

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

EDWIN J. RUST,)	CASE NO. 3:10CV00029
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
)	
ELECTRICAL WORKERS)	
LOCAL NO. 26 PENSION)	
TRUST FUND, ET AL.)	By: B. Waugh Crigler
)	U. S. Magistrate Judge
Defendants.)	

INTRODUCTION

Plaintiff's October 21, 2011 motion for the award of attorneys' fees and costs and his April 19, 2012 supplemental motion for the award of fees-on-fees, under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(g), are before this court in accordance with the authority of 28 U.S.C. § 636(b)(3) to render to the presiding District Judge a report setting forth appropriate findings, conclusions, and recommendations for the disposition of the case. The issues presented are whether plaintiff is entitled to attorneys' fees, costs, and fees-on-fees, after prevailing on his motion for summary judgment as well as on his opposition to defendants' post-judgment motion, and, if so, how much he should recover. For the reasons that follow, the undersigned will RECOMMEND that the presiding District Judge enter an Order AWARDING total attorneys' fees, costs, and fees-on-fees in the amount of \$271,869, representing \$177,643.50 in attorneys' fees and \$2,329.40 in costs on his original petition and \$91,834 in fees and \$62.10 in costs on his supplemental fee-on-fee petition.

CASE HISTORY AND PROCEDURAL BACKGROUND

Plaintiff filed this action against the defendants challenging the propriety of their administration of his pension plan and seeking to recover benefits from the plan, which is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”). (Dkt. Nos. 1, 24, 63.) The instant pension plan (“Plan”) is an employee benefit plan defined and governed by ERISA, 29 U.S.C. § 1002(3). (Dkt. No. 63, at 2.) Plaintiff is, and has been, a participant in the Plan, as defined under 29 U.S.C. § 1002(7). *Id.* Plaintiff is represented by attorneys in the law firm of Troutman Sanders, LLP (“Firm”). (Dkt. Nos. 81-1, 81-2, 81-3, 81-5.) The defendants are the pension trust fund itself and several trustees of the fund. (Dkt. No. 63, at 1-2.) Plaintiff claimed that his benefits had been improperly and arbitrarily terminated by the defendants. *Id.* He also alleged multiple violations of ERISA for failing to provide him with plan documents, despite his repeated requests, and he sought to recover the costs and fees incurred in pursuing his claims against the defendants. *Id.*

On February 2, 2011, the parties filed cross motions for summary judgment. (Dkt. Nos. 38, 40.) On September 29, 2011, the presiding District Judge entered an Order granting plaintiff’s motion for summary judgment, denying the defendants’ motion, and directing the plaintiff to file a petition for attorneys’ fees and costs together with a proposed order of judgment which calculated the amounts due and owing as of the date of judgment. (Dkt. No. 73.)

In his Memorandum Opinion filed in support of the decision to grant summary judgment in favor of the plaintiff, the presiding District Judge, for want of a better description, took the defendants to the woodshed on each of plaintiff’s claims. The court pointed out how the defendants’ decision to terminate and rescind plaintiff’s benefits was not based on any language in the applicable ERISA Plan, and that the “slim quantity” of evidence relied on by defendants on was “woefully inadequate.” (Dkt. No. 72, at 23.) He further described the defendants’

decision as “neither reasoned nor principled,” found that it represented “repeated violations of ERISA,” determined it had “no factual basis” to support it, and concluded that it constituted a form of self-help that was “unavailable” under the applicable law. *Id.* at 23-24, 26, 29. Moreover, the court appeared ill-pleased with what it called the “rather dopey response” to the inquiry from plaintiff’s attorneys concerning the provisions of the Plan the defendants relied on to terminate and rescind plaintiff’s benefits. *Id.* at 30. Finally, the court detailed the prejudice suffered by plaintiff and rejected the defendants’ contention that this prejudice was the result of their ignorance or mistake, but rather the result of their bad faith. *Id.* at 40.

On October 25, 2011, the presiding District Judge entered judgment in favor of plaintiff, awarding plaintiff a total amount of \$385,219.20, plus continuing monthly benefits. (Dkt. No. 83.) This award was comprised of \$348,915.00 in statutory damages, \$30,440.00 in improperly terminated back benefits, \$5,864.20 in pre-judgment interest on the back benefits, and continuing monthly benefits of \$536.00 per month beginning on November 1, 2011. *Id.* The court retained jurisdiction to resolve any claim for attorneys’ fees and costs. *Id.* On October 27, 2011, the presiding District Judge referred plaintiff’s motion for the award of attorneys’ fees and costs to the undersigned to conduct proceedings and to issue a Report and Recommendation as to the disposition of the motion. (Dkt. No. 84.)

On November 21, 2011, the defendants filed a motion to amend or correct judgment under Fed.R.Civ.P. 59(e) to which plaintiff filed his objections. (Dkt. Nos. 85, 86, 94.) The parties having waived argument, the presiding District Judge entered an Order on April 9, 2012 denying the motion to amend for reasons set forth in a Memorandum Opinion of even date. (Dkt. Nos. 99, 100.)¹ On April 19, 2012, plaintiff filed motion seeking an award of “fees-on-fees”

¹ On December 1, 2011, the undersigned issued an order staying all proceedings related to plaintiff’s petition for the award of attorneys’ fees and costs pending the resolution of the

which were incurred post-judgment which once more was briefed by both sides in light of the continued opposition by the defendants. (Dkt. Nos. 102-.106.) Thereafter, on May 4, 2012, defendants appealed the judgment of this court to the Court of Appeals for the Fourth Circuit. (Dkt. No. 107.)

Plaintiff seeks an award of \$288,714, representing \$181,972.50 in attorneys' fees and \$2,329.40 in costs on his original petition and \$98,834 in fees and \$62.10 in costs on his supplemental fee-on-fee petition. (Dkt. Nos. 80, 102.) Not surprisingly, defendants object on several grounds. Both parties waived oral argument, and they submitted the matter to be decided on the briefs. (Dkt. No. 108.) The undersigned, therefore, dispenses with oral argument.

ATTORNEY FEES UNDER ERISA

In an action brought under ERISA, a court may, in its discretion, award reasonable attorneys' fees and costs to either party. 29 U.S.C. § 1132(g). In the Fourth Circuit, the courts are to follow a three step framework to determine whether attorneys' fees and costs should be awarded and whether the request is reasonable. *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 634-636 (4th Cir. 2010); *Bd. of Trustees for the Hampton Roads Shipping Ass'n. v. Ransone-Gunnell*, 781 F.Supp.2d 286, 290-291 (E.D.Va. 2011); *see also Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2154-2155 (2010). First, the party seeking attorneys' fees must show some degree of success on the merits in the matter for which that party seeks attorneys' fees. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2157-8 (2010); *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 634 (4th Cir. 2010). Success must be more than either a trivial on the merits or purely procedural victory. *Id.*

defendants' Rule 59 motion. (Dkt. Nos. 85, 91.) When the presiding District Judge denied the defendants' motion, the stay expired.

Once the party has shown the requisite degree of success on the merits, the court conducts a five factor analysis to determine whether an award of attorneys' fees and costs is appropriate. These five factors are: (1) the degree of opposing parties' culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 635 (4th Cir. 2010); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993). This analysis is not rigid and, instead, is intended to provide general guidelines for determining whether to grant a request for attorneys' fees. *Id.* Because ERISA's remedial purpose is protecting employee rights and securing access to federal courts, a prevailing individual beneficiary ordinarily should recover attorneys' fees and costs unless special circumstances would render such award unjust. *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993).

Should the court then determine that an award of fees and costs is appropriate, the court then must engage in the lodestar analysis to determine the fees and costs recoverable by multiplying the reasonable number of hours counsel expended by a reasonable hourly rate, or in this case reasonable hourly rates. *Robinson v. Equifax Information Services*, 560 F.3d 235, 243 (4th Cir. 2009); *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008). In making its lodestar determination, the court is to be guided the by the twelve *Johnson/Barber* factors: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in

pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Robinson v. Equifax Information Services*, 560 F.3d 235, 243-244 (4th Cir. 2009); *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir.1978) (adopting twelve factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974)). These factors are neither exclusive nor exhaustive, and the court need not engage in a lengthy discussion of what portion of the ultimate award is influenced by any factor. *Arnold v. Burger King Corp.*, 719 F.2d 63, 67-68 (4th Cir. 1983). In appropriate circumstances, the court may consider the relative financial position of the parties along with the other *Johnson/Barber* factors. *Id.* at 68. After determining the lodestar amount, the court then subtracts from the total fee award any time spent on unsuccessful and unrelated claims.² *Robinson*, 560 F.3d at 244; *Grissom*, 549 F.3d at 321. Finally, the court awards some percentage of the remaining lodestar amount, depending on the degree of success enjoyed by the plaintiff. *Id.* In sum, any fee awarded must represent the reasonable number of hours spent multiplied by a reasonable hourly rate.

I. ELIGIBILITY AND ENTILEMENT TO ATTORNEYS' FEES

Plaintiff contends his success on the merits hardly can be contested. (Dkt. No 81, at 9.) He points out that the District Court granted his motion for summary judgment in its entirety and found him entitled to receive \$385,219.20 in damages, past-due benefits, continuing future benefits, statutory penalties, and interest, all because of the defendants' failure to comply with

² There were no unsuccessful claims in this case.

the requirements of ERISA. *Id.* at 10. Plaintiff offers that he has demonstrated his eligibility for an award of attorneys' fees under Fourth Circuit precedent.³ *Id.*

Plaintiff also argues that the *Quesinberry* factors support a finding that he is entitled to an award of attorneys' fees and costs. He contends when the court ordered him to prepare and file a petition for fees and costs, the court implicitly, if not explicitly, signaled that he met the five factors, and, if not, then a reasoned analysis of the factors supports not only eligibility but entitlement to such an award. (Dkt. No. 81, at 10.)

Plaintiff looks no further than the court's Memorandum Opinion to support the degree of defendants' culpability and bad faith. He highlights the court's findings that the defendants' failure to produce the documents justifying their adverse determination constituted bad faith, that they breached their fiduciary duties, that their decision to terminate and rescind benefits was unjustified, and that their litigation position was not supported by the law or the facts. (Dkt. Nos. 81, at 10-11; 103, at 5.) Moreover, he reminds the undersigned that the presiding District Judge observed that the defendants' conduct in this case was substantially worse than that of defendants in other cases where penalties were awarded. (Dkt. No. 103, at 5.) He also cites District decisional authority for the proposition that attorneys' fees may be awarded even when a defendant's conduct falls short of bad faith and amounts only to a breach of fiduciary duty.⁴ *Id.*

With regard to the second *Quesinberry* factor, plaintiff counters any notion offered by the defendants that they would be unable to satisfy an award of attorneys' fees, pointing to the defendants' annual filings with the Department of Labor and Internal Revenue Service, which showed trust assets of nearly \$334 million. (Dkt. No. 81, at 11.)

³ Citing *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 634-635 (4th Cir. 2010); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2158 (U.S. 2010).

⁴ Citing *Phillips v. Brink's Co.*, No. 2:08CV00031, 2009 U.S. Dist. LEXIS 101360 (W.D.Va. October 31, 2009).

As to the third factor, plaintiff points out that the presiding District Judge believed statutory penalties were necessitated both as incentive for the defendants to comply with information requests and as punishment for their utter non-compliance with ERISA requirements. *Id.* at 11-12. He contends that an award of attorney's fees would deter the defendants and others that are similarly situated from ignoring their obligations under ERISA and from taking positions in administering pension plans that are not well grounded in law and fact. *Id.* at 12. Plaintiff also offers that a decision to award fees would inform others participants in this and other pension plans of their rights and of the steps available to them where there has been similar conduct on the part of pension administrators. *Id.*

Plaintiff argues that the fourth factor also has been satisfied. He points out that the penalty in this case will provide the defendants incentive to comply with information requests from plan participants in the future which certainly inures to the benefit of others under the Plan. (Dkt. No. 81, at 12.) Plaintiff also notes out that his attorneys were compelled to brief complex legal theories in order to counter what the court later found to be essentially unavailing defenses, one of which was a matter of first impression in this circuit. *Id.* at 12-13. He contends that this satisfies the requirement that the case resolved significant legal questions regarding ERISA and that it will benefit participants in this and other plans. *Id.* at 12-13.

Finally, plaintiff points out that there was nothing "relative" about the merits here. *Id.* at 13. He offers that the presiding court undeniably found plaintiff's claims entirely meritorious, and nothing of merit in positions of the defendants. *Id.* at 13-14.

The defendants organize their opposition in an interesting format. At first, they appear to concede plaintiff is eligible for an award of fees and costs because of his success on the merits, admitting that the court "plainly [found] that the defendants were far off the mark in this case."

(Dkt. No. 87, at 12.) They further admit that the court rejected the relative merits of their position, conceding the fifth *Quesinberry* factor. *Id.* The defendants also offer that it would be “difficult to argue” against plaintiff satisfying the first, second, and third *Quesinberry* factors and simply place those factors before “the Court to determine.” *Id.* However, they gratuitously advance in this post-judgment proceeding that “they never intended to act in bad faith,” and suggest that they have suffered enough because of the adverse judgment against them. *Id.* at 12-13. The defendants appear to argue that if they are required to satisfy fees and costs the Plan participants actually will be harmed in light of the current financial climate which has caused many other plans to become “drastically underfunded.”⁵ *Id.* at 12-13.

Finally, the defendants address the fourth factor under *Quesinberry*. They contend that plaintiff essentially was looking out for himself in this case and did not seek to benefit all participants and beneficiaries of the Plan. *Id.* at 12. Thus, they do not believe plaintiff should prevail on the fourth factor.

A. Findings and Conclusions: Success on the Merits and the *Quesinberry* Factors

No one can question on this record that plaintiff achieved more than “trivial success on the merits” and more than a “purely procedural victory.” *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2158 (U.S. 2010). Pointedly, a court’s granting a motion for summary judgment is an example of a very high degree of success by the moving party. *Williams v. Metropolitan Life Ins. Co.*, 609 F.3d 622, 634-635 (4th Cir. 2010). Here, plaintiff’s motion for summary judgment was granted on all counts. Accordingly, the undersigned finds plaintiff achieved the degree of success on the merits necessary to satisfy his eligibility for fees at the initial level of the evaluation.

⁵ It is interesting that the defendants do not assert that this Plan is “drastically underfunded,” only that some are. (Dkt. No. 87, at 13.)

This finding carries over to satisfy both the first and fifth factors of the *Quesinberry* test. To repeat, the District Judge found no relative merit at stake here because all the merit in the underlying action lay with plaintiff and none with the defendants. The District Court granted plaintiff's motion for summary judgment, found that the defendants' decision to terminate benefits was neither reasoned nor principled, and that defendants had violated their fiduciary duties. (Dkt. No. 72, at 23, 40, 45, 47-48.) In addition, there is no hint in the court's decision that the defendants' conduct was the result of mere negligence or error, or that the outcome was even fairly debatable. See *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634, 641 (4th Cir. 1995). This is punctuated by the District Judge's finding that the defendants' conduct was egregious, substantially worse than other cases where statutory damages were awarded, was in bad faith and constituted a breach of their fiduciary duties. (Dkt. Nos. 72, at 40-45.) Thus, plaintiff has more than satisfied the first and fifth *Quesinberry* factors.

An award also is favored under the second *Quesinberry* factor. Simply put, the defendants have not rebutted evidence concerning the net worth of the trust and, instead, have only offered the irrelevant argument that the economy is in such a historically dreadful state that other plans are suffering failure. (Dkt. Nos. 81, at 11; 81-1, at 13; 87, at 12-13.) Given plaintiff's evidence and the lack of relevant evidence or cogent argument from the defendants on this issue, the undersigned finds that the defendants can afford to pay plaintiff's attorneys' fees. *Jackson v. Coyne & Delany Co.*, 2004 WL 1381157, at *3 (W.D.Va. June 18, 2004).

The third factor also favors plaintiff. The District Court concluded that statutory damages were necessary to punish the defendants for violations of ERISA and provide incentive to meet information requests in a timely fashion. (Dkt. No. 72, at 42.) The undersigned believes that an award of fees here punctuates the court's conclusions about the defendants' conduct and

would serve to deter both these defendants and others similarly situated from failing to comply with ERISA requirements. Further, the outcome can have general application, for the facts here are not so peculiar that any application of the principles announced would be limited by the circumstances of this case. Accordingly, the third factor also favors the award of plaintiff's attorneys' fees. *Quesenberry v. Volvo Group North America*, 2010 WL 2836201, at *7 (W.D.Va. July 20, 2010).

The undersigned's conclusion on the third factor certainly influences a decision on the fourth factor of the *Quesinberry* test, namely whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself. As was found above, it is likely that the District Court's judgment should, and likely will frame how the defendants will administer the plan in the future, and this benefits all participants. On the other hand, there can be no question that plaintiff sought relief that was purely personal to him. *Sedlack v. Braswell Services Group*, 134 F.3d 219, 227 (4th Cir. 1998); (Dkt. No. 63, 19-22.) By the same token, plaintiff raised several complex legal issues in litigating his claim, including whether the defendants had any justification to terminate the claim and rescind benefits by way of set-off. (Dkt. No. 81, at 12-13.) In addition, this case raised a significant issue regarding the appropriate remedy for an administrator's breach of its fiduciary duties where benefits first were awarded and then terminated and rescinded under a claim of set off. *Quesenberry v. Volvo Group North America*, 2010 WL 2836201, at *7 (W.D.Va. July 20, 2010); Compare with, *Matlock v. Pitney-Bowes, Inc.*, 811 F.Supp.2d 1186, *1192 (M.D.N.C. 2011). The undersigned is of the view that this case raised significant legal questions regarding ERISA, and, accordingly, this factor weighs in favor of awarding plaintiff's attorneys' fees.

In summary, the undersigned concludes that plaintiff is entitled to an award of attorneys' fees and costs in this case.

III. LODESTAR AMOUNT AND THE JOHNSON/BARBER FACTORS

The defendants' object to the reasonableness of plaintiff's attorneys' fee request on several grounds, challenging both the hourly rates and the number of hours claimed. First, the defendants assert that, in ERISA cases, the Fourth Circuit does not allow the award of fees and costs for work claimed during administrative proceedings prior to the drafting and filing of a complaint. (Dkt. No. 87, at 1.) They point out that that plaintiff's complaint was filed on June 9, 2010, but that plaintiff seeks payment for billings that begin a year and a half earlier. *Id.* at 1-2. They contend that plaintiff cannot be awarded fees for work done before April 22, 2009,⁶ and that his initial fee request should be reduced by \$17,633.00. *Id.* at 2.

Second, the defendants argue that the claimed hourly rates are unreasonable. They contend that the rates charged by Anthony F. Troy, Esq., Richard E. Hagerty, Esq., Michael E. Lacy, Esq., and Jon S. Hubbard, Esq.,⁷ are far in excess of the highest reasonable rates that can be charged in the Charlottesville area for each respective attorney.⁸ (Dkt. No. 87, at 3-4.) They offer that attorneys at the same level and experience as plaintiff's would receive a maximum of

⁶ It is likely that the defendants meant April 22, 2010, because there is no mention of any work performed on April 22, 2009, much less work done drafting a complaint, and the fees incurred before April 22, 2009 for which plaintiff is seeking compensation would only amount to \$2,808. (Dkt. No. 93-1, at 1-2, 4.)

⁷ The rates charged by plaintiff's attorneys are \$585, \$500, \$425, and \$365 per hour respectively. (Dkt. No. 81-2, at 28.)

⁸ The defendants include the affidavit from their counsel, John E. Davidson, to support their conclusions about reasonable rates for legal service at different levels of experience in Charlottesville. (Dkt. No. 87-1.) Mr. Davidson states, "I recognize that as counsel of record in this case, I suffer from the appearance of bias in sharing these opinions." *Id.* at 5. Accordingly, the entirety of defendants' opposition consists either of their own or their counsel's views on what may be reasonable hourly rate. The undersigned cannot help but observe that this kind of opposition is supremely self-serving, and, as such, it will be given only the weight it deserves. Nevertheless, the undersigned is constrained to conduct an assessment of plaintiff's motion independent of the defendants' opposition to determine its merits under the applicable standards.

\$450, \$400, \$300, and \$275 per hour respectively in the Charlottesville legal community. *Id.* Therefore, the defendants ask that plaintiff’s initial attorney fee request be reduced by an additional \$32,311.50. *Id.* at 4-5.

The defendants also challenge individual time entries. They cite several entries as “logically impossible”, including hours spent drafting documents they claim already had been filed days earlier, time spent in oral argument before argument occurred, and time claimed in excess of that which actually could have been spent at the hearings. (Dkt. No. 87, at 5-7.) The defendants assert that these inconsistencies should lead to a reduction of plaintiff’s initial fee request by \$14,997.50.⁹ *Id.* at 8.

In addition, the defendants contend that several entries are “impossibly vague” or “plainly excessive”. *Id.* They cite several examples of what they believe to be unreasonable amounts of time plaintiff’s attorneys spent working on certain pleadings or other papers. *Id.* at 8-11. Accordingly, the defendants argue that the remaining initial fee request should be reduced by 35% (from \$119,359.90 to \$77,583.94, a reduction of \$41,775.96).¹⁰ *Id.* at 11.

The defendants further challenge certain aspects of plaintiff’s supplemental motion for fees-on-fees. They contend that the Fourth Circuit Judicial Council is poised to establish that, in federal capital prosecutions at the district court level, any request for defense fees in excess of

⁹ The defendant’s complaint that there were “logical impossibilities” in plaintiff’s original fee request was correct. However, the anomalies were addressed and reasonably explained in plaintiff’s revised fee petition. (Dkt. Nos. 93, 93-1, 93-2.) Plaintiff explained how the error occurred in moving data from Microsoft Excel. The defendants have accepted the explanation, though they assert that there are several other valid reasons for why plaintiff’s fee request should be substantially reduced. (Dkt. No. 104, at 1-2.)

¹⁰ The defendants assert that their suggested 35% reduction is not due to incomplete success on the merits, as they do not contest that plaintiff was successful on the merits of his claim. Further, they argue that the suggested percentage reduction should not be criticized as arbitrary, pointing out that the burden is on the Plaintiff to provide objective, precise bases for all of his claimed attorney’s fees, and that they simply are identifying several incidences where plaintiff has not done so. (Dkt. No. 87, at 11.)

\$100,000 is presumptively unreasonable.¹¹ (Dkt. No. 104, at 3.) They offer that plaintiff's fees-on-fees request would add nearly another \$100,000 to the claim for work performed at the district court level. *Id.* at 3-4. The defendants seem to draw a conclusion that, if the Circuit Court is contemplating placing a cap on "the most solemn, most important and most time-consuming duties any lawyer will ever handle," this court should be considered lowering fees in what the defendants consider to be less serious civil cases. *Id.*

The defendants also point to several examples of what they assert is unreasonable billing in the supplemental fee petition, including eleven hours spent reviewing the presiding District Judge's decision on summary judgment and 105 hours spent preparing the fee-on-fee motion. (Dkt. No. 104, at 4-5.) They point to the amount of time their own counsel spent himself on similar activities and refer to some asserted rule of thumb, which heretofore has been unknown by the undersigned, that it is unreasonable for an attorney to spend more than an hour working per each page of a brief. *Id.* at 4-6. The defendants also repeat their contention that the hourly rates of plaintiff's various attorneys are far in excess of the maximum found in Charlottesville. *Id.* at 7-8. From that, they argue that the Charlottesville market cannot "bear this kind of crushing invoice for legal services." *Id.* at 6.

Finally, the defendants contend that certain fees claimed in the fee-on-fee petition are reflections of block billing, citing several examples of time records including several different activities in the same block of time. (Dkt. No. 104, at 6.) They assert that such block billing frustrates review by both the defendants and the court. *Id.* at 6-7.

Accordingly, the defendants request that the fee request in the supplemental fee petition be reduced to match their proposed appropriate hourly rates and by an additional 35% for

¹¹ The Judicial Council of the Fourth Circuit, "Special Procedures for Reviewing Compensation Requests in Death Penalty Cases," (December 6, 2011), *available at* www.ca4.uscourts.gov/pdf/noticeofresolutionattorneycompensationcapitalcases.pdf.

unreasonable billing, or a total reduction from \$98,834 to \$45,995.63. *Id.* at 7-8. In the end, the defendants offer that plaintiff should be awarded no more than \$123,579.57 in attorneys' fees.

In his several briefs, plaintiff contends that all twelve of the *Johnson/Barber* factors, as well as the additional factor of the defendants' ability to pay, support an award for the full value of the fees sought. (Dkt. No. 81, at 14-27.) More pointedly, plaintiff observes that the defendants have failed to set forth any viable arguments in opposition under the *Johnson* factors, and, as a result, the court should find that the defendants have conceded both that plaintiff is entitled to fees and that the requested fees are reasonable. (Dkt. No. 103, at 3.)

Alternatively, plaintiff counters each of the defendants' challenges to the reasonableness of the fees in general. First, he counters the defendants' argument regarding fees incurred during administrative appeal on the basis that the presiding District Judge made a finding that the Union never properly conducted an administrative review and never rendered an administrative decision in this case. (Dkt. Nos. 72 at 45-47; 103, at 9.) He also points out that he is not seeking to recover fees for Mr. Lacey and Mr. Hagerty who primarily were involved in the case before litigation commenced. (Dkt. No. at 9-10.) Furthermore, plaintiff offers that the Firm began work on the complaint in March of 2009, spending only .4 hours on plaintiff's case before that point, and that this would require a reduction of only \$234. *Id.* at 10. Plaintiff also asserts that, even if the court accepts defendants' April 22, 2009 proffered cutoff date, the resultant reduction in fees, at most, would be \$2,808.00 in fees. *Id.*

Plaintiff questions how the defendants' reference to any proposed action taken by the Fourth Circuit Judicial Council in Criminal Justice Act capital cases has any bearing here. (Dkt. No. 106, at 7.) He points out that the Fourth Circuit Judicial Council's notice applied only to

capital cases, was based on the set hourly rate cap found in capital cases, and has been suspended indefinitely for further review.¹² *Id.*

Plaintiff also challenges the proffered one hour-per-page calculus, referring to it as a “one size fits all” approach to brief writing. He doubts that such an approach ever would be followed in the Fourth Circuit, and he points out that the defendants actually mischaracterize the District of Columbia District Court decision in *Mitchell v. AMTRAK*, 217 F.R.D. 53 (D.D.C. 2003) in order to rely on the notion of a one page calculus here. (Dkt. No. 106, at 7-8.) In fact, plaintiff contends that *Mitchell* acknowledged that many hours may be necessary for review of complicated legal issues and for editing pleadings and papers.¹³ *Id.* Plaintiff submits the adage, “[I]f it reads well. It (sic) wrote hard,” and asks the court to reject the one hour-per-page calculus and find the time spent to be reasonable. *Id.* at 8-9.

Plaintiff next points out that the majority of the defendants’ response brief is focused on a clerical error that occurred in producing the original fee exhibit. Plaintiff offers that he has submitted a corrected exhibit and included declarations from the Troutman Sanders’ Director of Client Accounting explaining the error. (Dkt. No. 103, at 13.) Plaintiff asserts that this correction resolves the defendants’ complaints regarding the dates and times of certain entries.¹⁴ *Id.* at 13-14.

Plaintiff also addresses the defendants’ complaints about individual time entries in both his original and supplemental fee petitions, referring to them as “misguided”. (Dkt. No. 103, at 14.) Plaintiff contends that several of the identified entries are shorthand references to more

¹²The United States Court of Appeals for the Fourth Circuit, “Suspension of Effective Date for Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases,” (February 28, 2012), *available at* <http://www.ca4.uscourts.gov/pdf/noticesuspensionresolutionattorneycompensationcapitalcases.pdf>.

¹³ Citing *Mitchell*, 217 F.R.D. at 58 (D.D.C. 2003).

¹⁴ Citing Dkt. Nos. 93, 93-1, and 93-2.

involved activities, e.g. drafting a motion referring to work done on both the motion and the supporting memorandum. (Dkt. Nos. 103, at 14-16; 106, at 9-11.) He distinguishes the cases cited by the defendants which allowed an across-the-board reduction in fees for such entries. (Dkt. No. 103, at 16-17.) Plaintiff offers that work on this complicated case was not overstaffed as was the claim in *Goodwin v. Metts*, 973 F.2d 378 (4th Cir. 1992), nor was there such a disproportionate amount of time spent on frivolous or unwarranted issues as in *Spell v. McDaniel*, 852 F.2d 762 (4th Cir. 1988). Plaintiff points out that, after all, every single one of his claims was found meritorious. (Dkt. No. 103, at 16-17.)

Additionally, plaintiff addresses as misplaced the defendants' objection that the time records reflect block billing. (Dkt. No. 106, at 11.) He offers that block billing occurs when counsel seeks fees for non-reimbursable work by lumping that work together with fees incurred for reimbursable work. *Id.* at 11-12. He believes that merely grouping or lumping tasks for the same work category, here all in the same day, is permissible as long as it is clear that only reimbursable work is included. *Id.* Therefore, he asks the court to reject the notion that the time entries represent non-compensable block billing. *Id.* at 12-13.

Finally, plaintiff defends the reasonableness of the hourly rates charged by his attorneys on several grounds. (Dkt. No. 106, at 2.) He points out the following: 1) the case was taken on a contingency basis and was extremely undesirable; 2) Troutman Sanders had prior experience with the plaintiff and with certain aspects of the case apart from the claims asserted here, while all along, the defendants relied on their national counsel, McChesney & Dale, to handle the litigation for the vast majority of the case; and 3) the defendants' litigation practices were marked by questionable tactics that drove up the hours required to respond. *Id.* at 3. Plaintiff also points out that there is authority for the award of attorneys fees at the rate charged in a wider

geographic location where the attorneys practiced rather than the precise city in which case was heard.¹⁵ *Id.* at 4. He offers that ERISA cases command premium rates, and that this case involved a number of novel and complex legal issue which defendants made more difficult to address because of the way they conducted their defense. *Id.* at 4-5. He also offers that the affidavit of Williams R. Rakes, Esq., of Roanoke and a past president of the Virginia State Bar whose firm appears in all divisions of the Western District, as support for both the reasonableness of the hourly rate and the total number of hours worked. *Id.* at 5. Plaintiff seems to be saying that the court should not be concerned with whether plaintiff could find a cheaper lawyer but rather with the reasonableness of the fees he actually incurred for legal services under the circumstances of this case. *Id.* at 5-6. Accordingly, plaintiff contends that his requested hourly rates are reasonable as are the overall fees. Therefore, he asks that the court grant his motion and award attorneys' fees set forth both in his original motion and in his request for supplemental fees-on-fees.

B. Findings and Conclusions on the Lodestar Amount and the Johnson/Barber Factors

As stated above, plaintiff is entitled to an award of his attorneys' fees and costs. The only remaining question is how much, and that is decided under the lodestar analysis by multiplying reasonable hourly rates by the reasonable number of hours spent on the case. *Robinson v. Equifax Information Services*, 560 F.3d 235, 243 (4th Cir. 2009); *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008). This determination is guided, but not bound, by the

¹⁵ Citing *Quesenberry v. Volvo Group North America*, 2010 WL 2836201, at *6 (W.D.Va. July 20, 2010). Plaintiff also cites several cases in this District where the attorneys' fees incurred by Troutman Sanders have been found reasonable. (Dkt. No. 106, at 4 fn.7.)

Johnson/Barber factors¹⁶, and while those factors may be relevant in adjusting the lodestar amount, “no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation.” *Blanchard v. Bergeron*, 489 U.S. 87, 94-95 (1989). As no unsuccessful claims were prosecuted, the undersigned need not be concerned with any reduction or adjustment for time spent on unsuccessful claims.

The undersigned rejects as patently frivolous the defendants’ effort to apply the Fourth Circuit Judicial Council’s notice of a cap on CJA fees in criminal cases. Whatever cost containment the Council may be attempting in capital criminal cases is immaterial to civil actions brought under ERISA’s fee shifting provisions. If applied, it very well may defeat ERISA’s substantive as well as its fee shifting purposes.¹⁷ That the notice has been suspended for further review adds even more reason to suggest the defendants are grasping at straws as much on the fee issues as they did on the underlying merits of the case.¹⁸

¹⁶ As said, these factors are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Robinson v. Equifax Information Services*, 560 F.3d 235, 243-244 (4th Cir. 2009); *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir.1978) (adopting twelve factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974)). Other factors, such as the disparity of assets between the parties, may be considered under certain circumstances. *Arnold v. Burger King Corp.*, 719 F.2d 63, 67-68 (4th Cir. 1983).

¹⁷ The Judicial Council of the Fourth Circuit, “Special Procedures for Reviewing Compensation Requests in Death Penalty Cases,” (December 6, 2011), *available at* www.ca4.uscourts.gov/pdf/noticofresolutionattorneycompensationcapitalcases.pdf. The notice specifies that it applies to “attorney compensation in federal capital prosecutions under Title 18 or 21 of the United States Code as well as federal and state death penalty habeas corpus cases under 28 U.S.C. § 2254 or 28 U.S.C. § 2255.” It limits attorney compensation to \$100,000 and \$50,000 respectively at the District Court level.

¹⁸ The United States Court of Appeals for the Fourth Circuit, “Suspension of Effective Date for Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases,”

As to the reasonableness of the hourly rates charged by plaintiff's attorneys, the undersigned rejects the notion that those rates should reflect only the rates for lawyers in Charlottesville. First, the Charlottesville Division of the Western District is served by lawyers from all over the region and Commonwealth of Virginia, and, of late, from over much of the country. Law firms from Richmond, Norfolk, Northern Virginia, Washington, D.C. and other metropolitan areas in Virginia routinely appear in civil matters in this and other divisions of the Western District. The undersigned believes that the defendants labor under a much more provincial concept of the Charlottesville market than reality demonstrates. *See Quesenberry v. Volvo Group North America*, 2010 WL 2836201, at *6 (W.D.Va. July 20, 2010).

Moreover, the evidence they offer to support their restrictive view of the market is as self-serving as it can get. While certainly a respected attorney before this court, reliance on Mr. Davidson's affidavit will not suffice to overcome the actual geographic scope of the market rates charged in this District and Division. The courts of this District already have determined that rates from the plaintiff's very law firm are reasonable. *Unnamed Citizen A, et al. v. White*, No. 7:09-CV-00057 (Dkt. No. 161) (W.D.Va. February 18, 2011). Moreover, the affidavit from William Rakes, Esq., former president of the Virginia State Bar and a practitioner before the courts of this District and Division, confirms what the undersigned already knows, namely that the market rates in this District are not just those charged by lawyers in Charlottesville. (Dkt. No. 81-6.);

(February 28, 2012), available at <http://www.ca4.uscourts.gov/pdf/noticEOFsuspensionresolutionattorneycompensationcapitalcases.pdf>. See also American Bar Association, *Fourth Circuit Judicial Counsel (sic) Suspends Effective Date of Attorney Compensation Procedures in Death Penalty Cases*, THE WASHINGTON LETTER (March 2012), available at http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2012/march/attycompensation.html.

The undersigned also is aware that where legal services of like quality are not available in the locality the services are rendered and the party choosing an attorney from elsewhere acted reasonably in making that choice, the court can look beyond even the geographic reach of the court to assess reasonable hourly rates. *National Wildlife Federation v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988). Plaintiff correctly points out that ERISA cases are well known for their complexity and the specialization required to litigate them successfully. Here the defendants' conduct made things much more difficult and complex. Further, plaintiff's Firm certainly has expertise and experience in this field, and they had a history with the plaintiff in matters related to this case. It also is noteworthy that the defendants, themselves, relied on counsel not only outside of Charlottesville but beyond the geographic boundaries of the District. Accordingly, the undersigned finds that plaintiff's requested hourly rates are reasonable under the circumstances of this case.

The other *Johnson/Barber* factors also militate in plaintiff's favor. Plaintiff's counsel not only achieved a favorable judgment in the first instance, they successfully opposed the defendants Rule 59 motion. (Dkt. No. 85.) No one can deny that Mr. Troy, a former Attorney General of Virginia, is well regarded in the legal community for his ability, skills and experience. (Dkt. No. 81-1, 81-3.) Furthermore, plaintiff and his attorneys have had a long professional relationship, developing in a previous related case. *Rust v. CommerceFirst Bank*, 2008 WL 2074071 (W.D.Va. May 14, 2008). Additionally, the attorneys took the case on a contingent basis, exposing themselves to financial risk that was dependent on the outcome of the case. (Dkt. No. 81-1, at 14.) To repeat, ERISA cases are known for their complexity, and certainly here, it took every bit of the skill and specialized experience of plaintiff's counsel to persevere despite many obstacles to the end. *See Porter v. Elk Remodeling, Inc.*, 2010 WL 3395660, at *4

(E.D.Va. August 27, 2010). In the end, the undersigned accords no weight to evidence offered in opposition to the reasonableness of the rates, accords great weight to the evidence offered by plaintiff and concludes that the rates charged in this case are reasonable. Thus, the undersigned turns to the defendants challenge to particular time entries.

Plaintiff is not entitled to attorneys' fees earned before the commencement of litigation on his ERISA claims. *McIntyre v. Aetna Life Ins., Co.*, 586 F.Supp.2d 638, 640-641 (W.D.Va. 2008); *Rego v. Westvaco Co.*, 319 F.3d 140, 150 (4th Cir. 2003). Work performed while on administrative review or appeal is not reimbursable, though work performed in preparation for litigation before the filing of a complaint may be reimbursable. *Id.* The request here covers a period that dates back about a year and a half before his Complaint was filed in the court. (Dkt. No. 93-1, at 1, 5.)

At first blush, counsel's billing records appear a bit confusing to the undersigned. There is what appears to be a stray entry on March 28, 2009, while the administrative claim was still being pursued, stating "Review Complaint." (Dkt. No. 93-1, at 2.) However, there is no other evidence in the record satisfactorily demonstrating that any work in preparation for litigation was performed until August 14, 2009, when there was a billing entry stating, "Review facts of ERISA claim; prepare for litigation." *Id.* at 3.

It certainly can be inferred that plaintiff and his counsel had determined that the administrative process was not likely to be fruitful. Yet, there is no evidence in the record that plaintiff planned to end his efforts in the administrative process and begin litigation until August 14, 2009. All previous time entries concern activities of administrative review, work done on matters unrelated to the defendants, or are too ambiguous to confirm with any certainty that they

were performed in preparation for litigation. (Dkt. No. 93-1, 1-3.) Accordingly, 7.4 hours of work claimed Mr. Troy before this date will be excluded.¹⁹

The defendants also argue that the supplemental fees-on-fees time sheets reflect block, lump or group billing. Block billing occurs when several tasks are grouped together under a single time entry without specifying the amount of time spent on each task. *Johnson v. Weinstein & Riley, P.S.*, 2011 WL 1261578, at *4 (E.D.N.C. March 30, 2011); *Wolfe v. Green*, 2010 WL 3809857 (S.D.W.Va. September 24, 2010). Such grouping or lumping impedes an accurate determination of the reasonableness of the time expended. *Id.* Along with other types of inadequate documentation, block billing can lead a court to reducing a fee award, either by disallowing specific hours as not adequately documented or by reducing the overall fee award by a specific percentage. *Worldwide Network Services, LLC v. Dyncorp Intern., LLC*, 2010 WL 2933001, at *6 (E.D.Va. July 23, 2010); *JP ex rel. Peterson v. County School Bd. of Hanover County, Va.*, 641 F.Supp.2d 499, 520 (E.D.Va. 2009).

Plaintiff's supplemental fee-on-fee petition includes many instances where several tasks are grouped together into the same time entry. (Dkt. No. 103-2.) All together, this represents well more than 100 hours of time claimed. However, all the tasks under each time entry were performed by the same lawyer and, from what the undersigned has no difficulty discerning, were for related activities. While this documentation hardly is ideal, there is nothing that would suggest that plaintiff is seeking fees for non-recoverable activities. *JP ex rel. Peterson v. County School Bd. of Hanover County, Va.*, 641 F.Supp.2d 499, 520 (E.D.Va. 2009); *Wolfe v. Green*, 2010 WL 3809857 (S.D.W.Va. September 24, 2010). Accordingly, the undersigned declines to impose an across the board reduction in this matter for what defendants believe was block billing.

¹⁹ This reduction amounts to \$4329 (\$585/hr x 7.4 hours)

The undersigned declines to accept the defendants' proposed one hour per page method of calculating a reasonable amount of time spent on a brief. As to defendants' complaints about time being recorded for hearings in excess of the amount of time spent in the hearing, the undersigned notes the fact that plaintiff's counsel was required to prepare for, travel to/from and wait for hearings to commence. Entries related to such hearings are reasonable.

Plaintiff also seeks \$7,000 in fees for "additional work expected." (Dkt. No. 103-2, at 11.) In other words, plaintiff is asking to court to approve further, but not yet incurred, fees. This case is now pending on appeal to the Fourth Circuit Court of Appeals, and the docket sheet reflects that plaintiff's counsel has continued to do reimbursable work on this case since the motion for fees-on-fees was filed. (Dkt. Nos. 106, 107, 108.) Should plaintiff prevail, the Court of Appeals will have an opportunity to assess fees or remand the question of additional supplemental fees to this court. In the meantime, the undersigned declines to speculate about plaintiff's future fees, and to that extent, will not award the \$7,000 sought here.

Finally, the defendants do not have any objections to plaintiff's costs. Therefore, the undersigned finds that the requested costs are reasonable.²⁰

FINDINGS AND RECOMMENDATION

For all these reasons, it is RECOMMENDED that the presiding District Judge find that:

1. Plaintiff achieved a high degree of success on the merits before the District Court;
2. After considering the *Quesinberry* five factor test, the undersigned finds that an award of attorneys' fees is appropriate in this matter;
3. After calculating the lodestar amount and considering the Johnson/Barber factors, the undersigned finds that plaintiff's fee request is reasonable with some specific exceptions.

²⁰ The undersigned need not address the matter of successful versus unsuccessful claims, and then weighing the relative degrees of success, because plaintiff prevailed on all claims.

Accordingly, plaintiff is entitled to an award of attorneys' fees and costs under ERISA. These reimbursable fees and costs total \$271,869, and they represent \$177,643.50 in attorneys' fees and \$2,329.40 in costs on his original motion and \$91,834 in fees and \$62.10 in costs on his motion for supplemental fees-on-fees.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to transmit a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: s/ B. Waugh Crigler
U.S. Magistrate Judge

June 14, 2012
Date