

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

BUNCOMBE COUNTY

20 CVS 3334

AVADIM HEALTH, INC.,

Plaintiff/  
Counterclaim  
Defendant,

v.

CRAIG HARKEY d/b/a HARK  
HEALTH SERVICES,

Defendant,

v.

DAYBREAK CAPITAL PARTNERS,  
LLC, and COMMUNITY HEALTH  
GROUP, INC.,

Defendants/  
Counterclaim  
Plaintiffs,

STEPHEN WOODY,

Counterclaim  
Defendant.

**ORDER ON COUNTERCLAIM  
PLAINTIFFS' MOTION FOR  
SANCTIONS**

1. **THIS MATTER** is before the Court on the 28 December 2021 filing of Counterclaim Plaintiffs' Motion for Sanctions (the "Motion") (ECF No. 62), Declaration of Matthew Kilby in Support of Counterclaim-Plaintiffs' Motion for Sanctions (and attached Exhibits A–D) (ECF No. 63), and Memorandum in Support of Counterclaim-Plaintiffs' Motion for Sanctions (ECF No. 64). The Motion represents on its face that it is filed pursuant to Rules 26(g) and 37(d) of the North Carolina Rules of Civil Procedure. The Motion further represents that "[b]ecause this motion is for sanctions and therefore such efforts would be futile, counsel for Counterclaim

Plaintiffs has not sought Counterclaim Defendants' consent or attempted to utilize the procedures set forth in Business Court Rule 10.9." (Mot. 2.)

2. North Carolina Business Court Rules 7.3 and 10.9 provide, in relevant part:

**7.3 Consultation.** All motions, except those made pursuant to Rules 12, 55, 56, 59, 60, or 65 of the Rules of Civil Procedure, must reflect consultation with and the position of opposing counsel or any pro se parties. The motion must state whether any party intends to file a response.

**10.9. Discovery motions.**

(a) **Application.** This rule applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure. References to "party" or "parties" in this rule include non-parties subject to subpoena under Rule 45 of the Rules of Civil Procedure.

(b) **Pre-filing requirements.**

(1) **Summary of dispute.** Before filing a motion related to discovery, a party must engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must e-mail a summary of the dispute to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel.

\* \* \*

(2) **Certification of good-faith effort to resolve the dispute.** A dispute summary under BCR 10.9(b)(1) must include a certification that, after personal consultation and diligent attempts to resolve differences, the parties could not resolve the dispute. The certificate must state the date(s) of the conference, which attorneys participated, and the specific results achieved. . . .

3. Both BCRs use the term "must" rather than "may" or "should." The use of the term is not an afterthought by the Court. Compliance with the requirement of good faith consultation and use of the pre-motion informal dispute resolution procedure in BCR 10.9 are not optional, regardless of moving counsel's apparent belief to the contrary. Further, there is no "futility" exception to the mandatory

provisions. And while adherence to the procedure mandated by BCR 10.9 may slightly delay any sanctions determination, use of the procedure regularly results in either a focusing of remaining disputes or outright settlement of the discovery disagreements at issue.

4. **THEREFORE**, the Motion is **DENIED** without prejudice to refile upon completion of the BCR 10.9 process and receipt of permission from the Court to proceed with filing a discovery motion.

**SO ORDERED**, this the 29th day of December, 2021.

/s/ Michael L. Robinson

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Michael L. Robinson  
Special Superior Court Judge  
for Complex Business Cases