Bucci v. Burns, 2022 NCBC Order 63.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16 CVS 15478
MARCY BUCCI; RICK BUCCI; EUGENE N. BUCCI; EUGENE M. BUCCI; DAVID LUBIN; KARL SCHULER; and LAUREL MANDERBACH, Plaintiffs, v. ROBERT BURNS; GARRETT PERDUE; and ZEESHAN-UL-HASSAN USMANI, Defendants.	**ORDER ON PETITIONS FOR COSTS AND ATTORNEY'S FEES**

1. In an earlier order, the Court held that Defendant Garrett Perdue is entitled to recover attorney's fees under N.C.G.S. § 6-21.5 but deferred a decision on the amount of the fee award. (*See* ECF No. 136.) Perdue has since filed his fee petition and supporting materials. (*See* ECF Nos. 145–47.) Defendant Robert Burns has also filed a combined motion and petition to recover costs and attorney's fees, along with supporting materials. (*See* ECF Nos. 164–68.) For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** both requests.

I.
BACKGROUND

2. This is an action for fraud by individuals who invested in a failed technology company called Predictify.me, Inc. Because previous decisions describe the claims

and lengthy procedural history in detail,[1] the Court opts to provide only a short, contextual summary here.

3. There were once fourteen plaintiffs. Half voluntarily dismissed their claims long ago. The half that remained in the case are Marcy Bucci; Eugene N. Bucci (Marcy's father-in-law); Rick Bucci and Gene M. Bucci (Marcy's brothers-in-law); and David Lubin, Karl Schuler, and Laurel Manderbach (friends of either Marcy or Rick). Each asserted claims against three of Predictify.me's officers and directors—Perdue, Burns, and Zeeshan-Ul-Hassan Usmani—for fraud, negligent misrepresentation, securities violations, and unfair or deceptive trade practices under N.C.G.S. § 75-1.1.

4. All claims have been resolved. Early in the litigation, the Court dismissed Marcy and Eugene N.'s section 75-1.1 claims. *See Bucci II*, 2018 NCBC LEXIS 37, at *26. Then, at summary judgment, the Court dismissed all claims against Perdue and some claims against Burns. *See Bucci IV*, 2020 NCBC LEXIS 79, at *50–51. Burns achieved a complete victory against Marcy, Lubin, and Schuler but continued to face claims by Eugene N., Gene M., Rick, and Manderbach. Before trial, he reached a settlement with the latter group, who voluntarily dismissed the surviving claims with prejudice. (*See* ECF No. 157.) Finally, all plaintiffs voluntarily dismissed their claims against Usmani, who has never appeared in the case. (*See* ECF Nos. 161, 178.)

5. After prevailing on summary judgment, Perdue moved to recover costs and attorney's fees from the seven active plaintiffs. The Court awarded costs to Perdue

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[1] *See generally Bucci v. Burns*, 2020 NCBC LEXIS 79 (N.C. Super. Ct. June 30, 2020) ("*Bucci IV*"); *Bucci v. Burns*, 2018 NCBC LEXIS 93 (N.C. Super. Ct. Sept. 4, 2018) ("*Bucci III*"); *Bucci v. Burns*, 2018 NCBC LEXIS 37 (N.C. Super. Ct. Apr. 25, 2018) ("*Bucci II*"); *Bucci v. Burns*, 2017 NCBC LEXIS 83 (N.C. Super. Ct. Sept. 14, 2017).

as a prevailing party. In addition, the Court agreed that Perdue was entitled to recover his reasonable attorney's fees under N.C.G.S. § 6-21.5 from Lubin and Schuler only. But the Court deferred a decision about the amount of the fee award, directing Perdue to file a fee petition with supporting evidence. (ECF No. 136.)

6. Perdue has since filed his fee petition and supporting evidence. (ECF No. 147.) Burns has likewise moved for an award of costs and attorney's fees against Lubin and Schuler. He does not seek an award against Marcy or any of the settling plaintiffs. (ECF No. 165.)

7. These matters are fully briefed. The Court held a hearing on 24 October 2022, at which all relevant parties were represented by counsel.[2] The motions are ripe for decision.

II.
COSTS

8. By statute, a prevailing party in a civil action may seek an award of taxable costs. *See* N.C.G.S. §§ 6-1, 6-20. Only those costs listed in N.C.G.S. § 7A-305(d) are recoverable. *See McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 202 (2013).

9. Burns has moved to assess costs against Lubin and Schuler but not any other plaintiff. He seeks $11,172.98, a figure that includes mediation fees and expenses related to ten depositions taken during discovery. (*See* Morton Aff. ¶ 12,

[2] Through summary judgment, Schuler was represented by the same attorneys as the other plaintiffs. Afterward, his counsel moved to withdraw from representing him but continued to represent the others. During briefing of the fee matters, Schuler represented himself. He filed his opposition briefs pro se and submitted an ex parte communication (which the Court immediately shared with all parties) stating that he stopped actively pursuing his claims as early as 2017 and that he had received few or no communications from his counsel after that point. (*See* ECF Nos. 153, 162.) Just before the hearing, Schuler retained new counsel.

ECF No. 166.) It is undisputed that these are recoverable costs under section 7A-305(d).

10. In his opposition, Lubin contends that the Court should exercise its discretion to deny costs or, failing that, should apportion costs to account for the fact that he and Schuler are just two of the original fourteen plaintiffs. Lubin also opposes making any award of costs joint and several. Although Schuler's opposition brief is silent as to costs, it appears that he endorses these arguments.

11. There is no reason to deny costs altogether. The Court of Appeals has held that "the trial court is afforded no discretion in determining whether or not to award those costs enumerated under section 7A-305(d)." *Khomyak v. Meek*, 214 N.C. App. 54, 57 (2011). And even if the Court had discretion, it would exercise that discretion to assess costs because Burns prevailed on all claims asserted by Lubin and Schuler and because it is undisputed that the mediation and deposition fees were necessarily incurred, are reasonable in amount, and are taxable under section 7A-305(d).

12. But the Court agrees with Lubin and Schuler that it would be inequitable to award all that Burns seeks. Without question, a trial court has discretion to allocate costs when, as here, a party prevails entirely against one opponent but only partly or not at all against another. *See, e.g.*, *Pee Dee Electric Membership Corp. v. Carolina Power & Light Co.*, 256 N.C. 56, 61 (1961) (discussing discretion to allocate costs under section 6-20); *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 181 (2001) (same); *see also Justus v. Rosner*, 371 N.C. 818, 829 (2018) (stating that "the assessment of costs is generally within the discretion of the trial court"). Moreover,

the usual rule is "that the prevailing party may receive only one satisfaction of costs." *Ortho-McNeil Pharm., Inc. v. Mylan Labs.*, 569 F.3d 1353, 1358 (Fed. Cir. 2009). This is because an award of costs is meant to be compensatory, not punitive or exemplary. As many federal courts have held, when a prevailing party has partly or fully recovered its costs through settlement or otherwise, the trial court should offset that amount from any judicial award of costs. *See, e.g.*, *Bravo v. City of Santa Maria*, 810 F.3d 659, 668 (9th Cir. 2016); *Ortho-McNeil Pharm.*, 569 F.3d at 1358; *Avila v. Willits Env't*, 2009 U.S. Dist. LEXIS 130416, at *26–27 (N.D. Cal. Nov. 23, 2009).

13. An offset is needed here. This is a multiparty litigation with multiple winners, multiple losers, and others who do not fit neatly in either camp. Many claims were never fully adjudicated. Although Burns won across the board against Lubin, Schuler, and Marcy, he avoided trial against Eugene N., Gene M., Rick, and Manderbach only through a settlement. By settling with these remaining plaintiffs, Burns forwent his chance to seek a judicial award of costs from the settling plaintiffs under section 6-20 in exchange for avoiding the expense and risk of trial. Thus, in its discretion, the Court concludes that Burns has already received a partial satisfaction of his costs. *See Ortho-McNeil Pharm.*, 569 F.3d at 1358 (concluding that party received partial satisfaction of costs in the form of settlement that avoided an appeal).

14. Because Burns has received a partial satisfaction of his costs, a pro rata reduction is the most reasonable way to proceed. *See id.* Lubin contends that the reduction should account for all fourteen original plaintiffs, but the seven who voluntarily dismissed their claims in the early stages had little involvement. The

Court therefore allocates costs based on the seven plaintiffs who actively participated in discovery and litigated their claims through summary judgment. Subtracting a pro rata share of costs for each settling plaintiff yields a remainder of $4788.42. This is the amount that Burns is entitled to recover.

15. Although Lubin argues that the award should not be made joint and several, he cites no law on point. The Court's research has not revealed any North Carolina precedent that addresses joint and several liability for costs awarded against multiple parties. Federal courts, however, "say that the presumptive rule is joint and several liability unless it is clear that one or more of the losing parties is responsible for a disproportionate share of the costs." *Anderson v. Griffin*, 397 F.3d 515, 522–23 (7th Cir. 2005) (collecting cases). It is up to "the losing parties to introduce evidence and persuade the court that costs should be apportioned, and in the event that they fail to do so, the default rule is that costs may be imposed jointly and severally." *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 469 (3d Cir. 2000); *see also State Farm Fire & Cas. Co. v. Silver Star Health & Rehab*, 739 F.3d 579, 586 (11th Cir. 2013); *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002). These decisions are compelling and do not appear to be inconsistent with North Carolina law.

16. With or without a presumptive rule, the equities decidedly favor joint and several liability. Lubin and Schuler "were represented by the same counsel" through summary judgment, "had common theories of liability, and sought the same discovery." *Concord Boat*, 309 F.3d at 497. Nothing suggests that any one plaintiff

is responsible for a disproportionate share of the costs. Moreover, Lubin and Schuler have introduced no evidence to support separate awards.

17. In sum, the Court grants in part Burns's motion for costs. He is entitled to recover $4788.42. Lubin and Schuler are jointly and severally liable for this amount.

III.
ATTORNEY'S FEES

18. "North Carolina follows the American Rule with regard to award of attorney's fees." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 94 (2011). In general, a party may not recover its attorney's fees "absent express statutory authority for fixing and awarding them." *McMillan v. Ryan Jackson Props., LLC*, 232 N.C. App. 35, 38 (2014) (quoting *United Artists Records, Inc. v. E. Tape Corp.*, 18 N.C. App. 183, 187 (1973)). "Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law," courts strictly construe them. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257 (1991). Whether to award fees is a matter within the trial court's sound discretion. *See, e.g.*, *Runnels v. Robinson*, 212 N.C. App. 198, 203 (2011).

A. Entitlement to Fees

19. The Court has already decided that Perdue is entitled to recover attorney's fees from Lubin and Schuler under N.C.G.S. § 6-21.5. (*See* ECF No. 136.) Burns now seeks to recover his attorney's fees from them on essentially the same grounds. Indeed, with minor exceptions, the parties' arguments mirror those that the Court addressed in resolving Perdue's motion. Having reviewed the record again, the Court reaffirms its earlier decision and concludes that Burns is entitled to an award of reasonable attorney's fees against Lubin and Schuler just as Perdue is.

20. The law has not changed since the Court decided Perdue's motion. Section 6-21.5 allows an award of attorney's fees "to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C.G.S. § 6-21.5. A justiciable issue is one that "is real and present as opposed to imagined or fanciful." *Sunamerica*, 328 N.C. at 257 (citation and quotation marks omitted). The standard of review is deferential, requiring "indulgent treatment" of the pleadings. *Id.* (citation and quotation marks omitted). Entry of summary judgment is a relevant factor but "is not in itself a sufficient reason for the court to award attorney's fees." N.C.G.S. § 6-21.5. Rather, Lubin and Schuler must either "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue or be found to have persisted in litigating the case after the point where he should reasonably have become aware that pleading he filed no longer contained a justiciable issue." *McLennan v. Josey*, 247 N.C. App. 95, 99 (2016) (cleaned up).

21. Nor have the facts changed. In the original complaint, Lubin and Schuler alleged that they "relied" on representations that Predictify.me "had acquired Go-Fig"—a company owned by Usmani—and therefore "owned the software developed by Go-Fig." (Compl. ¶¶ 33, 36, 55, 61, ECF No. 1.) In the amended complaint, they alleged that they had "relied" on representations "that Predictify.me had acquired Go-Fig and its proprietary technology." (Am. Compl. ¶¶ 114, 123, ECF No. 29.) These allegations were the centerpiece of the pleadings.[3] And they were

[3] The complaint and amended complaint also alleged reliance on a misrepresentation that Predictify.me "had a formal business relationship with the" United Nations. (*E.g.,* Am.

false: deposition testimony shows that neither Lubin nor Schuler had a basis to allege reliance on representations about Predictify.me's acquisition of Go-Fig and its technology.

22. Some of this testimony featured prominently in the decisions on summary judgment and Perdue's fee motion. It is worth cataloging the testimony again. Lubin candidly testified that he "didn't follow this investment very closely." (Dep. Lubin 55:2–3, ECF No. 84.1.) He admitted over and over that he had never heard of Go-Fig before investing in Predictify.me.[4] And he couldn't identify any proprietary technology related to the alleged misrepresentation. (*See* Dep. Lubin 56:20–24 ("Q. All right. What proprietary algorithmic software programs are you talking about in your complaint, if you know? . . . A. I don't know.").)

23. Likewise, defense counsel asked Schuler, "Did anybody represent to you that PredictifyMe [sic] acquired Go-Fig before you made your investment?" Schuler answered, "I don't recall." (Dep. Schuler 184:2–5, ECF No. 99.3.) Neither could he recall whether he had heard of Go-Fig before investing. (*See* Dep. Schuler 135:11–14

Compl. ¶ 114; *see also* Compl. ¶ 56.) At summary judgment, Burns and Perdue showed that Predictify.me did have a business relationship with the United Nations. *See Bucci IV*, 2020 NCBC LEXIS 79, at *16–17. Lubin, Schuler, and the other plaintiffs did not dispute this evidence. Instead, they abandoned the allegation and argued that the purported fraud turned solely on the acquisition of Go-Fig and its propriety technology. (*See* ECF No. 133.)

[4] (*See* Dep. Lubin 43:1–3 ("Q. Okay. Prior to making your investment, had you ever heard of the company called Go-Fig? A. No."), 66:6–8 ("Q. Right. But you testified you'd never heard of Go-Fig prior to making your investment; correct? A. That's correct."), 87:14–16 ("During that time period, did the words 'Go-Fig' ever cross your radar in respect to the investment? A. No."), 95:22–24 ("Q. I think I asked you this, but you said you never heard of Go-Fig before you made the investment; correct? A. Correct."), 111:17–20 ("Q. Okay. Okay. But you stand behind your testimony today that you did not hear of Go-Fig until after your investment; correct? A. Yes, I do.").)

("[Q.] My question to you is, prior to you making your investment, had you ever heard the words 'Go-Fig'? A. I don't recall.").) Even after seeing documents that supposedly contained the misrepresentation, Schuler could not say that he had reviewed or relied on them when making his investment.[5]

24. Every defense and explanation given by Lubin and Schuler is irrelevant or otherwise unpersuasive. They chalk their equivocations up to bad memories, try to impute evidence of other plaintiffs' reliance to themselves, and point to testimony suggesting that they relied on different misrepresentations that were not alleged in the complaint. But Lubin and Schuler must live with the pleadings they filed. Unstated allegations and allegations made by other plaintiffs are beside the point.

25. And faulty memories are no excuse. This is not a case in which the facts turned out to be something other than Lubin and Schuler believed. The facts concerning what they relied on when making their investments are uniquely within their knowledge. In their original and amended complaints, they alleged having relied on representations that Predictify.me acquired Go-Fig (a company neither had even heard of) and its technology (software that neither could identify). Both knew or should have known at the time of the complaint that these allegations were false.

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[5] (*See* Dep. Schuler 48:1–4 ("Q. When you made the investment, was that an important factor, that PredictifyMe was going to acquire Go-Fig? A. I don't recall the timeline."); Dep. Schuler 115:3–17 ("Q. Okay. Well, can you recall – can you recall independently today, sitting here under oath, if anybody from PredictifyMe communicated anything to you or provided you any written investment materials to you that said PredictifyMe had acquired Go-Fig? A. I don't recall."), 182:8–15 ("I can't honestly say that I read this—this exact blog post before I—my money changed hands.").)

26. As a result, Lubin and Schuler had no reasonable basis to allege or argue actual reliance on a misrepresentation of material fact—an essential element of their claims for fraud, negligent misrepresentation, and violations of section 75.1.1. *See, e.g.*, *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88–90 (2013); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664 (1995). The Court concludes that they knew or reasonably should have been aware at the outset of the case that "there was a complete absence of a justiciable issue of either law or fact raised by" their pleadings. N.C.G.S. § 6-21.5. Burns is therefore entitled to fees because he was forced to defend "claims that wholly lacked a justiciable issue of law or fact." *Jacobson v. Walsh*, 2014 NCBC LEXIS 2, at *42 (N.C. Super. Ct. Jan. 22, 2014) (awarding fees under section 6-21.5 when plaintiff admitted in a deposition that two claims were based on a false allegation).

27. As the Court observed in its decision on Perdue's fee motion, this rationale does not necessarily apply to certain securities claims in the case, some of which may not require reliance as an element of proof. *See, e.g.*, *Brown v. Secor*, 2020 NCBC LEXIS 134, at *27 (N.C. Super. Ct. Nov. 13, 2020). But Burns and Perdue are not required to show that every claim lacked a justiciable issue. Section 6-21.5 applies to issues, not actions. *See Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 66 (2009) ("[A] 'prevailing party,' as used in Section 6-21.5, is a party who prevails on a claim or issue in an action, not a party who prevails *in the action*." (emphasis in original)). Whether the Court must apportion fees among recoverable and nonrecoverable claims is a distinct question addressed below.

28. Finally, Burns also seeks fees under sections 75-16.1(2) and 1D-45. The Court has considered these arguments and deems them cumulative. Because Burns is entitled to fees against Lubin and Schuler under section 6-21.5, it is unnecessary to decide whether these additional statutes provide a second or third basis to award the same fees.

B. Fee Awards

29. Next, the Court addresses the amount of recoverable fees. Burns and Perdue are entitled to recover only their reasonable attorney's fees. *See* N.C.G.S. § 6-21.5. In assessing what is reasonable, the Court must "enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience and or ability of the attorney based on competent evidence." *WFT Lynnwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 933 (2018); *accord Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672 (2001).

30. Burns claims to have spent over $250,000 defending against the claims asserted by all plaintiffs. Perdue claims to have spent over $200,000. Both concede that they may not recover all these fees against Lubin and Schuler and that the awards must be apportioned in some way. They argue that the most efficient and equitable way to apportion the fees is to divide by the number of plaintiffs who actively participated in the case and charge Lubin and Schuler their shares. In response, Lubin and Schuler contend that a mechanical division of fees is inequitable and that the evidence in support of the fee petitions is lacking.

31. The Court agrees with Lubin and Schuler that a mechanical division of fees is not appropriate in this case. As the Court of Appeals has explained, section 6-21.5 "is most sensibly understood as permitting an award only of attorney's fees directly *caused* by the filing, logically, those at the trial level." *Hill v. Hill*, 173 N.C. App. 309, 321 (2005) (cleaned up; emphasis added). In other words, there must be a causal connection between the fees awarded and the misconduct at issue—which is typically true for most fee awards. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017) (applying federal law and holding that "the court can shift only those attorney's fees incurred because of the misconduct at issue"); *Bradshaw v. Maiden*, 2018 NCBC LEXIS 98, at *15 (N.C. Super. Ct. Sept. 20, 2018) (limiting fee award for discovery violation to work directly attributable to that violation).

32. This causation requirement is significant here because Burns and Perdue would have incurred most of their attorney's fees even if Lubin and Schuler had never joined the litigation. They would have deposed the other plaintiffs, served discovery on those plaintiffs, and conducted much of the same legal research. As a result, it would be error to add up the total fees and divide by the number of plaintiffs because doing so would shift fees that Burns and Perdue would have incurred anyway. The Court must instead carefully review the record to determine which fees are attributable to the assertion of nonjusticiable issues by Lubin and Schuler.

33. The state of the record makes this task difficult. Neither Burns nor Perdue has attempted to show which fees were caused by the conduct of Lubin and Schuler, rather than common to all plaintiffs. In addition, Burns's invoices use a block-billing

format—sometimes for hundreds of hours on many different matters over a period of weeks. The Court has often observed that "the 'block-billing' format makes it difficult . . . to assess whether the time spent with respect to each task was reasonable." *Miriam Equities, LLC v. LB-UBS 2007-C Millstream Road, LLC*, 2022 NCBC LEXIS 115, at *6–7 (N.C. Super. Ct. Jul. 8, 2022). These practices also make it difficult to assess causation. Of course, when aggregated invoices are the only evidence available, the Court has ample discretion to estimate a reasonable number of hours for relevant matters and dock the requested fees accordingly. *See, e.g.*, *Ekren v. K&E Real Estate Invs., LLC*, 2014 NCBC LEXIS 57, at *17–18 (N.C. Super. Ct. Nov. 10, 2014).

34. The record also makes it difficult to apportion among recoverable and nonrecoverable claims. "[A]pportionment of fees is unnecessary when all the claims in an action arise from the same nucleus of operative fact such that 'each claim is inextricably interwoven with the other claims.' " *Phillips v. Pitt Cnty. Mem. Hosp., Inc.*, 242 N.C. App. 456, 459 (2015) (cleaned up; citations omitted). All claims arise from a common nucleus of law or fact—the plaintiffs' failed investments in Predictify.me. Accordingly, the Court concludes that there is no need to apportion fees among recoverable and nonrecoverable claims. *See id.*

35. Finally, it bears repeating that North Carolina follows the American Rule. Section 6-21.5 is a limited exception to that rule—and a discretionary exception at that. *See* N.C.G.S. § 6-21.5 ("the court . . . *may* award (emphasis added)). The Court

may exercise its discretion to lessen the fee award even if the time expended and rates charged are reasonable. *See Willen v. Hewson*, 174 N.C. App. 714, 722 (2005).

36. With these principles in mind, the Court turns to Perdue's fee petition first and then to Burns's petition.

37. **Perdue's Fee Petition.** Perdue is represented by Douglas Hanna of Fitzgerald Hanna & Sullivan, PLLC. Supporting invoices show that counsel spent a total of 675 hours on all aspects of this case and charged an hourly rate of $300. (*See* Perdue Fee Pet., ECF No. 147; Perdue Aff., ECF No. 146.) Perdue has offered an affidavit from James Hickmon, a local lawyer, to show that Mr. Hanna's hourly rate is typical of the rates customarily charged for complex commercial litigation in the Raleigh, North Carolina area. (*See* Hickmon Aff. ¶ 5, ECF No. 145.) Neither Lubin nor Schuler disputes the reasonableness of this hourly rate. Accordingly, the Court finds that a rate of $300 per hour is reasonable. *See, e.g.*, *Bradshaw v. Maiden*, 2018 NCBC LEXIS 98, at *12 (N.C. Super. Ct. Sept. 20, 2018) (surveying cases showing that a typical and customary hourly rate in North Carolina complex commercial litigation ranges from $250 to $475).

38. The Court has thoroughly reviewed the invoices submitted by Perdue. Most of the charges relate to discovery tasks that were common to the claims of all plaintiffs or that were specific to plaintiffs other than Lubin and Schuler. As noted, Perdue would have incurred these fees even if Lubin and Schuler had not joined the case as plaintiffs. As a result, they are not recoverable.

39. The Court finds that the fees attributable to the conduct at issue include fees related to the depositions of Lubin and Schuler and the motions for summary judgment concerning their claims. It is difficult to determine with precision how much time related to these activities. The invoices describe certain tasks—preparing for and attending Lubin's deposition, for example—with specificity. Other time entries use a block-billing format.

40. Based on the evidence and in its discretion, the Court estimates the time spent on these tasks as follows: 13.6 hours ($4,080.00) related to preparing for and attending Lubin's deposition; 30.0 hours ($9,000) related to the motion for summary judgment against Lubin; 6.5 hours ($1,950) related to preparing for and attending Schuler's deposition; and 10.0 hours ($3,000) related to the motion for summary judgment against Schuler. The Court observes that Perdue filed four separate motions for summary judgment, which included a significant amount of repetition. As a result, the Court concludes that some of the time spent on Lubin's motion for summary judgment was excessive or cumulative and concludes that 20.0 hours ($6,000) is reasonable.

41. Furthermore, the Court finds that this case required the level of skill typical of most complex commercial litigation in this State. And ample evidence shows that Mr. Hanna has an appropriate level of experience and ability. These factors support the reasonableness of the Court's estimates and the resulting award.

42. Next, Perdue argues that he is entitled to recover fees incurred for pursuing the motion for attorney's fees. Courts have allowed fees on fees, as this is commonly

known, under other statutory provisions. *See, e.g.*, *Morris v. Scenera Research, LLC*, 2017 NCBC LEXIS 48, at *43–49 (N.C. Super. Ct. May 31, 2017). The Court sees no reason to treat section 6-21.5 differently. Denying fees on fees would limit the deterrent effect of the statute by undermining the incentive for parties to seek fees. *See In Re Williamson*, 91 N.C. App. 668, 685 (1988). Moreover, but for having to defend against nonjusticiable claims, Perdue would not have had to incur the expense of a motion for attorney's fees. And the fees incurred in pursuit of an award of attorney's fees are not disproportionate to those incurred litigating other phases of the case.

43. Although Perdue's invoices show $12,000 in fees incurred pursuing his motion, he prevailed only in part. The Court denied his motion to recover fees from the five plaintiffs other than Lubin and Schuler. Accordingly, the Court exercises its discretion to award $1,500 against Lubin and $1,500 against Schuler and concludes that this amount is reasonable.

44. In sum, the Court concludes that Perdue is entitled to recover $11,580 from Lubin and $6,450 from Schuler in reasonable attorney's fees.

45. **Burns's Fee Petition.** Burns is represented by Robert Morton of North Raleigh Law Group. Mr. Morton's affidavits show that he and his paralegal spent roughly 1,200 hours defending against all claims in this case and charged hourly rates of $275 for in-office work, $350 for out-of-office work, and $100 for paralegal work. (*See* Morton Aff. ¶ 4; *see also* Supplemental Morton Aff. ¶ 14, ECF No. 168.) Burns has offered an affidavit from John Austin, a local lawyer, to show that these hourly

rates are typical of the rates customarily charged for complex commercial litigation in the Raleigh, North Carolina area. (*See* Austin Aff. ¶ 5, ECF No. 167.) Neither Lubin nor Schuler disputes the reasonableness of these rates. Accordingly, the Court finds them reasonable. *See, e.g.*, *Bradshaw*, 2018 NCBC LEXIS 98, at *12–13 (surveying cases).

46. Mr. Morton's affidavits include a summary of invoices but no individualized time entries. Again, most charges relate to discovery and other tasks that were common to all plaintiffs or concerning issues specific to plaintiffs other than Lubin and Schuler. These fees are not recoverable. Because the invoices aggregate time spent on a variety of tasks, it is impossible to tell how much time was devoted to recoverable and nonrecoverable matters. One invoice, for example, includes 51.5 attorney hours and 163.3 paralegal hours on six different activities with no indication of how much time was spent on each. The Court will cautiously estimate the time expended on relevant tasks and will give the benefit of the doubt to Lubin and Schuler to ensure the reasonableness of the award. *See Ekren*, 2014 NCBC LEXIS 57, at *17–18.

47. Based on the evidence and in its discretion, the Court applies a blended hourly rate of $300 and estimates the time spent on recoverable tasks as follows: 8.0 hours ($2,400) related to preparing for and attending Lubin's deposition; 10.0 hours ($3,000) related to the motion for summary judgment against Lubin; and 10.0 hours ($3,000) related to the motion for summary judgment as to Schuler. Because of a

complete lack of evidentiary support, the Court declines to award fees related to preparing for and attending Schuler's deposition.

48. For the same reasons stated above, the Court finds that this case required the level of skill typical of most complex commercial litigation in this State. Likewise, the evidence shows that Mr. Morton has an appropriate level of experience and ability. These factors support the reasonableness of the Court's estimates and the resulting award.

49. In sum, the Court concludes that Burns is entitled to recover $5,400 from Lubin and $3,000 from Schuler in reasonable attorney's fees. The Court notes that Burns has not asked for an award of fees on fees.

50. Finally, the Court rejects any argument that the attorney's fees awards should be joint and several. Burns and Perdue have not offered any legal support for doing so. The better course is to hold Lubin and Perdue separately liable for their individual conduct.

IV.
CONCLUSION

51. For these reasons, the Court **GRANTS in part** Burns's motion for costs. Lubin and Schuler shall pay a total of $4788.42 in costs to Burns and are jointly and severally liable for that amount.

52. The Court also **GRANTS in part** Burns's motion for attorney's fees and fee petition. The Court **ORDERS** Lubin to pay $5,400.00 and Schuler to pay $3,000.00.

53. The Court **GRANTS in part** Perdue's fee petition. The Court **ORDERS** Lubin to pay $11,580 and Schuler to pay $6,450.

54. No issues or claims remain to be decided, and this action is now final subject to any rights of appeal.

SO ORDERED, this the 17th day of November, 2022.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases