

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY SUPERIOR COURT DIVISION

2019 JUN -7 PM 2: 17 18 CVS 014001

COMMON CAUSE, *et al.* WAKE CO.), C.S.C.

Plaintiffs,

v.

ORDER

Representative DAVID R. LEWIS,
in his official capacity as Senior
Chairman of the House Select
Committee on Redistricting, *et al.*,
Defendants.

THIS MATTER comes before the undersigned three-judge panel upon
Plaintiffs' Supplemental Brief regarding Plaintiffs' First and Second Motions to
Compel ("supplemental brief"), filed April 12, 2019.

Factual and Procedural Background

On February 19, 2019, Plaintiffs filed their first motion to compel discovery responses from Legislative Defendants. On February 22, 2019, Plaintiffs filed their second motion to compel discovery responses from Legislative Defendants. Plaintiffs' motions to compel also requested that the Court award Plaintiffs fees and expenses. On March 25, 2019, the Court entered an order granting Plaintiffs' requests in the first motion to compel but held open the issue of Plaintiffs' request for fees and expenses to consider the matter in the event that Legislative Defendants failed to comply with the terms of the March 25, 2019, order. On April 12, 2019, Plaintiffs filed their supplemental brief, which while not perfect in form, requested the Court compel Legislative Defendants' compliance with its previously-entered order.

On May 1, 2019, the Court entered an order in which it found that Legislative Defendants failed to fully comply with the terms of the Court's March 25, 2019, order. Specifically, Legislative Defendants failed to timely produce a privilege log in compliance with Rule 26(b)(5)(a) and failed to fully and reasonably search for records responsive to Plaintiffs' requests for production in the manner reasonably suggested by Plaintiffs. Accordingly, the Court granted Plaintiffs' requests for reasonable expenses and attorneys' fees incurred as a result of filing and arguing their supplemental brief. Plaintiffs have now submitted, at the Court's request, affidavits showing an accounting of attorneys' fees. The affidavits request only reimbursement for attorneys' fees and do not request reimbursement for any other expenses.

Award of Attorneys' Fees

When a motion to compel discovery "is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion . . . 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.G.S. § 1A-1, Rule 37(a)(4). Absent such findings, Rule 37(a)(4) requires an award of attorneys' fees when a motion to compel is granted. *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988). Additionally, a trial court may order a party to pay an opposing party's reasonable

costs, including attorneys' fees, if they fail to comply with a court order. *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987).

As the Court concluded in its May 1, 2019, order, there was no evidence of substantial justification for Legislative Defendants' opposition to Plaintiffs' motions to compel, their failure to comply with discovery obligations, or their failure to fully comply with the Court's March 25, 2019, order. The Court also concluded that Legislative Defendants failed to present evidence of circumstances that would make an award of expenses, including attorneys' fees, unjust. Accordingly, the Court has already concluded that Plaintiffs are entitled to an award of their reasonable expenses incurred, including attorneys' fees.

Calculation of Reasonable Attorneys' Fees

In assessing the reasonableness of fees and expenses, the Court considers a number of factors, including "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney[.]" as well as "the novelty and difficulty of the questions of law[,] the adequacy of the representation, the difficulty of the problems faced by the attorney, especially any unusual difficulties, and the kind of case for which fees are sought and the result obtained." *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993) (internal citations and quotation marks omitted). Additionally, Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar, which restates most of the factors named above, determines the

reasonableness of fees. *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96, 717 S.E.2d 9, 33 (2011).

With respect to the customary fee for like work, and pertinent to the matter presently before the Court, the amount of the fee is dependent upon the geographic area—i.e., the locality—in which the litigation takes place. *See Ge Betz, Inc. v. Conrad*, 231 N.C. App. 214, 244, 752 S.E.2d 634, 655 (2013) (finding persuasive the court’s analysis of the reasonableness of out-of-state attorney’s fees in *Nat’l Wildlife Fed’n v. Hanson*, 859 F.2d 313 (4th Cir. 1988)). When out-of-state counsel request fees in excess of those customarily billed in the local community, the court should “consider whether ‘services of like quality were truly available in the locality where the services are rendered.’” *Id.* at 246, 752 S.E.2d at 657 (quoting *Hanson*, 859 F.2d at 317). If so, the court should consider whether the higher out-of-state fees should be adjusted in light of those typically charged in North Carolina; if awarding higher out-of-state fees, the court must find why an award of fees at a rate unusually high for the community is reasonable. *Id.* at 246-47, 752 S.E.2d at 657.

Plaintiffs have submitted three affidavits in support of their request for an award of fees. The affidavits were submitted by attorneys from three different law firms representing Plaintiffs and contain detailed billing records accounting for the time each firm spent filing and arguing the supplemental brief. The attorneys from one of the firms are located at offices in Washington, D.C. (Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”)), another firm’s attorney is located in Seattle, Washington (Perkins Coie LLP (“Perkins Coie”)), while attorneys from a third firm

are located at offices in Raleigh, North Carolina (Poyner Spruill LLP (“Poyner Spruill”)). This case was filed and will be tried in Wake County, North Carolina.

Counsel from Arnold & Porter spent 15.8 hours of time on work related to the supplemental brief, including reviewing pertinent filings, attempting to resolve the dispute with opposing counsel, drafting and revising the supplemental brief, and preparing for and attending the telephonic hearing on the matter. Counsel from Perkins Coie spent 0.8 hours of time on work related to the supplemental brief, including reviewing and revising the supplemental brief. Counsel from Poyner Spruill spent 5.4 hours of time on work related to the supplemental brief, including reviewing Legislative Defendants’ discovery responses and privilege log, reviewing the supplemental brief, and preparing for and attending the telephonic hearing on the matter. The Court finds the time spent filing and arguing the supplemental brief was necessarily and reasonably incurred.

The Court, however, does not find counsels’ requested hourly rates for the specific work performed to be reasonable . Counsel from Arnold & Porter charged hourly rates of \$940.00, \$920.00, and \$855.00 for their work, counsel from Perkins Coie charged an hourly rate of \$720.00, and, lastly, counsel from Poyner Spruill charged hourly rates of \$585.00 and \$350.00. Based on the affidavit provided by Plaintiffs’ only counsel located in Wake County, North Carolina—Poyner Spruill—the Court finds that an hourly rate of \$585.00 is a premium rate in North Carolina commensurate with a most senior partner in a local law firm, and that premium rate, as well as Plaintiffs’ out-of-state counsels’ rates, are in excess of those

customarily billed by local attorneys in this locality providing services similar to those at issue in this discovery motion.

While Plaintiffs' counsel are all highly-regarded and have extensive experience litigating voting-rights cases, the work performed in filing and arguing the supplemental brief was fairly routine in litigation and did not require specialized knowledge of voting rights, nor did it require extensive years of experience. Therefore, an award of fees for this specific work at a rate unusually high for the community would not be reasonable considering the work performed by out-of-state counsel could have been performed by local counsel at local rates.

In consideration of the time and labor necessarily and reasonably expended by Plaintiffs' counsel, the experience of Plaintiffs' attorneys and the skill that was required litigating this specific matter, the straightforward questions of law involved in the supplemental brief, the adequacy of the representation by Plaintiffs' counsel in prevailing on their motion, the customary fee for similar, litigation-related work in Wake County, North Carolina, as shown by Poyner Spruill's affidavit, and for the reasons otherwise stated herein, the Court finds an hourly rate of \$350 is reasonable for the work performed by Plaintiffs' counsel in filing and arguing their supplemental brief.

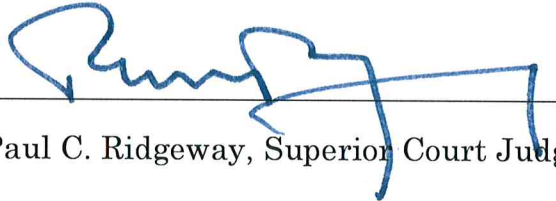
Accordingly, the Court concludes, in its discretion, that Plaintiffs are entitled to reimbursement of attorneys' fees incurred in the amount calculated as follows: \$5,530.00 for attorneys' fees attributed to Arnold & Porter; \$280 for attorneys' fees

attributed to Perkins Coie, and \$1,890.00 for attorneys' fees attributed to Poyner Spruill.

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS that:

1. Plaintiffs' request for attorneys' fees incurred as a result of Plaintiffs filing and arguing their supplemental brief is GRANTED, and Plaintiffs are awarded a total of \$7,700.00 in attorneys' fees in accordance with the terms of this order.
2. Legislative Defendants shall pay the above-referenced amount by July 1, 2019.

SO ORDERED, this the 7th day of June, 2019.



Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

Edwin M. Speas, Jr.
Caroline P. Mackie
Poyner Spruill LLP
espeas@poynerspruill.com
cmackie@poynerspruill.com
*Counsel for Common Cause,
The North Carolina Democratic Party
And the Individual Plaintiffs*

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
Arnold & Porter Kaye Scholer LLP
Stanton.jones@arnoldporter.com
David.gersch@arnoldporter.com
Elisabeth.theodore@arnoldporter.com
Daniel.jacobson@arnoldporter.com
*Counsel for Common Cause
And for Individual Plaintiffs*

Mark E. Braden
Richard Raile
Trevor Stanley
Katherine McKnight
Elizabeth Scully
Erica Prouty
Baker & Hostetler LLP
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
kmcknight@bakerlaw.com
EScully@bakerlaw.com
eprouthy@bakerlaw.com
Attorneys for Legislative Defendants

Marc E. Elias
Aria C. Branch
Abha Khanna
Perkins Coie LLP
melias@perkinscoie.com
ABranch@perkinscoie.com
akhanna@perkinscoie.com
*Counsel for Common Cause
And the Individual Plaintiffs*

Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree Deakins
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com
Counsel for Legislative Defendants

Stephanie A. Brennan
Amar Majmundar
Paul Cox
NC Department of Justice
sbrennan@ncdoj.gov
amajmundar@ncdoj.gov
pcox@ncdoj.gov
*Counsel for the State of North
Carolina and members of the State
Board of Elections*

Katelyn Love
NC State Board of Elections
legal@ncsbe.gov
Counsel for the State Board of Elections

John E. Branch, III
Nathaniel J. Pencook
Andrew D. Brown
Shanahan Law Group PLLC
jbranch@shanahanlawgroup.com
npencook@shanahanlawgroup.com
abrown@shandahanlawgroup.com
Attorneys for Defendant-Intervenors

This the 7th day of June, 2019.



Kellie Z. Myers
Trial Court Administrator
10th Judicial District
Kellie.Z.Myers@nccourts.org