id.* at ¶¶ 106, 109, 113 and 116. As this Court recently held, class standing is appropriate because "the facts required to prove the Plaintiffs' 'own' claims will be substantially similar to—not very different from—the facts required to prove the other, related claims against the Defendants". *Ontario Teachers' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.,* No. 3:17-CV-558, 2020 WL 1181366, at *12 (D. Conn. Mar. 10, 2020) (internal quotations omitted).

Unsurprisingly, courts routinely hold that a participant who has standing to sue under one Plan have standing to pursue claims on behalf of similarly situated participants in other plans. *See,*

e.g., Haddock v. Nationwide Fin. Servs., Inc., 262 F.R.D. 97, 110–11 (D. Conn. 2009), *rev'd on other grounds,* 460 F. App'x 26 (2d Cir. 2012) (ERISA plaintiff could represent class that included participants or beneficiaries of plans to which he did not belong) (citing *Fallick v. Nationwide Mutual Insurance Co.,* 162 F.3d 410, 423 (6th Cir.1998)); *Charters v. John Hancock Life Ins. Co.,* 534 F. Supp. 2d 168, 172 (D. Mass. 2007) (same) (citing *Forbush v. J.C. Penney Co.,* 994 F.2d 1101 (5th Cir.1993))); *Cress v. Wilson,* No. 06 Civ. 2717, 2007 WL 1686687, at *10 (S.D.N.Y. June 6, 2007) ("[A]n individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to the general practices which affect all of the plans.").

In *Wood v. Prudential Ret. Ins. & Annuity Co.,* No. 3:15-cv-1785, 2017 WL 3381007, at *4 (D. Conn. Aug. 4, 2017), this Court noted it was "disinclined to hold categorically that a plan participant cannot represent the interests of ***participants*** in plans of which the representatives are not members." That is exactly what the Defendants are asking for here. This Court should reject that argument just as it did in *Wood*.[17]

b. Plaintiffs Have Standing To Assert Claims Under UTC, Carrier and Otis Plans

Raytheon contends that Plaintiff Machuga has no standing to assert claims relating to the UTC DC Plan because he is now a participant in the Carrier DC Plan, which assumed the liabilities

[17] Raytheon's cases provide little support for its position. In *Coriale v. Xerox Corp.*, 775 F. Supp. 2d 583, 588-589 (W.D.N.Y. 2011), *aff'd,* 490 F. App'x 387 (2d Cir. 2012), neither the District Court or the Second Circuit considered whether the Plaintiffs could represent class action participants in other plans. The Courts in *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 612-13 (S.D.N.Y. 2015), *aff'd sub nom. Muehlgay v. Citigroup, Inc.*, 649 F. App'x 110 (2d Cir. 2016), did the same. Similarly, in *In re SLM Corporation ERISA Litig.*, No. 08 Civ. 4334, 2010 WL 3910566 * 12 (S.D.N.Y Sept. 24, 2010), *aff'd sub nom. Slaymon v. SLM Corp.,* 506 F.App'x 61 **3 (2d Cir. 2012), neither the District Court nor the Second Circuit conducted any analysis under Rule 23. Accordingly, these decisions are inconsistent with the authority cited above.

of the UTC DC Plan. Raytheon Br. at 26. Ironically, Carrier argues the exact opposite, contending that because all of the alleged wrongful acts occurred before the Transaction when Machuga was in the UTC DC Plan, he has no claim against the Carrier DC Plan. Carrier Br. 22-23. Although these arguments are diametrically opposed to each other, Otis appears to agree with both. Otis Br. at 36. Defendants cannot get their stories straight because their arguments are unfounded.

The only case any of the Defendants cite is *Chastain v. ATT*, 558 F.3d 1177 (10th Cir. 2009). Raytheon Br. at 27. In *Chastain*, plaintiffs were members of the AT&T pension plan when AT&T spun off Lucent in 1996. At the time of the spinoff, plaintiffs were transferred to the Lucent plan. Seven years later, Lucent eliminated certain benefits, and plaintiffs sued AT&T for denial of benefits under ERISA section 502 (a)(1)(B) only. *Id*. at 1179. On appeal, the court upheld summary judgment for AT&T because plaintiffs no longer had a claim for defined benefits against AT&T, the former sponsor, citing *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996). 588 F.3d at 1181-1182. But, the court specifically noted that under *Varity*, although a participant might not have a claim against a former sponsor for denial of benefits under ERISA section 502(a)(1)(B), it could have a claim for breach of fiduciary duty under ERISA section 502 (a)(3). *Id.* at 1182-83. The court did not fully consider that claim, however, because plaintiffs "ignored" it on summary judgment. *Id*. at 1182. Plaintiffs do not ignore ERISA section 502 (a)(3) as set forth below.

Plaintiff Machuga is not seeking to hold his prior plan or its fiduciaries liable for amendments to his current plan by its fiduciaries. He had an account in a defined contribution plan – the UTC DC Plan – that lost value as a result of Defendant's actions. He has standing to assert claims relating to the UTC DC Plan because, as the result of Defendants' actions, the value of his plan account was reduced. ERISA provides standing to "former employees . . . who have a colorable claim to vested benefits." *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity*

Comm'n of Nassau Cty., Inc., 710 F.3d 57, 65 (2d Cir. 2013) (quoting *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117 (1989)); *In re Polaroid ERISA Litig.,* 240 F.R.D. 65, 71–72 (S.D.N.Y. 2006) (former plan participants had standing to pursue ERISA claims alleging "that the distributions they received under a defined contribution plan were reduced because of defendants' breaches of fiduciary duty"). And, because the assets and liabilities of the UTC DC Plan were transferred to the Carrier DC Plan, Machuga has standing to seek relief against that Plan as well.

3. Plaintiffs Can Pursue Claims Under Section 502(a)(1)(B) and Section 502(a)(3)

Defendants claim that Plaintiffs should be thrown out of Court because the ERISA 502(a)(1)(B) claims are subject to exhaustion and that all other ERISA claims should be dismissed because they simply duplicate the section 502(a)(1)(B) claims. Raytheon Br. at 33 (citing *Varity*, 516 U.S. at 512). Even if Defendants were correct that exhaustion applied to the section 502(a)(1)(B) claims (which, as discussed above, it does not), the Second Circuit expressly rejected the argument that a complaint cannot simultaneously allege claims under both Section 502(a)(1)(B) to enforce the terms of a plan and Section 502(a)(3) for breach of fiduciary duty:

> The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a) (1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty; instead, the Court indicated that equitable relief under § 502(a)(3) would "normally" not be appropriate. Ultimately, we believe that the determination of "appropriate equitable relief" rests with the district court ***should plaintiffs succeed on both claims***. This determination must be based on ERISA policy and the "special nature and purpose of employee benefit plans." *Id.* (internal quotation marks omitted).

Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89-90 (2d Cir. 2001).

Devlin reversed the granting of a motion for summary judgment, not a motion to dismiss, and instructed the district court to consider remedies only if and after the plaintiffs ultimately prevailed. Accordingly, this Court should not consider appropriate remedies and claims at this

time, particularly since the contract-based claims under Count IV and the fiduciary-duty-based claims under Count V have substantially different elements and remedies.

Devlin is particularly applicable in this case because Defendants have taken inconsistent positions. As the Court noted in *Varity*, if a plaintiff does not have a claim for benefits under Section 502(a)(1)(B) to enforce the terms of a plan, he or she may have a claim under Section 502(a)(3), ERISA's catch all provision which applies when a claim does not fit within the specific confines of the other statutory claims. *Varity*, 516 U.S. at 515; *see also Chastain*, 588 F.3d at 1181-1182. Here, Raytheon argues it cannot be liable for benefits under the EMA because Carrier and Otis have assumed those liabilities. Raytheon Br. at 10. Carrier and Otis say they cannot be not liable because the events occurred before the spin-off. Carrier Br. at 17-19; Otis Br. at 16-17. Defendants are playing a "shell game." Depending on how the facts turn out concerning successor liability under the EMA, it is unclear factually which Defendant is responsible for what – each appears to be trying to blame the other. And, depending on how this issue is resolved, Plaintiffs may have a Section 502(a)(1)(B) to enforce the terms of a plan against Raytheon, and claims under Section 502(a)(3) for breach of fiduciary duty against Carrier and Otis, or vice versa. It is too early to tell as the factual record has not been developed. Accordingly, the Court should not decide this issue now. *See Negron*, 300 F. Supp. 3d at 362.

4. <u>Plaintiffs Seek Appropriate Relief Under Section 502(a)(3)</u>

Raytheon's arguments that the relief Plaintiffs seek is unavailable under ERSIA Section 502(a)(3) (Raytheon Br. at 33-34), ignores the most recent and overriding Supreme Court decision on this issue, *Cigna v. Amara*, 563 U.S. 421 (2011). *Amara*, like this case, concerned equitable claims under ERISA against ***fiduciaries***. The Supreme Court recognized a wide range of equitable remedies, including "monetary 'compensation' for a loss resulting from a trustee's breach of duty,

or to prevent the trustee's unjust enrichment." *Id.* at 441. This remedy is known as "surcharge." *Id.* at 442.

In reaching this decision, the Supreme Court distinguished *Great–West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), which considered a claim brought by a fiduciary against a tort-award-winning ***non-fiduciary*** beneficiary for monetary reimbursement for medical outlays that the plan had previously made on the beneficiary's behalf. *Amara* at 439. *Amara*, in sharp contrast, "concerns a suit by a beneficiary against a ***plan fiduciary*** (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). . . . It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." *Amara* 563 U.S. at 439-40. (internal citations omitted; emphasis added). Accordingly, because a suit against a breaching fiduciary was brought in equity before the merger of law and equity, suits for "monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment" may be brought under ERISA's equitable relief provisions, *id.* at 441, but suits against a non-fiduciary for monetary relief may not be brought under those provisions.

New York State Psychiatric Ass'n v. United Health Group, 798 F.3d 125 (2d Cir. 2015), a post-*Amara* case relied upon by Raytheon (Raytheon Br. at 35), makes Plaintiffs' point. In that case, the plaintiff sued under both Section 502(a)(1)(B) and 502(a)(3). In considering the 502(a)(3) claims, the Court stated:

> Here, Denbo's § 502(a)(3) claims are for breach of fiduciary duty, he has not yet succeeded on his § 502(a)(1)(B) claim, and it is not clear at the motion-to-dismiss stage of the litigation that monetary benefits under § 502(a)(1)(B) alone will provide him a sufficient remedy. In other words, it is too early to tell if his claims under § 502(a)(3) are in effect repackaged claims under § 502(a)(1)(B). We therefore hold that the District Court prematurely dismissed Denbo's claims under § 502(a)(3) on the ground that § 502(a)(1)(B) provides Denbo with adequate relief. *See Varity Corp.,* 516 U.S. at 515, 116 S. Ct. 1065 (granting a remedy where no

> other remedy is available "is consistent with the literal language of [ERISA], [ERISA's] purposes, and pre-existing trust law"); *Devlin,* 274 F.3d at 89 ("*Varity Corp.* evidences a clear intention to avoid construing ERISA in a manner that would leave beneficiaries without any remedy at all." (quotation marks omitted)). If, on remand, Denbo prevails on his claims under both § 502(a)(1)(B) and § 502(a)(3), the District Court should then determine whether equitable relief under § 502(a)(3)is appropriate. *See Devlin,* 274 F.3d at 89–90.

Id. at 134. Moreover, in considering whether the plaintiff could seek monetary relief under Section 502(a)(3), the court stated:

> We add that where, as here, a plan participant brings suit against a "plan ***fiduciary*** (whom ERISA typically treats as a trustee)" for breach of fiduciary duty relating to the terms of a plan, any resulting injunction coupled with surcharge"—"monetary 'compensation' for a loss resulting from a [fiduciary's] breach of duty, or to prevent the [fiduciary's] unjust enrichment"—constitutes equitable relief under § 502(a)(3). *CIGNA Corp. v. Amara,* 563 U.S. 421, 131 S. Ct. 1866, 1879–80, 179 L.Ed.2d 843 (2011).

New York State Psychiatric Ass'n, 798 F.3d at 134 (emphasis added). Here, Plaintiffs seek a variety of types of equitable relief, including correction of the transactions associated with their plan accounts caused by the formula and monetary compensation in the form of surcharge. Compl., ¶ 224. Under *Amara* and *New York State Psychiatric Ass'n,* these are typical forms of equitable relief against a breaching fiduciary.[18]

In *Spears v. Liberty Life Assurance Co. of Boston*, No. 3:11-cv-1807, 2018 WL 2390136 (D. Conn. May 25, 2018), Raytheon Br. at 36, this Court recognized *Amara, Devlin* and *New York State Psychiatric Ass'n* in concluding that a plaintiff can proceed simultaneously under both Section 502(a)(1)(B) and 502(a)(3). *Id.* at **7-8. But, the Court dismissed the complaint because the plaintiff did not allege any false or misleading statement or other facts giving rise to equitable

[18] Defendants' citations to *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. 136, 139, 141 (2016) and *Wood v. Prudential Retirement Insurance*, No. 3:15-cv-1785, 2016 WL 5940946 ** 4-5 (D. Conn. Sept 19, 2016) (Raytheon Br. at 34 & 36), which both involved claims against ***non-fiduciaries,*** are thus not relevant to the equitable remedies available with respect to plaintiffs' claims against fiduciaries here.

relief. *Id*. at *7. Here, in sharp contrast, Plaintiffs have alleged inequitable conduct and Raytheon has admitted that the conversion was inequitable.[19] Compl., ¶¶ 162-66; ECF 49-6 at 3 (amending the 4/5 WVAP formula to "treat employees and retirees fairly in the conversion process").

The remaining cases upon which Defendants rely cannot support their argument in the face of *Amara's* clear guidance. *Frommert v. Conkright*, 433 F. 3d 254, 269-270 (2d Cir. 2006), and *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96 (2d Cir. 2005) (Raytheon Br. at 34), were both decided prior to *Amara.*[20] Moreover, both indisputably involved pure claims for benefits, which this case does not.[21] And, unlike plaintiffs in *Central States, S.E. and S.W. Areas Health & Welfare*

[19] The *Spears* court indicated, in *dicta*, that the types of relief that plaintiff requested – "restitution, disgorgement of profits made by withholding benefits, surcharge, and an injunction requiring Defendants to pay benefits allegedly owed" were "of the type which the Supreme Court has held 'almost invariably' seek monetary rather than equitable relief." *Id.* at * 9 (quoting *GreatWest. Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210 (2002)). *Great West,* however, did not involve an action against a fiduciary, nor did it involve a request for a surcharge. Post-*Amara,* courts have recognized that a surcharge is an appropriate equitable remedy under Section 502(a)(3) in suits against ERISA fiduciaries. *See, e.g, DeRogatis v. Bd. of Trustees of Welfare Fund of Int'l Union of Operating Engineers Local 15 , 15A, 15C & 15D, AFL-CIO,* 385 F. Supp. 3d 308, 319 (S.D.N.Y. 2019) (the "surcharge remedy extend[s] to a breach of trust committed by a fiduciary encompassing ***any*** violation of a duty imposed upon that fiduciary.") (internal quotations and citations omitted); *Amy F. v. California Physicians' Serv.*, No. 19-CV-6078, 2020 WL 2850282, at *3 (N.D. Cal. June 2, 2020) ("surcharge is an equitable remedy 'in the form of monetary compensation for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment") (internal quotations and citations omitted); *Moitoso v. FMR LLC,* 451 F. Supp. 3d 189, 217–18 (D. Mass. 2020) (surcharge, which is "the equitable form of relief that compensates a beneficiary for losses traceable to a fiduciary's breach . . . may be available under section 1132(a)(3) even when a party does not have a cause of action under other sections of ERISA"); *Horan v. Reliance Standard Life Ins. Co.*, No. 12–7802, 2014 WL 346615, at *12 (D.N.J. Jan. 30, 2014) (because equity courts traditionally *had* the power to surcharge a fiduciary for losses resulting from" a breach of fiduciary duty, "the fact that Plaintiff is seeking a monetary surcharge does not make the relief legal, even when the requested funds are not clearly traceable to the funds in the defendant's possession") (internal quotations and citations omitted).

[20] Similarly, *Fenwick v. Merrill Lynch & Co.*, 570 F. Supp. 2d 366 (D. Conn. 2008) (Eginton, J.), Raytheon Br. at 36, was also pre-*Amara*, while *Fernandez v. Wells Fargo Bank*, Nos. 12 Civ. 7193, 12 Civ. 7194, 2013 WL 3465856 * 6 (S.D.N.Y. July 9, 2013) (Raytheon Br. at 36), did not even acknowledge, much less discuss, *Amara*.

[21] The same is true of many other cases cited by Otis and Raytheon, including *Meidl v. Aetna,* 346 F. Supp. 3d 223, 232-33 (D. Conn. 2018), *McElwaney v. Becker*, 394 F. Supp. 342, 345 (W.D.N.Y

Fund v. Gerber Life Ins. Co., 771 F.3d 150 (2d Cir. 2014), (Raytheon Br. at 35; Otis Br. at 34), Plaintiffs are ***relying*** on ERISA Section 502(a)(3), not attempting to avoid it through artful pleading. *See id*. at 154 ("[Plaintiff] did not allege that these claims arose under § 502(a)(3), or that ERISA's jurisdictional provision . . . otherwise provided a basis for the claim."). Furthermore, unlike the plaintiff in *Michael E. Jones, M.D., P.C. v. Aetna, Inc.,* No. 19-CV-9683, 2020 WL 5659467, at *4 (S.D.N.Y. Sept. 23, 2020) (Raytheon Br. at 36), Plaintiffs have not requested the exact same equitable relief as is available under § 502(a)(1). Their request for relief includes correction of the transactions and monetary compensation in the form of surcharge, Compl., ¶ 224, not just enforcement of the Plans and clarification of Plaintiffs' rights under the Plans.

5. Defendants Do Not Prove that Any ERISA Plans Are Top Hat Plans and Any Decision Would Be Premature

The Court should reject Defendants' suggestion that the UTC ERISA Fiduciaries[22] are exempt from ERISA's fiduciary duties because the UTC ERISA Plans are "top hat" plans. Otis Br. at 34, n. 21; Carrier Br. at 11 (incorporating Otis's argument). A "top hat" plan is an ERISA plan that provides "deferred compensation for a select group of management or highly compensated employees." ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1). ERISA's definition makes "the 'top hat' category a narrow one," *In re New Valley Corp.*, 89 F.3d 143, 148 (3d Cir. 1996), on which employer-defendants bear the burden of proof. *Daft v. Advest, Inc.*, 658 F.3d 583, 596-97 (6th Cir. 2011); *Browe v. CTC Corp.*, 331 F. Supp. 3d 263, 294-95 (D. Vt. 2018).

2019), *Coriale v. Xerox Corp.*, 775 F. Supp. 2d 583, 598 (W.D.N.Y. 2011), *aff'd,* 490 F. App'x 387 (2d Cir. 2012) and *Krauss v. Oxford Health Plans, Inc*. 418 F. Supp. 416, 433 (S.D.N.Y. 2005), *aff'd* 517 F.3d 614 (2d Cir. 2008) (*see* Otis Br. at 34-35), and *Wegmann v. Young Adult Inst., Inc*., No. 15 Civ. 3815, 2016 WL 827780 (S.D.N.Y. Mar. 2, 2016) and *Farkas v. Cigna Health & Life Ins. Co.*, 386 F.Supp.3d 238, 247 (E.D.N.Y. 2019), Raytheon Br. at 37.

[22] The UTC ERISA Fiduciaries consist of UTC, the UTC Compensation Committee, the Committee Defendants and the UTC Director Defendants. Compl., ¶ 217.

To determine if a plan qualifies as a top hat plan, courts must "***conduct a fact-specific inquiry, analyzing quantitative and qualitative factors***" about the percentage of employees that participate, and their compensation compared to non-participants. *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 287-89 (2d Cir. 2000) (emphasis added). "Proper consideration of these factors requires evidentiary proof and ***cannot be done at the motion to dismiss stage*** . . . ." *Godina v. Resinall Intern., Inc.*, No. 3:07-cv-497, 2009 WL 454213, at * 4 (D. Conn. Dec. 1, 2009) ("*Godina I*") (emphasis added); *Fenwick v. Merrill Lynch & Co.*, No. 3:06-cv-880, 2007 WL 703613, at * 5 (D. Conn. Mar. 5, 2007).

Here, Defendants – separately or collectively – have ***not*** provided the Court with ***any*** of the required "evidentiary proof" to allow the Court to decide if the ERISA Plans qualify as "top hat" plans. *Godina*, 2009 WL 454213, at * 4. There are no statistics about the number of participants in the ERISA Plans or if participants are a "select group of management or highly compensated employees." ERISA § 401(a)(1), 29 § 1101(a)(1). The only time the issue is mentioned is in a conclusory statement in Otis's brief that does not address any of the "quantitative and qualitative factors" that the Second Circuit requires courts to consider. *Demery*, 216 F.3d at 287; Otis Br. at 34, n. 21.

The only authority that Otis cites, *Godina v. Resinall Intern., Inc.*, 677 F. Supp. 2d 560 (D. Conn. 2009) ("*Godina II*"), proves Plaintiffs' point. *Godina II* was considered on a motion for summary judgment made on what Otis describes as a "factual record." Otis Br. at 34 n. 21. The same court, however, in *Godina I*, earlier denied a motion to dismiss because it did not have the required "evidentiary proof." *Godina I*, 2009 WL 454213, at *4. Ultimately, whether the UTC ERISA Plans are "top hat" plans should be decided on a factual record that the parties develop during discovery, not a conclusory statement in a footnote of Otis's brief.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motions to Dismiss should be denied. In the event the Court grants the Motions in whole or in part, Plaintiffs seek leave to amend.

Dated: January 15, 2021

Respectfully submitted,

/s/ Craig A. Raabe

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