

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 5216

MICHAEL G. WOODCOCK,
Derivatively on behalf of Fayetteville
Ambulatory Surgery Center Limited
Partnership,

Plaintiff,

v.

CUMBERLAND COUNTY
HOSPITAL SYSTEM, INC., and
CAPE FEAR VALLEY
AMBULATORY SURGERY
CENTER, LLC,

Defendants.

v.

FAYETTEVILLE AMBULATORY
SURGERY CENTER LIMITED
PARTNERSHIP,

Nominal
Defendant.

**ORDER ON DEFENDANTS'
PETITION FOR ATTORNEYS' FEES
AND COSTS**

1. **THIS MATTER** is before the Court on Defendants Cumberland County Hospital System, Inc. (“CCHS”) and Cape Fear Valley Ambulatory Surgery Center, LLC’s (“CFVASC”) Petition for Attorneys’ Fees and Costs (“Petition,” ECF No. 142).

2. On 5 December 2022, this Court entered an Order (the “5 December Order”) granting Defendants’ Amended Motion to Compel and for Attorneys’ Fees (the “Motion to Compel”) pursuant to North Carolina Rule of Civil Procedure 37(a) and ordered Plaintiff Michael G. Woodcock to pay Defendants’ reasonable expenses, including attorneys’ fees, incurred in obtaining the 5 December Order. (Order on Defs. CCHS and CFVASC’s Am. Mot. Compel and for Att’ys’ Fees, ECF No. 135.) The

Court directed Defendants to “file a petition for payment of their reasonable expenses, including attorneys’ fees, with supporting affidavits and any other materials,” by 4 January 2023. (5 Dec. Order, at 12.) The Court then stated that “Woodcock shall have thirty (30) days after Defendants file their fee application and supporting materials in which to file any response to Defendants’ fee petition,” and that, upon the filing of a response by Woodcock, Defendants would be permitted seven days in which to file a reply brief. (5 Dec. Order, at 12.) The Petition has now been fully briefed.

3. After considering the Petition, the parties’ briefs in support of and in opposition to the Petition, the parties’ submissions, and other appropriate matters of record, the Court hereby **ENTERS** the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, and **ORDERS** the relief set forth below.

FINDINGS OF FACT

4. A complete summary of the issues presented in this case can be found in the Court’s Order and Opinion on Defendants’ Motions for Partial Judgment on the Pleadings (ECF No. 125). Furthermore, the Court’s 5 December Order recounts the pertinent facts that led to the Court’s decision to grant Defendants’ Motion to Compel and to authorize Defendants’ submission of a petition seeking an award of their reasonable expenses, including attorneys’ fees, pursuant to Rule 37. The Court will briefly summarize those facts that are most directly relevant to the present Petition.

5. During discovery, Defendants—by means of comparing (a) Woodcock’s 6 April 2022 responses to Defendants’ First Set of Requests for Production of Documents, with (b) documents produced by a third-party in response to a subpoena issued by Defendants—discovered that Woodcock had withheld from his discovery responses a substantial number of responsive documents. (5 Dec. Order, at 2.)

6. This revelation prompted counsel for Defendants to send a letter to Woodcock’s counsel insisting that Woodcock implement a satisfactory search protocol to identify missing responsive documents and suggesting that Woodcock seek the assistance of an e-discovery vendor to facilitate the search. (5 Dec. Order, at 2.) Following further correspondence between the attorneys for the parties, counsel for Defendants provided Woodcock’s counsel with a search protocol to use for the purpose of identifying responsive documents, and Woodcock enlisted the services of Technology Concepts & Design, Inc. (“TCDI”) to execute the search protocol.

7. As of 23 August 2022—which was more than two months after the above-referenced correspondence—Woodcock’s counsel informed counsel for Defendants that TCDI had not even started searching for responsive documents. (5 Dec. Order, at 3.) As a result, Defendants submitted two Business Court Rule (“BCR”) 10.9 dispute summaries (the “BCR 10.9 Summaries”) regarding the withheld documents and the delayed search for responsive documents. (5 Dec. Order, at 3–4.)

8. At a 7 September 2022 conference with the Court regarding the BCR 10.9 Summaries, Woodcock’s counsel represented to the Court that Woodcock would produce his tax returns by 9 September 2022 and would produce any and all

documents captured by the application of the search protocol no later than 14 September 2022. (5 Dec. Order, at 4.)

9. Woodcock failed to meet either deadline, and the Court authorized Defendants to file a motion to compel and seek an award of attorneys' fees in the event the documents at issue were not produced by the close of business on 15 September 2022. (5 Dec. Order, at 5.) When Woodcock failed to produce any documents by the close of business on 15 September 2022, Defendants filed their original Motion to Compel that same day. (5 Dec. Order, at 5; Mot. Compel, ECF No. 105.)

10. On 16 September 2022, Woodcock produced 27,787 files to Defendants (the "16 September Production"). (5 Dec. Order, at 5.)

11. Defense counsel's review of the 16 September Production and a subsequent affidavit from TCDI revealed multiple deficiencies with the 16 September Production, including the fact that the search protocol was not properly utilized. (5 Dec. Order, at 5–6.) As a result, Defendants filed an Amended Motion to Compel and sought an order compelling Woodcock to properly implement the agreed-upon search protocol or, alternatively, compelling a forensic examination of Woodcock's data sources and devices to identify documents that he improperly withheld. (Am. Mot. Compel, ECF No. 113.) Furthermore, Defendants requested that they be awarded their reasonable attorneys' fees pursuant to Rule 37. (Am. Mot. Compel, at 4.)

12. Following a hearing, the Court entered the 5 December Order. The Court concluded that Woodcock had failed to comply with his obligations under the North Carolina Rules of Civil Procedure when responding to Defendants' discovery requests. Furthermore, the Court determined that Woodcock's opposition to the BCR 10.9 Summaries and to the Motion to Compel was not substantially justified and that, pursuant to Rule 37(a)(4), Woodcock would be required to pay Defendants' reasonable expenses, including attorneys' fees, incurred in obtaining the 5 December Order. (5 Dec. Order, at 12.) The Court ordered that

[s]uch fees and expenses shall be limited to those incurred in: (i) prosecuting the Motion to Compel and Amended Motion to Compel; and (ii) seeking and obtaining the withheld documents, including expenses incurred in identifying deficiencies in Woodcock's discovery responses, sending deficiency letters, engaging in meet-and-confer discussions, and complying with the Rule 10.9 process.

(5 Dec. Order, at 12.)

13. In response to the Court's directive, Defendants submitted their Petition to the Court on 4 January 2023. The Petition consists of a brief, the affidavit of Marla Reschly (one of Defendants' attorneys from the K&L Gates law firm), biographical information regarding each of the timekeepers working on this matter, billing invoices tendered by K&L Gates to Defendants, and confidential market rate data regarding law firm billing rates in North Carolina (filed under seal).

14. Two tables attached to the Reschly affidavit contain line-item summaries of each relevant billing entry for (i) the three K&L Gates attorneys who have made an appearance in this matter; and (ii) an additional K&L Gates attorney from its e-discovery analysis and technology ("e-DAT") team, who also performed

work in connection with identifying deficiencies in Woodcock's discovery responses. (Reschly Aff. ¶¶ 36–37, ECF No. 143.1.) The tables reflect the date of each billing entry, the attorney conducting the task, a brief description of the task, the hours spent on the task, and the total amount charged for the time and task in accordance with the attorney's billable rate. (Reschly Aff. ¶¶ 36–37.)

15. Defendants seek reimbursement for the work of four attorneys: Marla Reschly, Susan Hackney, Daniel McClurg, and Jennifer Bortmes. Ms. Reschly is a partner and Mr. McClurg is an associate in the Charlotte office of K&L Gates, Ms. Hackney is a partner in the Research Triangle Park office of K&L Gates, and Ms. Bortmes is an e-DAT senior attorney based in K&L Gates' Pittsburgh, Pennsylvania office. (Reschly Aff. ¶ 18.)

16. Woodcock filed a brief in opposition to Defendants' Petition, (Pl.'s Resp. Br. Opp'n Pet., ECF No. 157), and Defendants subsequently filed a reply brief, (Defs.' Reply Br. Supp. Pet., ECF No. 162).

17. In sum, Defendants request a total of \$111,625 in attorneys' fees based on 214 hours of work performed by Defendants' counsel. (Reschly Aff. ¶ 17.)

18. The Petition is now ripe for decision.¹

CONCLUSIONS OF LAW

19. In North Carolina, attorneys' fees are only recoverable "if such a recovery is expressly authorized by statute." *Robinson v. Robinson*, 210 N.C. App.

¹ The Court concludes, in its discretion, that a hearing would not assist the Court with respect to the matter currently before it and thus elects to decide the issues raised in the Petition based solely on the parties' briefs and other submissions. *See* BCR 7.4.

319, 336 (2011) (internal quotation marks omitted). With regard to cases where, as here, a court has granted a motion to compel pursuant to Rule 37(a), Rule 37(a)(4) provides, in pertinent part, that:

[T]he court shall . . . require the party . . . whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

N.C. R. Civ. P. 37(a)(4).

20. Therefore, where opposition to a motion to compel is not substantially justified and there is “no evidence of ‘other circumstances’ that would make an award of expenses unjust[,] . . . an award of attorney’s fees to the movant [is] mandatory.” *Benfield v. Benfield*, 89 N.C. App. 415, 422 (1988); *see also Kent v. Humphries*, 50 N.C. App. 580, 590 (1981) (holding that absent such justification, the court is “required by the mandatory language of Rule 37(a)(4) to order defendant to pay plaintiff’s attorney’s fees”), *modified and aff’d*, 303 N.C. 675.

21. A trial court’s determination as to the amount of attorneys’ fees to be awarded is left to the court’s discretion and “will not be disturbed without a showing of manifest abuse of [that] discretion.” *Bryson v. Cort*, 193 N.C. App. 532, 540 (2008).

22. However, “as Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney’s fees.” *Benfield*, 89 N.C. App. at 422–23 (vacating award of attorney’s fees where trial court’s order contained no findings of fact to support conclusion that fees were reasonable). 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). Furthermore, “[a] trial court, in making an award of attorneys’ fees, must explain why the particular award is appropriate and how the court arrived at the particular amount.” *Dunn v. Canoy*, 180 N.C. App. 30, 49 (2006). Finally, “[t]he [court’s] findings should be consistent with the purpose of [Rule 37(a)] which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses.” *Benfield*, 89 N.C. App. at 422.

23. In his response brief, Woodcock makes several arguments that essentially seek to relitigate the question of whether his opposition to the Motion to Compel was justified. However, the Court has already ruled on that issue. The only question remaining for the Court’s determination is the amount of fees and expenses that are reasonable based on the present record.

24. Rule 37(a)(4) requires that the Court’s award of expenses, including attorneys’ fees, be reasonable. N.C.R. Civ. P. 37(a)(4). 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).

25. 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.

N.C. Rev. R. Prof. Conduct 1.5(a).

A. Reasonableness of Rates

26. The Court first analyzes the reasonableness of the hourly rates charged by Defendants' counsel. Defendants' attorneys charged the following hourly rates in this case: (i) \$650.00 for Marla Reschly, a partner who was initially licensed to practice law in another state in 2001 and has been employed with K&L Gates since 2015; (ii) \$600.00 for Susan Hackney, a partner who was licensed to practice law in 2004 and has been employed by K&L Gates since 2009 after serving as an attorney for the North Carolina Department of Justice for approximately four years; (iii) \$490.00 for Daniel McClurg, a fourth-year associate who was licensed to practice law in 2018; and (iv) \$340.00 per hour for Jennifer Bortmes, an e-DAT group senior

attorney who was licensed to practice law in another state in 2005 and has been employed with K&L Gates since 2011. (Reschly Aff. ¶ 22.) Woodcock contends that these rates are excessive.

27. The Reschly affidavit states that “the rates [Defendants’ counsel] charged are comparable to the rates charged by similarly skilled attorneys in the area for like work[.]” (Reschly Aff. ¶ 29.)

28. In support of this assertion, Defendants filed, under seal, a spreadsheet (the “Market Data Spreadsheet”) providing certain confidential market-based attorney fee rate data that provides a comparison of the rates charged by counsel for Defendants in this case to the agreed hourly rates charged by peer firms for litigation work in the same geographic areas. (Order on Defs.’ Mot. Seal, ECF No. 147.) With respect to the attorneys appearing as counsel of record for Defendants in this matter (i.e., Ms. Reschly, Ms. Hackney, and Mr. McClurg), the Reschly affidavit states that the data contained in the Market Data Spreadsheet “represent[s] the average agreed rates and/or the 75th percentile agreed rates for timekeepers in litigation practice operating in the Charlotte and/or Raleigh/Durham areas between March 2022 and November 2022 with similar years of experience.” (Reschly Aff. ¶ 24.) The affidavit further provides that with regard to Ms. Bortmes, the market data “represent[s] the average agreed rates and/or the 75th percentile agreed rates for litigation support timekeepers operating throughout the U.S. between March 2022 and November 2022.” (Reschly Aff. ¶ 24.)

29. Although the customary hourly rates for North Carolina attorneys engaged in complex business litigation vary from firm to firm and typically increase with each passing year, the Court observes that the rates charged by Defendants' counsel here are in excess of the hourly rates typically approved by this Court in past cases involving attorneys' fee awards. *See, e.g., Ford v. Jurgens*, 2022 NCBC LEXIS 59, at *4, 11 (N.C. Super. Ct. June 15, 2022) (concluding that requested hourly rate of \$380 was reasonable); *Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 58, at *19–20 (N.C. Super. Ct. Mar. 19, 2019) (holding hourly rates of \$450, \$350, and \$250 to be reasonable), *aff'd per curiam*, 376 N.C. 798 (2021); *Bradshaw v. Maiden*, 2018 NCBC LEXIS 98, at *12 (N.C. Super. Ct. Sept. 5, 2019) (“conclud[ing] that a typical and customary hourly rate charged in North Carolina for complex commercial litigation . . . ranges from \$250 to \$475”); *In re Krispy Kreme Doughnuts, Inc., S’holder Litig.*, 2018 NCBC LEXIS 61, at *21 (N.C. Super. Ct. June 20, 2018) (finding an implied rate of \$300 per hour to be “well within the standard range” for complex civil litigation fees); *In re Pike Corp. S’holder Litig.*, 2015 NCBC LEXIS 95, at *22–23 (N.C. Super. Ct. Oct. 8, 2015) (holding that hourly rates of \$550, \$375, and \$250 were within, but at the higher end of, reasonable fees for complex business litigation in North Carolina); *In re PokerTek Merger Litig.*, 2015 NCBC LEXIS 10, at *23–24 (N.C. Super. Ct. July 6, 2015) (concluding that rates “in the range of \$250-\$450 per hour” were “reasonable and clearly not excessive”).

30. The Court takes judicial notice of such holdings, including the effect of the passage of time thereon, and of the customary hourly rates of local attorneys of

the same experience level providing similar services in the Charlotte and Research Triangle Park areas. *See Simpson v. Simpson*, 209 N.C. App. 320, 328 (2011) (stating that a court “considering a motion for attorneys’ fees . . . is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience”).

31. The Court, in the exercise of its discretion, finds—for purposes of its award of fees pursuant to the Petition—that it is appropriate to reduce the hourly rates of Defendants’ counsel and that the following rates are reasonable: (1) \$600 per hour for Ms. Reschly; (2) \$550 per hour for Ms. Hackney; (3) \$375 per hour for Mr. McClurg; and (4) \$325 per hour for Ms. Bortmes.

B. Time and Labor Expended

32. The Court next evaluates the time and labor expended by Defendants’ counsel. *See* N.C. Rev. R. Prof. Conduct 1.5(a)(1). The Court considers this factor in light of the Court’s conclusion in the 5 December Order that Defendants are entitled to their reasonable expenses, including reasonable attorneys’ fees, incurred in “(i) prosecuting the Motion to Compel and Amended Motion to Compel; and (ii) seeking and obtaining the withheld documents, including expenses incurred in identifying deficiencies in Woodcock’s discovery responses, sending deficiency letters, engaging in meet-and-confer discussions, and complying with the Rule 10.9 process.” (5 Dec. Order, at 12.)

33. The Court has reviewed the requested fees to determine whether any labor billed is beyond the scope of the 5 December Order or contains vague descriptions that render a reasonableness determination impossible.²

34. The Court has identified the following entries as labor beyond the scope of the December 5 Order:

| Attorney | Date | Description | Hours | Amount |
|-----------------|-------------|------------------------------------------------------------------------------------------------------------|--------------|-----------------|
| McClurg | 9/12/22 | “Exchange correspondences with opposing counsel regarding forthcoming productions and Demetri tax returns” | 0.2 | \$98.00 |
| McClurg | 11/29/22 | “Draft proposed e-mail to Court regarding Woodcock deposition” | 0.3 | \$147.00 |
| Total: | | | 0.5 | \$245.00 |

(Pet. Ex. D., at 59, 87.)

35. The above-quoted 12 September 2022 entry related to “Demetri tax returns” concerns Dr. George Demetri, an original plaintiff in this matter who has since voluntarily dismissed his claims in this lawsuit. (Voluntary Dismissal, ECF No. 108.) Because the 5 December Order was directed toward *Woodcock*, the Court concludes that fees should not be awarded for this time entry.

36. With regard to the above-quoted 29 November 2022 entry, the 5 December Order does not contemplate an award of attorneys’ fees incurred in

² In conducting this review, the Court considers the invoices (filed as Exhibit D, (ECF No. 143.4), and Exhibit E, (ECF No. 143.5), to Defendants’ Petition for Attorneys’ Fees and Costs) as the official billing record, rather than the tables included in the Reschly Affidavit.

connection with deposing Woodcock. Thus, Defendants will not be awarded attorneys' fees for this entry.

37. Furthermore, the Court declines to award attorneys' fees to Defendants for billing entries that are too vague to allow for a reasonableness determination of the labor expended.

38. The Court has identified the following entries as containing vague descriptions that render a reasonableness determination impossible:

| Attorney | Date | Description | Hours | Amount |
|-----------------|-------------|---------------------------------------------------------------------------------|--------------|-----------------|
| Hackney | 4/20/22 | "Conference with D. McClurg and M. Reschly regarding discovery" | 0.2 | \$120.00 |
| McClurg | 4/20/22 | "Attend telephone conference with M. Reschly and S. Hackney regarding strategy" | 0.2 | \$98.00 |
| Total: | | | 0.4 | \$218.00 |

(Pet. Ex. D, at 3–4.)

39. The vagueness of the above two entries renders it impracticable for the Court to discern whether or not the entries come within the scope of the 5 December Order. *See Bradshaw*, 2018 NCBC LEXIS 98, at *17–18. For this reason, the Court will not award fees to Defendants associated with these entries.

40. In his response brief, Woodcock's primary argument against the reasonableness of the time and labor expended by Defendants' counsel relates to a thirteen-page letter regarding alleged discovery deficiencies that Defendants' counsel sent to counsel for Plaintiff on 22 June 2022 (the "First Deficiency Letter"). Plaintiff

contends that the time entries contained in the billing sheets associated with the drafting of this letter are excessive.

41. The ability to conduct a precise analysis of the time entries associated with the drafting of the First Deficiency Letter is made more difficult by the manner in which a number of the relevant time entries are worded. Numerous entries relating to the drafting of the letter do not differentiate between the time spent actually drafting the letter itself and the time spent identifying the deficiencies in the production of documents by Woodcock that created the need to draft the letter. Nevertheless, the Court, based on its thorough review of the billing records, construes them as reflecting the fact that counsel for Defendants spent approximately 37 hours on tasks relating in some way with the drafting of the First Deficiency Letter—at least 29 hours of which were spent by Mr. McClurg.

42. The Court, in its discretion, determines that these time entries are excessive, and will reduce Mr. McClurg's time in this regard to 13 hours.

43. Finally, Woodcock makes a general assertion as to the unreasonableness of time entries reflecting the presence of all three of Defendants' primary attorneys (Ms. Reschly, Ms. Hackney, and Mr. McClurg)—two partners and an associate—at conferences and hearings. (Pl.'s Resp. Br. Opp'n Pet., at 6.) However, the only specific example Woodcock gives is the 7 September 2022 BCR 10.9 conference. With regard to that conference, the Court's notes indicate that Ms. Reschly did not actively participate in the conference. In its discretion, the Court will disallow recovery for

her time entry in connection with that conference, which is listed on the billing records as 0.9 hours.

C. Remaining Rule 1.5 Factors

44. 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 the attorneys' fees ordered herein.

45. With regard to Rule 1.5(a)'s first factor—"the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"—the Court finds that Defendants' counsel's work was challenging and required a high degree of skill and experience. Identifying impermissibly withheld documents by comparing Woodcock's productions with a third-party production, addressing complicated e-discovery issues with TCDI, and building a case for a successful motion to compel under these circumstances required experience in complex litigation and specialized knowledge.

46. With regard to the fourth factor of Rule 1.5(a)—the "amount involved and the results obtained"—although Defendants' overall success in defending this litigation remains to be seen, Defendants were successful with respect to their goals in bringing the Motion to Compel and establishing that Woodcock's opposition to the Motion to Compel was not substantially justified. In obtaining the discoverable materials Woodcock withheld and successfully asserting their Motion to Compel, Defendants accomplished their purposes. The Court thus concludes that this factor weighs in favor of the Court's award of attorneys' fees.

47. As for Rule 1.5(a)'s seventh factor—"the experience, reputation, and ability of the lawyer or lawyers performing the services"—the Court finds that the four attorneys who have billed Defendants for their services in relation to this matter all have significant experience in complex business litigation. These attorneys have proven themselves to be highly competent in their handling of this case. The Court concludes that this factor weighs in favor of the award of attorneys' fees ordered herein.

48. Finally, the Court has considered the remaining factors of Revised Rule of Professional Conduct 1.5(a)—that is, to the extent they can be applied to an award of attorneys' fees in the context of discovery sanctions—and finds that the attorneys' fees awarded herein are reasonable in light of these factors as well.

49. Therefore, after making the above-described adjustments to Plaintiffs' submitted statement of fees and expenses, the Court, in its discretion, concludes that the total reasonable amount of attorneys' fees that shall be awarded to Defendants pursuant to Rule 37(a)(4) is \$85,237.50.

CONCLUSION

50. **THEREFORE**, the Court, in the exercise of its discretion, **ORDERS** Woodcock to pay Defendants' reasonable expenses, including attorneys' fees, in the amount of \$85,237.50 within forty-five (45) days after the entry of this Order.

SO ORDERED, this the 3rd day of April, 2023.

/s/ Mark A. Davis

Mark A. Davis

Special Superior Court Judge
for Complex Business Cases