

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 5801

TOTAL MERCHANT SERVICES, LLC,

Plaintiff,

v.

TMS NC, INC. AND CHRISTOPHER
COLLINS,

Defendants.

**ORDER ON PLAINTIFF'S
FEE APPLICATION**

1. **THIS MATTER** is before the Court upon Plaintiff Total Merchant Services, LLC's ("Plaintiff") Fee Application ("Fee Application" or "Application") filed 11 July 2022.¹

2. Having considered the Fee Application, the related briefs, the materials offered in support of and in opposition to the Application, and other appropriate matters of record, the Court hereby **GRANTS** the Application, **ENTERS** the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, and **ORDERS** relief as set forth below.

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

3. On 1 July 2022, the Court granted in part and denied in part Plaintiff's Amended Motion to Compel Discovery Responses and for Award of Expenses² (the

¹ (Fee Appl., ECF No. 154.)

² (Am. Mot. Compel Disc. Resp. and for Award of Expenses, ECF No. 66.)

“Amended Motion”), which was made pursuant to Rules 26, 33, 34, and 37 of the North Carolina Rules of Civil Procedure (“Rule(s)”) (“Order”).³

4. In that Order, the Court concluded as follows:

Defendants have not offered anything approaching a valid reason or excuse for failing to produce full and complete responses to the Discovery Requests within the time periods provided by the North Carolina Rules of Civil Procedure or as otherwise agreed by the parties. Nor have they offered a substantial justification for maintaining their opposition to the Amended Motion.⁴

5. The Court further concluded:

Nor are there circumstances present here that make an award of expenses unjust. To the contrary, Defendants have consistently and obstinately refused to comply with their discovery obligations under the North Carolina Rules of Civil Procedure without any legal justification to delay providing full and complete responses to the Discovery Requests—and the production of any documents to Plaintiff—for over a year since the Requests were served. An award of expenses is fully merited in these circumstances[.]⁵

6. Based on these conclusions, the Court ordered Defendants to, among other things, pay Plaintiff its “reasonable attorneys’ fees and costs incurred in obtaining [the Order] as well as those caused by Defendants’ failure to comply with its discovery obligations,” pursuant to Rules 37(a)(4) and 37(d) of the North Carolina Rules of Civil Procedure.⁶

³ (Order Granting Pl. Total Merchant Services’ Am. Mot. Compel Disc. Resp. and for Award of Expenses [hereinafter “July 1 Order”], ECF No. 152.)

⁴ (July 1 Order ¶ 23.)

⁵ (July 1 Order ¶ 25.)

⁶ (July 1 Order ¶¶ 23–26.)

7. The Court established a schedule in the Order for the briefing and the presentation of evidence on Plaintiff's Fee Application.⁷ Plaintiff timely filed its Fee Application on 11 July 2022, Defendants filed their opposition on 21 July 2022,⁸ and Plaintiff filed its reply on 26 July 2022.⁹

8. The Fee Application has been fully briefed and is ripe for determination. The Court concludes, in the exercise of its discretion, that a hearing would not assist the Court in ruling on the Fee Application and thus decides this matter without a hearing. *See* Business Court Rule 7.4 (“The Court may rule on a motion without a hearing.”).

9. Both Rule 37(a)(4) and 37(d) require that the Court's award of expenses thereunder, including an award of attorneys' fees, be reasonable. N.C. R. Civ. P. 37(a)(4), 37(d). Because awarded expenses are required “to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney's fees.” *Benfield v. Benfield*, 89 N.C. App. 415, 422 (1988).

10. Generally, “an award of attorneys' fees . . . requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence.” *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672 (2001). The trial court “may also in its discretion consider and make findings on the services expended by

⁷ (July 1 Order ¶ 28f.)

⁸ (Defs.' Resp. to Pl.'s Fee Appl. [hereinafter “Defs.' Br.”], ECF No. 168.)

⁹ (Reply Br. in Supp. Pl.'s Fee and Expenses Appl. [hereinafter “Reply”], ECF No. 169.)

paralegals . . . if, in the trial court’s opinion, it is reasonable to do so.” *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195 (1993) (cleaned up).

11. The reasonableness of attorneys’ fees in this State “is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar.” *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96 (2011).

12. “The factors to be considered in determining whether a fee is clearly excessive” under Rule 1.5(a) of the Revised Rules of Professional Conduct include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

See, e.g., N.C. Rev. R. Prof. Conduct 1.5(a); *Ehrenhaus*, 216 N.C. App. at 96–98.

13. The Court first considers the reasonableness of the hourly rates charged by Plaintiff’s counsel. Those rates were: (i) \$460 for Joshua Gunnemann (“Gunnemann”), a founding partner of Councill, Gunnemann & Chally, LLC in Atlanta, Georgia with approximately sixteen years’ experience; (ii) \$395 for Thomas H. Segars (“Segars”), a partner at Ellis & Winters LLP in Raleigh, North Carolina with approximately twenty-two years’ experience; (iii) \$225 for Jeffrey S. Warren (“Warren”), an associate at Ellis & Winters LLP in Raleigh, North Carolina with approximately three years’ experience; and (iv) \$130 for Teresa K. Rodriguez

(“Rodriquez”), a paralegal at Ellis & Winters LLP in Raleigh, North Carolina with over thirty years’ experience.¹⁰

14. Plaintiff supports the reasonableness of these rates with affidavit testimony from Gunnemann, Segars, and Gavin B. Parsons (“Parsons”), an experienced and well-regarded attorney practicing complex business litigation in Wake County, North Carolina who currently serves as Head of Litigation at the law firm of Coats & Bennett, PLLC in Raleigh, North Carolina. Parsons avers that the hourly rates charged by Plaintiff’s attorneys and paralegal are “reasonable, customary, and well within the range of hourly rates charged by lawyers of similar skill, training, and experience in Wake County, North Carolina for complex business litigation similar to the litigation in this case[.]”¹¹

15. Defendants do not object to the hourly rates Plaintiffs’ attorneys have charged. Based on Plaintiff’s counsel’s affidavits, Parsons’s affidavit, the previous holdings of North Carolina state and federal courts, and this Court’s knowledge of the hourly rates of local attorneys providing similar services in Wake County in matters before the North Carolina Business Court, the Court concludes that Plaintiff’s attorneys’ and paralegal’s rates are reasonable, clearly not excessive, and within those “customarily charged in [this] locality for similar legal services.” N.C. Rev. R. Prof. Conduct 1.5(a)(3); *see, e.g., Lorenzo v. Prime Commc’ns, L.P.*, No. 5:12-CV-69-H-KS, 2018 WL 10689708 (E.D.N.C. Sept. 28, 2018) (approving hourly rates

¹⁰ (Aff. Joshua P. Gunnemann ¶¶ 3–5, 14 [hereinafter “Gunnemann Aff.”], ECF No. 155; Aff. Thomas H. Segars ¶¶ 7–9, ECF No. 156.)

¹¹ (Aff. Gavin Parsons ¶ 8(a) [hereinafter “Parsons Aff.”], ECF No. 157.)

of \$425 for experienced counsel in complex litigation); *Jones v. Campbell Univ., Inc.*, No. 5:20-CV-29-BO, 2021 WL 3618043, at *2 (E.D.N.C. Aug. 16, 2021) (approving hourly rate of \$477 for experienced employment litigation counsel); *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 112, at *13–14 (N.C. Super. Dec. 15, 2021) (approving hourly rate of \$400 for partner with seventeen years’ experience in Buncombe County); *see also, e.g., Simpson v. Simpson*, 209 N.C. App. 320, 328 (2011) (recognizing that, in awarding attorneys’ fees, a trial court may “take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience”).

16. The Court next evaluates the time and labor expended by Plaintiff’s counsel. *See* N.C. Rev. R. Prof. Conduct 1.5(a)(1). Defendants argue that much of the time Plaintiff requests should be adjusted because certain billing entries do not appear to relate to the Amended Motion and otherwise the requested fees reflect an excessive amount of time spent on the Amended Motion.¹²

17. Plaintiff initially sought to recover \$30,000 in attorneys’ fees arising from 74.4 hours of attorney and paralegal time spent between 7 January 2022 and 21 June 2022 in obtaining the Order granting the Amended Motion.¹³ In reply to Defendants’ specific line-item objections, however, Plaintiff withdrew certain time entries totaling 2.9 hours, thereby reducing its claimed fees by \$1,321 and resulting in a modified attorneys’ fee request of \$28,679 arising from 71.5 hours of attorney and

¹² (*See* Defs.’ Br. 2, 6.)

¹³ (Fee Appl. 5–9.)

paralegal time.¹⁴ At the same time, Plaintiff also withdrew two delivery charges totaling \$140.48 from its requested costs, reducing Plaintiff's requested costs from \$176.82 to \$36.34.¹⁵ As a result of these modifications, Plaintiff requests fees and costs in the total amount of \$28,715.34.¹⁶

18. Of these modified requested fees, Defendants specifically challenge as unrelated to the Amended Motion various costs and 7.9 hours of Plaintiff's requested time totaling \$3,003.50.¹⁷ Plaintiff, however, has provided compelling explanations establishing that each of the challenged time entries relates to Plaintiff's effort to obtain the Order granting the Amended Motion and are properly reimbursed under Rule 37 and the Court's Order.

19. Plaintiff has also provided persuasive testimony from Parsons, who, having reviewed the relevant materials in connection with the Amended Motion as well as Plaintiff's billing statements, has opined that Plaintiff's counsel's

total fees and expenses are reasonable and necessary, considering the difficulty of the matters involved, the skill required to perform the legal

¹⁴ (Reply 1.)

¹⁵ (Reply 1–2.)

¹⁶ (Reply 1–2.) Plaintiff asserts in its Reply that Plaintiffs' modified request for fees and costs totals \$28,404.84. In reaching that conclusion, however, Plaintiff appears to have mistakenly reduced its requested fees for Gunnemann's 1 June 2022 time entry at Gunnemann's \$575/hour stated discounted rate rather than at the \$460 hourly rate extended to Plaintiff, which is the rate Plaintiff has otherwise used for Gunnemann's time in the Application. (*Compare* Reply 1, 6 *with* Gunnemann Aff. Ex. 1, ECF No. 155.1 (showing that the \$1,552.50 figure for 1 June 2022 referenced in the Reply does not include the 20% client discount).) Adjusting for this error, the Court concludes that Plaintiff's modified request is for \$28,715.34 in fees (\$28,679) and costs (\$36.34).

¹⁷ Specific to Plaintiff's modified request, Defendants challenge time entries for Gunnemann (5 hours, \$2,300), Segars (.3 hours, \$118.50), and Warren (2.6 hours, \$585). (Defs.' Br. 2–5.)

services properly, the fees customarily charged in Wake County, North Carolina for similar legal services, the amount in controversy, the results obtained, and the experience, reputation, and ability of the lawyers and professional performing these services.¹⁸

20. The Court has carefully reviewed Plaintiff's counsel's billing statements and evaluated the parties' competing arguments and evidence, and contrary to Defendants' contention that the time Plaintiff spent obtaining the Order was excessive, concludes, in the exercise of its discretion, that the time Plaintiff's attorneys and paralegal spent in obtaining the Order granting the Amended Motion was reasonable under the circumstances.

21. The Court thus finds, in the exercise of its discretion, that Plaintiff should be awarded reasonable attorneys' fees for 71.5 hours of attorney and paralegal time spent in connection with the Amended Motion in the total amount of \$28,679 as follows: Gunnemann 39.2 hours (\$18,032); Segars 23.4 hours (\$9,243); Warren 2.6 hours (\$585); Rodriguez 6.3 hours (\$819) as well as reasonable costs in the total amount of \$36.34.

22. The Court finds that the remaining factors set forth in Rule 1.5(a) of the Revised Rules of Professional Conduct merit the award of attorneys' fees awarded hereunder.

23. As to that portion of N.C. Rev. R. Prof. Conduct 1.5(a)'s first factor considering "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," the Court finds that the work

¹⁸ (Parsons Aff. ¶ 8b.)

required in connection with the Amended Motion was challenging in light of Defendants' persistent intransigence and continued refusal to comply with its discovery obligations and therefore required a high degree of skill, experience, and specialized knowledge to obtain the Order in the circumstances Defendants created. Accordingly, this factor weighs in favor of the attorneys' fees awarded hereunder.

24. Considering N.C. Rev. R. Prof. Conduct 1.5(a)'s seventh factor—"the experience, reputation, and ability of the lawyer or lawyers performing the services"—the Court finds that Plaintiff's attorneys have significant experience in complex business litigation matters and have shown great ability in investigating and prosecuting the Amended Motion. The Court concludes that this factor also weighs in favor of the Court's award of attorneys' fees hereunder.

25. Finally, the Court has considered the remaining factors of N.C. Rev. R. Prof. Conduct 1.5(a) and finds that, to the extent those factors apply in these circumstances, the attorneys' fees awarded hereunder are reasonable in light of these factors as well. In particular, the fourth factor—"the amount involved and the results obtained"—favors the award of attorneys' fees hereunder because Plaintiff achieved through the Order most of what it sought through the Amended Motion, which in itself, as a practical matter, achieved a significant portion of the relief Plaintiff seeks in the lawsuit.

26. Accordingly, based on the above, the Court concludes, in the exercise of its discretion, that Defendants should pay Plaintiff its reasonable attorneys' fees in the amount of \$28,679 and its reasonable costs in the amount of \$36.34.

II.

CONCLUSION

27. **WHEREFORE**, the Court, for the foregoing reasons and in the exercise of the Court's discretion, hereby **ORDERS** Defendants to pay Plaintiff's reasonable attorneys' fees and costs in the total amount of \$28,715.34 within twenty (20) days of the entry of this Order.

SO ORDERED, this 1st day of August 2022.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge