STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: February 4, 2021]

CATHERINE TAYLOR,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2015-4284**
	:	
SCOTT MOTORS, INC.	:	
d/b/a SCOTT VOLKSWAGEN,	:	
Defendant.	:	

DECISION

STERN, J. Before this Court is Plaintiff Catherine Taylor's Motion for an Award of Attorneys' Fees from Defendant Scott Motors, Inc. d/b/a Scott Volkswagen pursuant to Defendant's Offer of Judgment. Defendant objects to the motion. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14.

I

Facts and Travel

In 2015, Volkswagen Group of America, Inc. (Volkswagen) contacted owners of Jetta SportWagen TDI diesel station wagons, including Plaintiff Catherine Taylor (Taylor), giving them notice of the need for a software update. (Pl.'s Mem. 7 (Aug. 25, 2020).) Days after Defendant Scott Motors, Inc. d/b/a Scott Volkswagen (Scott) serviced Taylor's vehicle and installed the new software, Taylor learned of a Notice of Violation issued to Volkswagen by the Environmental Protection Agency relative to this software update. (Second Am. Compl. ¶ 25.) The Notice of Violation suggested that the update was in fact the installation of a "defeat device" and was later found to be "intentionally designed to detect, evade and defeat U.S. emissions standards." (Pl.'s

Mem. at 8, Ex. B. at Exh. 2-17 ¶ 44.) On October 1, 2015, after learning that the diesel vehicle she purchased was "equipped with [this] emissions masking software," Taylor filed a Complaint seeking to rescind the contract and revoke acceptance of the vehicle she purchased from Scott.[1] (Compl. ¶¶ 5-7, 12, 15 (Oct. 1, 2015).)

In response to the Complaint, Scott filed simultaneous motions, one to extend the time to file a response for 120 days and the other to stay the action for 120 days due to nation- and world-wide pending litigation involving the same emissions issue against Volkswagen, the distributor and manufacturer of the vehicle. (Def.'s Mot. Stay (Nov. 20, 2015); Def.'s Mot. Extension (Nov. 20, 2015).) The Court granted Scott a 20-day extension and denied the motion to stay. (Order Mot. Extension (Dec.11, 2015); Order (Dec. 11, 2015).)

After Scott refused to rescind the sales agreement, take back the vehicle, and return Taylor's purchase price, Taylor filed an Amended Complaint adding a claim for violation of Rhode Island Motor Vehicle Business Practices Act, G.L. 1956 § 31-5.1. (Am. Compl. 3 (Dec. 22, 2015).) Following various motion practice from December 3, 2015 through February 22, 2016,[2] Scott filed a Notice of Removal to the Federal District Court of Rhode Island, contending that the case belongs in the Multi-District Litigation pending in the Northern District of California because of the case's relation to the hundreds of putative class actions concerning Volkswagen's "defeat device." (Def.'s Notice of Removal, Ex. 1 ¶¶ 20-23 (Feb. 22, 2016).) Taylor moved for a remand, and the District

[1] In September of 2015, Scott installed said "defeat device" on Taylor's vehicle. (Second Am. Compl. ¶ 23 (Dec. 22, 2015); Pl.'s Mem., Ex. C ¶ 23.) In due time during this litigation, the defeat device was subject of a Criminal Plea Agreement entered into by Volkswagen. (Pl.'s Mem., Ex. B.)

[2] Motions included: Taylor's Motion for Partial Summary Judgment filed December 3, 2015, and Scott's Objection; Scott's Motion to Dismiss filed January 4, 2016, Taylor's Objection and Scott's Reply; Taylor's Motion to Strike and for Sanctions filed January 8, 2016, and Scott's Objection, Taylor's Supplemental Memorandum, Scott's Supplemental Memorandum, Taylor's Reply to Scott's Supplemental Memorandum, and Scott's Sur-Reply.

Court remanded the case back to state court because it was untimely, and the federal court lacked subject matter jurisdiction. (Pl.'s Notice Remand (Mar. 16, 2016).)

Further motion practice ensued, and after Taylor filed her Second Amended Complaint adding a more definite statement to the misrepresentation claim and a claim for Deceptive Trade Practices, pursuant to G.L. § 6-13.1, on March 2, 2017, Scott filed its first Answer. (Second Am. Compl. (Feb. 28, 2017); Answer (Mar. 2, 2017).) Thereafter, there were several motions, cross motions, and objections filed concerning discovery and a decision and orders issued concerning the same, including a conditional order of default against Scott for its failure to respond to Taylor's discovery requests. (Decision (Nov. 27, 2018)); Order (Feb. 27, 2019).) Following an Order entered on April 30, 2020, compelling Scott to produce documents in response to Taylor's discovery requests, Scott made an offer of judgment that was served on Taylor on July 9, 2020. (Pl.'s Mem. Ex. A.)

The foregoing is merely a brief rendition of the travel of this case, which started in October of 2015 with a claim to rescind the purchase of a vehicle and after years of litigation, ended with an Offer of Judgment in the amount of Taylor's purchase price for the vehicle, plus costs of litigation. The Offer of Judgment provided:

> "Pursuant to R.I. Super. Ct. R. Civ. P. 68(a) of the Rhode Island Rules of Civil Procedure, Defendant Scott Motors, Inc. d/b/a Scott Volkswagen ("Defendant") hereby offers to Plaintiff Catherine Taylor ("Plaintiff") to allow judgment to be taken against Defendant in this action in favor of Plaintiff for the sum of: (1) Twenty Nine Thousand Four Hundred and Forty-Three Dollars and Seventy Five Cents ($29,443.75), which amount is offered inclusive of Plaintiff's claims (if any) for compensatory damages, incidental and consequential damages, punitive damages, and pre- and post-judgment interest, plus (2) the amount of costs (including reasonable attorney's fees) incurred in connection with this action through the date hereof in an amount to be determined by the Court (the "Offer")." (Pl.'s Mem. Ex. A, Offer J. at 1 (Offer J.).)

Taylor accepted Scott's Offer of Judgment and filed a Motion for an Award of Attorneys' Fees Mandated in Defendant's Offer of Judgment requesting fees in "the lodestar amount of Two Hundred Fifty-Six Thousand Dollars and 00/100 ($256,000), plus an upward adjustment of 20% for a total of Three Hundred Seven Thousand Dollars and 00/100 ($307,000) together with costs in the amount of One Thousand Four Hundred Seven Dollars and 03/100 ($1,407.03)." (Pl.'s Mem. at 1.)

Scott objects, contending that (1) under the language of the Offer of Judgment, Taylor did not "incur" any attorneys' fees because there is no evidence that Taylor has an obligation to pay attorneys' fees and (2) if she is entitled to attorneys' fees, the requested fees are unreasonable and should be substantially reduced. (Def.'s Mem. Supp. Obj. (Def.'s Obj.) at 4 (Oct. 20, 2020).) On November 10, 2020, this Court heard oral arguments on the motion. This Decision follows.

II

Whether Taylor Incurred Attorneys' Fees

A

Standard of Review

When "review[ing] a document that purports to release rights,"[3] the Court applies "the 'well-settled rules on the interpretation of contracts.'" *Ashley v. Kehew*, 992 A.2d 983, 987 (R.I.

[3] There is no doubt that in this case, the Offer of Judgment purports to release the rights of Taylor to pursue any further action against Scott or Volkswagen that arise out of the facts of the case. Specifically, the Offer of Judgment states:

> "This Offer is in complete satisfaction of all of Plaintiff's claims that Plaintiff has alleged in this action, or that Plaintiff could have alleged arising from or relating to the facts and circumstances that are the subject of this action, against Defendant or Defendant's affiliated companies, the automobile manufacturer and/or distributor from which Defendant acquired the subject vehicle, or any of their current of former directors, officers or employers." (Offer J. at 1.)

2010) (quoting *McBurney v. Teixeira*, 875 A.2d 439, 443 (R.I. 2005); *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)); *see also State Department of Environmental Management v. Administrative Adjudication Division*, 60 A.3d 921, 925 (R.I. 2012) (applying the principles of contract interpretation to review of a consent agreement).

B

Analysis

1

The Offer of Judgment

Scott claims that pursuant to the unambiguous terms of the Offer of Judgment, Taylor is only entitled to costs, including attorneys' fees, "incurred" and because she lacked a fee agreement and has no obligation to pay attorneys' fees, Taylor "incurred" no such fees. (Def.'s Obj. at 4.) Scott argues that because Taylor's husband was one of the attorneys representing her, she has no legal obligation to pay her attorneys and thus, has not "incurred" fees under the plain meaning of the term. *Id.* at 13.

In applying the principles of contract interpretation, if the terms of an agreement "are clear and unambiguous, 'the task of judicial construction is at an end and the agreement must be applied as written.'" *Ashley*, 992 A.2d at 987 (quoting *McBurney*, 875 A.2d at 443). "'In determining whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'" *McBurney*, 875 A.2d at 443 (quoting *W.P. Associates*, 637 A.2d at 356). "'[A]n agreement is ambiguous only when it is reasonably and clearly susceptible to more than one interpretation.'" *Id.* (quoting *W.P. Associates*, 637 A.2d at 356).

Scott cites *United States v. Claro*, 579 F.3d 452 (5th Cir. 2009), for the general rule that, "fees are 'incurred' when the litigant has a legal obligation to pay them." *Claro*, 579 F.3d at 464 (citing *S.E.C. v. Comserv Corp.*, 908 F.2d 1407, 1414-15 (8th Cir. 1990)). In *Claro*, defendant sought attorneys' fees under the Hyde Amendment and requested fees payable to his wife, who assisted defendant with his defense and acted as a paralegal. *See Claro*, 579 F.3d at 464-65. The United States Court of Appeals for the Fifth Circuit found that defendant lacked a legal obligation to pay his wife for her services because: (1) "she was not employed by any of the law firms representing" defendant, "did not contract with [defendant] to provide paralegal services, nor did she bill him for her time spent working on his criminal proceeding"; and (2) the fees requested to pay his wife were separate from and in addition to the compensable fees to pay the law firms he retained and their respective attorneys and support staff, which included three paralegals. *Id.* at 465-66. Therefore, the Court found that under the general rule, no fees were "incurred" to pay his wife. *Id.* at 465.

If compared to *Claro*, Taylor did in fact incur attorneys' fees under this general rule. *Id.* at 465-66. In this case, although Taylor's husband provided legal services to her, unlike in *Claro*, Taylor's spouse is employed by the law firm that represented her throughout this action, as evidenced by the filings since commencement of the action that are signed by her counsel on her behalf. In *Claro*, the law firms that represented defendant were compensated for fees incurred in connection with his defense, and there was no evidence that if the defendant's wife worked for one of those firms, her fees would not be "incurred" and compensable. *Id.* Here too, Taylor is requesting attorneys' fees for the law firm that represented her throughout this action, which were compensable in *Claro* and, here, happen to include work performed by her husband as part of that law firm. *Id.* In *Claro*, the mere fact that defendant's wife was performing the work did not make

the fees not incurred and not compensable; rather, it was the fact that the law firms that represented defendant provided competent and sufficient legal representation, she did not work for one of those firms, her fees were separate from and additional to those legal services, and the husband and wife had no contract for her services, all of which rendered the wife's fees as not incurred. *Id.* Here, Taylor was represented by one firm throughout this action, and the fact that her husband is employed by that firm and provided some of those services is of no conclusive consequence.

The Court in *Claro* also recognized that there are circumstances, however, in which a fee award "is *not* contingent upon an obligation to pay counsel." *Id.* In *Phillips v. General Services Administration*, 924 F.2d 1577 (Fed. Cir. 1991), the United States Court of Appeals for the Federal Circuit recognized that fees are "'incurred' . . . if they are incurred in his behalf, even though he does not pay them" so long as there is "an express or implied agreement that the fee award will be paid over to the legal representative." *Phillips*, 924 F.2d at 1583 (citing *O'Donnell v. Department of Interior*, 2 M.S.P.B. 604, 608-09 (1980)). In *Phillips*, the court found that, under a fee shifting statute, the party "incurs the attorney fees that may be awarded her . . . [and] if no fee award is made to her, she does not have an obligation to pay any further fees to her attorney[.]" *Id.* at 1582.

If compared to *Phillips*, the attorneys' fees in this case were incurred on Taylor's behalf even if she never planned to pay them. *See id.* at 1583. Although the Offer of Judgment is not based on a fee-shifting statute, Taylor's attorneys performed their obligations to her, in her representation, by bringing and pursuing claims under fee shifting statutes.[4] Thus, under the terms of the Offer of Judgment, the attorneys' fees were "incurred in connection with this action" in

[4] Taylor brought claims under § 31-5.1 entitled Regulation of Business Practices Among Motor Vehicle Manufacturers, Distributors, and Dealers, which provides for a reasonable attorney's fee, § 31-5.1-13, and § 6-13.1 entitled Deceptive Trade Practices, which provides for reasonable attorney's fees, Section 6-13.1-5.2(d).

pursuit of recovery for Taylor under fee-shifting statutes, and it is of no effect that the case ended instead in a settlement. (Offer J. at 1.)

There are other circumstances in which a fee award "is *not* contingent upon an obligation to pay counsel." *Claro*, 579 F.3d at 465-66. For example, where a party is represented *pro bono* and bringing a claim under a fee-shifting statue that requires the attorneys' fees to be "incurred," the litigant need not have an obligation to pay counsel in order to receive a fee award. *Claro*, 579 F.3d at 465 (citing *Cornella v. Schweiker*, 728 F.2d 978, 986 (8th Cir. 1984) (considering the legislative history of EAJA and fee awards in pro bono matters, "the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client")). Another circumstance is when "policy dictates allowing fees to further" the purpose of a fee-shifting statue—to ensure fees do not deter litigants that wish to challenge governmental actions. *Id.* at 466 (considering fee-shifting provision under the EAJA). In *Claro*, defendant was not deterred by the costs of litigation because he was represented by counsel, and if his wife had worked for one of the law firms representing defendant, there was no evidence that her services otherwise would not have been compensable. *Id.* at 467.

Our Supreme Court has also recognized that "an award of attorney's fees to a successful plaintiff 'is not contingent upon an obligation to pay an attorney and is not affected by the fact that no fee was charged.'" *Krikorian v. Rhode Island Department of Human Services*, 606 A.2d 671, 674 (R.I. 1992) (quoting *Martin v. Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985)). In *Krikorian*, the Supreme Court considered the fee-shifting provision under Rhode Island's Equal Access to Justice Act (EAJA) and its purpose in discouraging wrongful conduct of administrative agencies and preventing a deterrence effect upon parties with meritorious claims and counsel that would represent them. *Id.* at 675. If only out of pocket expenses were compensable, "any litigant

represented pro bono would not be entitled to reimbursement[,]" which would ride contrary to EAJA's purpose. *Id.* Thus, even when a litigant is represented *pro bono*, with no obligation to pay an attorney, he or she may recover "incurred" attorneys' fees because the fees are incurred in connection with the action. *See id.*

At a minimum, the aforementioned cases and circumstances establish that fees may be "incurred" in absence of an obligation to pay and that the term "incurred," when read alone, is reasonably susceptible to more than one meaning, both with and without an obligation to pay.

In this case, Scott asserts that the award of costs, including attorneys' fees, is not pursuant to a fee-shifting statute, but pursuant to the Offer of Judgment, and therefore, "incurred" should be afforded its plain and ordinary meaning—that if one has not paid and does not have a legal obligation to pay, one has not "incurred" fees. However, the Court disagrees with Scott's contention that the term "incurred" in the Offer of Judgment is unambiguous and means Taylor incurred no attorneys' fees. The Offer of Judgment states that in addition to an amount equal to the cost of her vehicle, Taylor will receive "the amount of costs (including reasonable attorney's fees) *incurred in connection with this action* through the date hereof in an amount to be determined by the Court[.]" (Def.'s Obj., Ex. C at 1) (emphasis added).

Scott cites *Jordan v. Mirra*, Civil Action No. 14-1485, 2019 WL 7037480 (D. Del. Dec. 20, 2019), for the definition of "incur" to mean "'to become liable or responsible' for that thing." *Jordan*, 2019 WL 7037480, at *12 (citing *Incur*, Webster's Third New International Dictionary, Unabridged, http://unabridged.merriam-webster.com). In *Jordan*, there was an agreement between the parties that the prevailing party was entitled to attorneys' fees incurred and the question was whether fees were incurred if the fees were paid by someone else. *Id.* The court found that the fees were incurred by that party because he was liable for the fees as his name was

on firm records as "payor" and even though there was no fee agreement for that particular action, he had been a continuing client of the firm. *Id.*

Here, Scott suggests that the lack of a fee agreement, memorialization of understanding, and documentary communications about a fee agreement mean that Taylor was not liable to the firm for attorneys' fees. (Def.'s Obj. at 13 (citing Def.'s Obj. Ex. E, No. 33 (Pl.'s Suppl. Resp. Def.'s Req. Produc. Docs.).) However, the Response to Production of Documents to which Scott cited and provided as Defendant's Exhibit E, includes a response to Request No. 33 with a supportive "invoice and draft bill reflecting time charges, disbursements and payments,"—which Defendant failed to include. (Def.'s Obj. Ex. E, No. 33.) Also, Taylor's supporting "Affidavit of Jeffrey H. Gladstone, Esq." and its Exhibit A lists Taylor as the only client and person responsible on a draft invoice. (Gladstone Aff., Ex. A.) Although Scott alleges that there is no evidence that the time on the invoice "was actually billed to [Taylor]," there is no case law cited by Scott or that this Court could find to suggest that the time must be billed to the client in order for the client to have incurred the attorneys' fees.

As in *Jordan*, where the party was not the person paying the legal fees but the evidence demonstrated an obligation to pay legal fees, or as in *Krikorian*, where the party was represented *pro bono* and there was no evidence of an obligation to pay legal fees, in both cases attorneys' fees were incurred. *Krikorian*, 606 A.2d at 675; *Jordan*, 2019 WL 7037480, at *12. In this case, Taylor is the party listed on the firm records and invoices and because Taylor added claims pursuant to two statutes with fee-shifting provisions, Taylor need not proceed through the litigation with an underlying obligation to pay legal fees as they come due. *See Krikorian*, 606 A.2d at 675; *see also* §§ 31-5.1-13 and 6-13.1-5.2(d).

In the instant case, lack of a fee agreement between Taylor and her attorneys for this matter is not dispositive, as Scott suggests. As in *Jordan*, where the party was a client of the firm in previous matters and there was no new fee agreement for the matter at hand, such is the case here. *Jordan*, 2019 WL 7037480, at *12. Pursuant to Rule 1.5 of the Rules of Professional Conduct, a fee agreement should be in writing except for when the lawyer will charge a regularly represented client on the same basis or rate. *See* Rule 1.5 cmt. 2. Taylor's counsel stated on record at the hearing on this motion that Taylor was not a new client to the firm. Although there is no fee agreement for this matter, there was some sort of agreement between Taylor and her counsel that the firm was representing her in this matter, as evidenced by the filings submitted by counsel on her behalf from commencement of the action through its conclusion. *See Phillips*, 924 F.2d at 1583 (recognizing that fees are "'incurred' . . . if they are incurred in his behalf" so long as there is "an express or *implied* agreement that the fee award will be paid over to the legal representative") (emphasis added).

In addition, the Rules of Professional Conduct and "'purposes of professional discipline are to protect the public and maintain the integrity of the profession.'" *In re Salzillo*, 37 A.3d 107, 109 (R.I. 2011); *In re McBurney*, 13 A.3d 654, 655 (R.I. 2011) (quoting *In re Almonte*, 678 A.2d 457, 458 (R.I. 1996)). Rule 1.5, specific to fees, was designed to be protection for the client from unreasonable fees, not as a tool for opposing counsel to utilize—against the very client the Rule intends to protect—in construing an Offer of Judgment against them. Allowing opposing counsel to use the Rule as a shield would be contrary to the purpose for which the Rule exists.

Finally, to determine if the Offer of Judgment is "'clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'" *McBurney*, 875 A.2d at 443 (quoting *W.P. Associates*, 637 A.2d at 356). Scott suggests that this

Court should isolate the term "incurred" to determine that it is clear and unambiguous, and that under the definition of this term, no attorneys' fees were incurred. However, the document must be viewed in its entirety, not one word in isolation. *Id.*

The Offer of Judgment offered to Taylor, "the amount of costs (including reasonable attorney's fees) incurred in connection with this action through the date hereof in an amount to be determined by the Court (the "Offer")." (Pl.'s Mem. Ex. A, Offer J. at 1.) Scott drafted the Offer of Judgment; if the term "incurred" was to be afforded the narrow and plain, ordinary, and usual meaning Scott suggests, the term should have been replaced with the terms "billed to and paid by Plaintiff." In addition, this provision of the Offer provides no suggestion that the costs need be *incurred by Plaintiff*; rather, the costs need only be "*incurred in connection with this action*[.]" When read as a whole, "costs (including reasonable attorney's fees) incurred in connection with this action" and when "incurred" is understood under all of the foregoing cases, so long as the attorneys' fees were incurred on behalf of Taylor and in connection with this particular action, the fees are recoverable under the terms of the Offer of Judgment.

The Court also finds that the attorneys' fees recoverable are those through the date the Offer of Judgment was served on Taylor, which is July 9, 2020. The Offer of Judgment stated that the sum to Taylor would include "the amount of costs (including reasonable attorney's fees) incurred in connection with this action *through the date hereof* in an amount to be determined by the Court[.]" The "date hereof" is the date the offer was made to Taylor, which is the date in which Taylor received the offer—July 9, 2020.

2

Pro Se Litigant

Scott argues that Taylor should not be awarded attorneys' fees because she is a *pro se* litigant due to her husband representing her throughout the litigation to whom she "had no obligation to pay[.]" (Def.'s Obj. at 15 ("Rhode Island courts have consistently refused to award attorney fees to *pro se* litigants, including attorneys, who did not have an obligation to pay fees to anyone.").) Scott cites *Wells v. Blanchard*, No. PC-2005-4066 (R.I. Super. Mar. 6, 2015) and explains that in that case "the Court refused to award attorney fees to an attorney who brought a claim on his own behalf under a fee shifting statute." (Def.'s Obj. at 15.) Scott argues that the dicta that "an attorney plaintiff does not 'incur' fees payable to oneself" is synonymous with a plaintiff being represented by a spouse. *Id.* Taylor is not the same person as her husband, and for Scott to suggest that she is or that she has no rights individually and separately from her husband is running a very slippery slope.

A *pro se* litigant is one who appears "on one's own behalf." *Pro se*, Black's Law Dictionary (10th ed. 2014). In *Wells*, the attorney appeared on his own behalf. *Wells*, No. PC-2005-4066 at *25. In the instant case, Taylor did not appear on her own behalf, and she is not an attorney. Taylor purchased a vehicle from Scott, in her own name, as is clear by the Purchase Agreement. (Compl., Ex. A (Oct. 1, 2015).) Taylor owned the vehicle, not her husband. *Id.* She wished to rescind the Purchase Agreement and return the vehicle after she became privy to the defeat device that was installed in her vehicle. *Id.* ¶¶ 7-15. Taylor chose her legal representation, which she has every right to do. Nothing in the Rules of Professional Conduct prohibit an attorney from representing a family member, so long as it is in compliance with the Rules. The mere fact

that her husband worked for the law firm representing her and performed legal services on her behalf is immaterial, *Claro*, 579 F.3d at 465-66, and does not equate to her being a *pro se* litigant.

III

Reasonableness of Attorneys' Fees

Taylor requested attorneys' fees and costs in the amount of $256,000, plus an upward adjustment of twenty percent, for a total request of $307,000. (Pl.'s Mem. at 1.) Scott argues that the amount requested is unreasonable and should be substantially reduced. (Def.'s Obj. at 15-16.)

A

Standard of Review

The determination of whether attorneys' fees are reasonable is an issue of fact. *See Colonial Plumbing & Heating Supply Co. v. Contemporary Construction Company, Inc.*, 464 A.2d 741, 744 (R.I. 1983). A trial justice's award of attorneys' fees, where there "is a contractual basis for awarding" such fees, is afforded discretion and will be reviewed "'for an abuse of discretion.'" *Tri-Town Construction Co., Inc. v. Commerce Park Associates 12, LLC*, 139 A.3d 467, 478 (R.I. 2016) (quoting *Dauray v. Mee*, 109 A.3d 832, 845 (R.I. 2015)).

B

Analysis

"The 'lodestar' is the starting point for determining the reasonableness of attorney's fees and is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Sisto v. America Condominium Association, Inc.*, 140 A.3d 124, 129 n.7 (R.I. 2016) (quoting *In re Schiff*, 684 A.2d 1126, 1131 (R.I. 1996)). In *Sisto*, the Court held that the lodestar base, which reduced the total request by seventy-five percent, was properly determined by the trial justice when calculating a fee award relative only to an anti-SLAPP claim, a claim for which fees

were recoverable, rather than for the issues in the case as a whole. *Sisto*, 140 A.3d at 129. The lodestar amount may then be adjusted upward or downward, based on what is reasonable under the circumstances of the case. *Id.* at 130 (citing *Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980)).

Our Supreme Court has held that "an attorney's fee should be 'consistent with the services rendered, that is to say, which is fair and reasonable.'" *Colonial*, 464 A.2d at 743 (quoting *Palumbo v. United States Rubber Co.*, 102 R.I. 220, 223, 229 A.2d 620, 622 (1967)). "What is fair and reasonable depends, of course, on the facts and circumstances of each case[,]" *Palumbo*, 102 R.I. at 223, 229 A.2d at 622, based on the following reasonableness factors:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> "(3) The fee customarily charged in the locality for similar legal services.
> "(4) The amount involved and the results obtained.
> "(5) The time limitations imposed by the client or by the circumstances.
> "(6) The nature and length of the professional relationship with the client.
> "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> "(8) Whether the fee is fixed or contingent." *Colonial*, 464 A.2d at 743.

"Each of these factors is important, but no one is controlling." *Palumbo*, 102 R.I. at 224, 229 A.2d at 622-23. Because "the factual issue of what is a reasonable fee requires particular facts upon which the trial court can base a decision[,]" *Colonial*, 464 A.2d at 744, the Court requires an affidavit (*Tri-Town* Affidavit) from counsel not representing the parties in the action, from which it can base a fee award, *Tri-Town Construction*, 139 A.3d at 480.

In the instant case, the *Tri-Town* Affidavits provided by the parties reflect extremely different conclusions. *Id.* On the one hand, Taylor's supporting affidavit concluded that the fees sought, as reflected on the billing records, from January 5, 2016 through June 23, 2020 in the amount of $234,488.50, were reasonable. (Pl.'s Mem. Ex. L.) On the other hand, Scott's *Tri-Town* Affidavit concluded that a reasonable lodestar would total $35,958.11. (Def.'s Obj., Ex. J ¶ 33.)

However, Scott's *Tri-Town* Affidavit, in considering the lodestar amount, concluded both the hours spent and the hourly rates were excessive based upon the factors set forth in *Colonial*. *Colonial*, 464 A.2d at 743. Specifically, to come to the "reasonable lodestar" amount of $35,958.11, Scott's expert considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the amount involved and the results obtained; the fee customarily charged in the locality for similar legal services; and the experience, reputation, and ability of the lawyers performing the services. (Def.'s Obj., Ex. J ¶¶ 25-33.) The lodestar amount, however, is the starting point based on "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Sisto*, 140 A.3d at 129, n.7. From that base amount, the reasonableness factors may warrant an adjustment of the lodestar based on what is reasonable under the circumstances of the case. *Colonial*, 464 A.2d at 743.

1

Lodestar Amount

Taylor requests a lodestar in the amount of $256,000. The draft invoice provided with Taylor's Motion for Attorneys' Fees stated a total of $266,692 for professional fees. (Pl.'s Mem., Ex. A.) As found in Section II.B.1, *supra*, fees incurred after July 9, 2020, according to the terms of the Offer of Judgment, are not recoverable. Taylor's invoice included fees in the amount of

$32,115.50 dated after July 9, 2020, and such fees are not recoverable pursuant to the Offer of Judgment. Therefore, only the fees incurred in connection with this action through the date of July 9, 2020, in the amount of $234,576.50, will be considered in the lodestar analysis.[5]

a

Reasonable Hourly Rate

Many federal courts utilizing the lodestar method have held a reasonable rate to mean "the prevailing market rates in the relevant community[.]" *Carter v. State of Rhode Island, Department of Corrections*, 25 F. Supp. 2d 24, 26 (D.R.I. 1998); *see also Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983); *Interfaith Community Organization v. Honeywell International, Inc.*, 726 F.3d 403, 407 (3d Cir. 2013); *Claro*, 579 F.3d at 463; *Wise v. Kelly*, 620 F. Supp. 2d 435, 448 (S.D.N.Y. 2008). A prevailing market rate is:

> "the average hourly rate charged in the local legal community as a whole. It is not the rate charged by particular segments of the bar or attorneys who work for large and prestigious private law firms. Nor is it the actual billing rate of any single attorney. The court said the average rate in the local legal community is a better approximation of the hourly fee that would be charged by reasonably competent counsel. The average rate is a satisfactory estimate of the hourly fee of attorneys who are neither unusually skilled nor experienced, but capable of providing required legal services." Don Zupanec, *Remedies: Attorneys' Fees – Lodestar – Reasonable Hourly Rate*, 19 No. 11 FEDERAL LITIGATOR 18 (2004) (internal quotations omitted).

[5] An Affidavit from Taylor's counsel stated that twenty hours not reflected in the billing records, dated prior to January 5, 2016, were initially spent "researching legal issues, drafting the complaint and engaging in initial negotiations." (Pl.'s Mem., Ex. A ¶ 9.) Although Taylor's *Tri-Town* Affidavit by Attorney Russo stated that he "interviewed Attorney Jeffrey H. Gladstone . . . regarding work performed prior to January 5, 2016[,]" Attorney Russo's Affidavit provides no further explanation or conclusion relative to the reasonableness of the work performed prior to January 5, 2016. Without any basis for determining the reasonableness of the hours expended and rate, the Court cannot consider the fees as part of an award. *See Colonial*, 464 A.2d at 744.

Scott provided and its expert in the *Tri-Town* Affidavit partially relied upon a 2018 Real Rate Report (Report), which is "The Industry's Leading Analysis of Law Firm Rates, Trends, and Practices[.]" (Def.'s Obj., Ex. K; Def.'s Obj., Ex. J ¶ 22.) Scott's expert concluded that reasonable hourly rates would be, at a partner level, $275 and, at an associate level, $225. (Def.'s Obj., Ex. J ¶ 24.) Scott's expert opined that: (1) yearly increases in the hourly rates were unreasonable and not agreed to by the client; (2) the time spent by a law firm partner, Attorney Gladstone, at senior level rates rather than associate rates was unreasonable and "there was nothing complex or novel about this simple consumer litigation . . . [and Taylor] would have had no problem finding competent and experienced Rhode Island Counsel to accept her case" at the suggested rates; (3) Attorney Taylor, according to Taylor's expert in its *Tri-Town* Affidavit, served as "litigation support" and should be paid at an associate rate; and (4) Rhode Island attorneys typically represent family members at substantially discounted rates. (Def.'s Obj., Ex. J ¶¶ 19-24.)

Taylor's expert stated that "in the role of the lead litigation partner . . . Attorney Gladstone's blended hourly rate [of $437.00 per hour] . . . [was] within the range of prevailing rates taking into account the qualification, experience and specialized competence[.]" (Pl.'s Mem., Ex. L ¶ 12.) In addition, Taylor's expert opined that due to Mr. Taylor's role in this case, as "providing litigation support . . . his blended rate [of] $347.00 per hour . . . [is] in the range of prevailing rates in the community for attorneys providing the type of litigation support undertaken by Attorney Taylor[.]" *Id.* ¶ 13. An affidavit of Attorney Gladstone provided that he has over thirty years of experience as a trial lawyer, has focused his practice on complex business and commercial litigation matters, is a partner at the law firm Partridge Snow & Hahn, LLP, and has a current hourly rate of $465. (Gladstone Aff. ¶¶ 2-4 (Aug. 25, 2020).) In addition, Attorney Taylor "has thirty-two years of litigation experience" and a current hourly rate of $385. (Pl.'s Reply Mem., Ex. N ¶ 5.)

The Report provided that partner level attorneys, with more than twenty-one years of experience, based out of Providence, Rhode Island, had an average hourly rate of $421 in 2018, $381 in 2017, and $399 in 2016. (Def.'s Obj., Ex. K at 34.) On the higher end, the Report's third quartile[6] provided that partners of twenty-one plus years of experience in Providence stated an hourly rate of $582 in 2018. *Id.* In addition, the Report provided that litigation associates, based out of Providence, had an average hourly rate of $219 in 2018, $219 in 2017, and $208 in 2016. *Id.* at 29.

Prevailing market rates, similar to those set forth in the Report, are appropriate benchmarks under the circumstances of this case. *See, e.g.*, *Carter*, 25 F. Supp. 2d at 26. The Report also eluded to "variables that drive rates up or down" including: geographic location of counsel, comparing urban to rural; degree of difficulty of the case, including complexity of or time consumed by the case; experience and reputation of counsel; and the firm's overhead. (Def.'s Obj., Ex. K at 6.) Although Scott's expert's opinion was that Taylor's counsel were inefficient, the opinion also stated that counsel "posses[es] the experience and ability to competently and efficiently pursue this litigation." (Def.'s Obj., Ex. J ¶ 29.)

Based on the foregoing, the Court finds that Attorney Gladstone's hourly rates of $430 in 2016, $435 in 2017, $450 in 2018, $460 in 2019, and $465 in 2020 are reasonable rates compared to the prevailing market rates in the community—as reflected in the 2018 Real Rate Report—and commensurate with his level and years of experience. In addition, although Mr. Taylor's role was providing "litigation support," he is not an associate attorney, which would justify an associate

[6] The third quartile of data is the median, or middle, of the upper half or in other words, the 75th percentile. *See Understanding Medians and Quartiles*, WTF Statistics (2018), https://wtfstatistics.com/index.php/references/variables-distributions/medians-and-quartiles/ (last visited Jan. 7, 2021).

rate as set forth in the Report or according to Scott's expert. Rather, Mr. Taylor has thirty-two years of litigation experience and his hourly rates of $335 in 2016, $345 in 2017, $355 in 2018, $375 in 2019, and $385 in 2020 are reasonable rates compared to the prevailing market rates in the community and commensurate with his level and years of experience.

Furthermore, the practice of notifying the client of rate changes, which Scott's expert opined justifies the unreasonableness of a rate change over the course of the litigation, is for the protection of the client and is neither a sword nor shield which should be allowed to be used by opposing counsel. In addition, Scott's expert's opinion that Taylor could have found competent and experienced counsel to accept her case for less, is equally unavailing. Taylor had a right to choose her counsel, and she need not shop the market to get the lowest rate or accept representation from counsel with whom she has no experience based solely on the fact that they have a lower hourly rate. In addition, any opinion that other counsel, at Scott's suggested hourly rates, would have sufficed is pure speculation.

Scott's expert opined that some of the hours spent by Attorney Gladstone as a partner level attorney were unreasonable as they were spent on tasks that could have been performed by associate attorneys. Although only persuasive, the First Circuit has recognized that "[a] court may reduce an attorney's hourly rate based on the type of work that attorney performed during the litigation." *Bogan v. City of Boston*, 489 F.3d 417, 429 (1st Cir. 2007) (citing *Miles v. Sampson*, 675 F.2d 5, 9 (1st Cir. 1982); *O'Rourke v. City of Providence*, 235 F.3d 713, 737 (1st Cir. 2001) (concerning a reduction in the billable rate of a partner attorney where the attorney assumed "the role of an associate" at the trial by performing less complex tasks).

However, this Court has recognized that "attorneys billing at a higher rate may 'perform their duties in fewer hours than less experienced attorneys who may bill at a lower rate.'" *Adler v.*

The Lincoln Housing Authority, C.A. No. 82-2045, 1995 WL 941385, at *2 (R.I. Super. Jan. 24, 1995) (quoting *In Re Public Service Co. of New Hampshire*, 160 B.R. 404, 408 (Bankr. D.N.H. 1993)). In that case, we recognized that it was not unusual for a partner to make court appearances, review files, participate in telephone conferences, prepare for hearings, and do some research and writing. *Id.* Accordingly, the Court finds that the tasks performed by Attorney Gladstone, whereby partner rates were charged, were not unusual for an attorney of his level of experience, and tasks were shared with Attorney Taylor, who billed at a lower rate. Where those tasks may have been duplicative or unnecessary, such will be addressed relative to reasonable hours expended.

b

Number of Hours Reasonably Expended on the Litigation

Taylor asserts that all hours expended on the litigation were necessary and proper in the prosecution of Taylor's claims. (Pl.'s Reply Mem., Ex. N ¶ 7.) On the other hand, Scott contends that hours expended on matters that did not advance Taylor's case must be excluded in their entirety, including time spent on monitoring litigation concerning Volkswagen and Taylor's unsuccessful Motion to Strike and for Sanctions. (Def.'s Obj. at 20-21.) The Court, in part, agrees with Scott.

In general, parties entitled to fee awards are not entitled to "awards for hours that are duplicative, unproductive, excessive or unnecessary." *In re Schiff*, 684 A.2d at 1131 (citing *Hensley*, 461 U.S. at 434). Time "'not properly billed to one's client [is] not properly billed to one's adversary[.]'" *Id.* (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)). In addition, "when more than one attorney represents a plaintiff, the records must contain a 'convincing description of the division of labor' so that it can be determined whether and to what

extent the efforts of various counsel were duplicative." *Id.* at 1132 (quoting *Furtado v. Bishop*, 635 F.2d 915, 922 (1st Cir. 1980)).

First, although Scott argues that all hours spent "unrelated to Plaintiff's case against Scott" should be stricken as "excessive, wasteful and unnecessary[,]" the Court finds that some—but not all—of those hours were related to Taylor's case against Scott and not unnecessary. (Def.'s Obj. at 21.) Scott summarized in its Appendix A-1 a total of 125.9 hours Taylor's counsel recorded for purposes of monitoring a consumer class action in the Northern District of California (MDL) (41.6 hours), the dealer class action against Volkswagen (38.7 hours), and other proceedings and related matters against Volkswagen (45.6 hours). *Id.*; Def.'s App. A-1. Shortly after filing the instant case, Taylor sought a prompt resolution of her rescission claim. (Pl.'s Mem. Ex. F.) Scott brought into issue the MDL concerning Volkswagen when it sought to stay the instant action pending the MDL and further remove the instant action to Federal Court, whereby Volkswagen then attempted to transfer the case to the MDL. (Pl.'s Mem. Ex. G; Pl.'s Mem. at 9-10.)

The issues being tried in the aforementioned cases were related to Taylor's claims. Although Taylor was asking for rescission and other remedies from Scott, in particular, based on its role as the dealership who sold the car and installed the defeat device, Scott understood that Taylor's case was related to the MDL as is obvious from the Notice of Removal Scott filed with the United States District Court in the District of Rhode Island. (Notice of Removal ¶¶ 11, 21-23 (Feb. 22, 2016).) The defeat device that Scott installed in Taylor's car and which formed the basis of her Complaint was one of the very issues being tried in the MDL. *Id.* at 21-22.

Not only were some of the hours spent related to Taylor's case but the time spent was necessary as competent attorneys, such as researching the impact of a settlement of the class action on Taylor's claims and researching issues to prepare motions and discovery. (Def.'s App. A-1.)

Attorneys commonly and should research other cases and outcomes to prepare a client's case. After reviewing all of the 125.9 hours expended, as set forth in Scott's Appendix A-1, the Court finds that many of the hours recorded, and to which Scott requests the Court cut completely from the lodestar amount, were necessary and include drafting motions and preparing for hearings, and the research necessary to draft and prepare, in the instant case. However, due to some excessive, duplicative, or unnecessary hours recorded whereby it was not clear how the task was related to the instant case, the Court is reducing the total reflected in Defendant's Appendix A-1 by $7,108.50 to a total of $42,761.00.

Second, Scott contends Attorney Taylor spent 71.8 "unnecessary, wasteful and excessive" hours on a "procedurally improper and unsuccessful Motions to Strike and for Sanctions in response to [Scott's] Motion to Dismiss." (Def.'s Obj. at 21.) Our Supreme Court has held that a motion need not be successful in order for fees to be awarded when incurred in connection with that motion. *See Tri-Town Construction*, 139 A.3d at 479 ("[T]he fact that a motion has been denied, standing alone, is not enough to invalidate an award of legal fees."); *see also Pearson v. Pearson*, 11 A.3d 103, 105-08 (R.I. 2011). In *Pearson*, an award of fees pursuant to a settlement agreement did not require the party seeking fees to be successful on the merits of its motion; all that was required was for the fees sought to be (1) sought from the bankrupt party, (2) reasonable, and (3) "incurred in 'pursuing . . . rights pursuant to remedies under [the settlement agreement].'" *Pearson*, 11 A.3d at 109 (quoting Settlement Agreement) ("declin[ing] to read nonexistent terms or limitations"—that being the party needed to be a prevailing party—into a contract).

In the instant case, Scott avers that Taylor's Motion to Strike and for Sanctions filed in response to Scott's Motion to Dismiss was procedurally improper and unsuccessful. The Offer of Judgment only required that the costs be incurred in connection with the action and reasonable as

determined by the Court. (Pl.'s Mem. Ex. A ("the amount of costs (including reasonable attorney's fees) incurred in connection with this action through the date hereof in an amount to be determined by the Court").) The motion need not be successful, and this Court declines to read this non-existent term into the parties' agreement. *See Pearson*, 11 A.3d at 109. Indeed, "[i]t is a basic tenet of contract law that the contracting parties can make as 'good a deal or as bad a deal' as they see fit . . . ." *Id.* at 110 (quoting *Rodrigues v. DePasquale Building and Realty Co.*, 926 A.2d 616, 624 (R.I. 2007); *Durfee v. Ocean State Steel, Inc.*, 636 A.2d 698, 703 (R.I. 1994)).

In addition, Scott's Appendix A-2, the hours which Scott contends are non-compensable in relation to Taylor's Motion to Strike and for Sanctions, includes time recorded unrelated to the Motion to Strike and for Sanctions; for instance, time to respond to Scott's Motion to Dismiss, attend hearings, attend to Taylor's Motion for Summary Judgment, and respond to Scott's Motion for More Definite Statement. (Def.'s App. A-2.) The Court finds that the items listed on Scott's Appendix A-2 were necessary to defend Scott's motions, to pursue Taylor's claims, or in pursuit of Taylor's case strategy even if that strategy was unsuccessful.

Third, Scott contends that the hours expended on discovery issues was unreasonable. Scott's expert opined that the 176.5 hours spent in discovery and related motions was unreasonable as a "grossly high number of excessive wasteful hours[.]" (Def.'s Obj., Ex. J ¶ 18.) Specifically, Scott's expert found that discovery on a "simple consumer case" absent "certain hallmarks of discovery that would typically require the incurrence of additional and substantial hours[,]" such as depositions and evidentiary hearings, make the hours spent on discovery unreasonable. *Id.* at ¶¶ 18, 26. Taylor's expert opined that of the 168.7 hours he reviewed as "spent on discovery up to the date of . . . an offer of judgment[,]" 90.9 of those hours were spent "on discovery disputes

that [Taylor] had to address in order to advance discovery responses in this matter." (Pl.'s Mem., Ex. L ¶ 20.)

Of the hours recorded in Taylor's draft invoice and as reflected on Scott's Appendix B, some of the items listed in Scott's Appendix B were not related to discovery; the hours based on discovery related matters are closer to the number Taylor's expert stated, 168.7 hours. (Def.' App. B, (Oct. 20, 2020).) Understanding that the case was devoid of actual depositions or evidentiary hearings, Taylor did in fact seek a deposition and subsequently defended Scott's motion to quash the deposition. In addition, there were several discovery related motions needed to compel Scott to comply with discovery requests, and such cannot be said to be unnecessary. However, the Court finds that some of the hours were duplicative regarding discovery and other matters or were subject to block billing for which this Court cannot make a reasonable assessment of whether or not the hours were duplicative and/or unnecessary, and, as a result, reduces the remaining hours expended by ten percent. This results in a lodestar amount of $208,997.30.

2

Taylor's Request for an Upward Adjustment from the Lodestar Amount

Taylor requests an upward adjustment of twenty percent to the lodestar amount due to four factors set forth in *Colonial*, 464 A.2d at 743, listed *supra*, namely: the time and labor required, novelty and difficulty of the questions involved, and skill required to perform the legal service properly; the fee customarily charged in the locality for similar legal services; the amount involved and results obtained; and the experience, reputation, and ability of the lawyers performing the services. (Pl.'s Mem. at 21.) Of the eight factors, there was no evidence provided by either party from which this Court can consider an adjustment of the fee award based on the instant case precluding Taylor's attorneys from other employment, imposing time limitations by the client or

circumstances, or being a fixed or contingent fee. Scott's expert did opine on the nature and length of the attorneys' professional relationship with the client. (Def.'s Obj., Ex. J ¶¶ 13, 24.) Thus, the Court will consider the five factors to determine whether an adjustment of the fee award is warranted.

a

Factor One: The Time and Labor Required, Novelty and Difficulty of the Questions Involved, and Skill Requisite to Perform the Legal Service Properly

Scott argues and its expert joins in the opinion that there was nothing "novel or complex about the claims or the law in this matter." (Def.'s Obj., Ex. J ¶ 14.) Scott's expert bases his opinion on the claims and supporting law set forth in Taylor's First and Second Amended Complaints and the simple nature of the case being that the sole defendant, Scott—a car dealership, allegedly made misrepresentations to Taylor "during the sale of her car." *Id.*

However, what may have started as a simple consumer case—whereby Taylor sought rescission of a purchase agreement and revocation of acceptance of her vehicle and which Scott rejected—turned into five years of litigation, directed by or at minimum dependent upon Volkswagen and its then pending litigation involving the defeat device, with Scott's multiple attempts to stay the action pending the outcome of cases against Volkswagen and attempts to remove the action to federal court, and Volkswagen's attempt to transfer Taylor's case to the MDL in the Northern District of California. Plainly, what may have started as a "simple consumer case"—which could have been resolved with the return of the vehicle and a refund to Taylor—per Scott's own efforts, transformed into a case where Taylor needed to defend against being subject to the class action against Volkswagen.

Furthermore, Scott recognized Taylor's claims regarding the defeat device were inextricably related to more complex claims being tried against Volkswagen, even though Taylor was seeking a simple form of relief directly from Scott. (Notice of Removal, ¶¶ 11, 21-22 (discussing the defeat device, "that the instant action was not a simple claim for vehicle value," and that in the MDL a settlement master was appointed "to use his considerable experience and judgment to facilitate settlement discussions among the various parties in these complex matters").)

Nevertheless, the Court finds that the complexities involved in the litigation and the skill required of Taylor's attorneys to secure an Offer of Judgment—which included a full refund of Taylor's purchase price, retention of the vehicle, costs, and reasonable attorneys' fees—are already reflected in Attorney Gladstone's and Attorney Taylor's hourly fees and do not support an additional upward adjustment.

b

Factors Three and Seven: Fee Customarily Charged and Experience, Reputation, and Ability of Counsel

In addition, the Court finds that factors three and seven—the fee customarily charged in the locality for similar legal services and the experience, reputation, and ability of the lawyers performing the services—are also reflected in Taylor's attorneys' hourly fees, were considered in the Court's assessment of a reasonable hourly rate pertaining to the lodestar amount, and do not warrant an additional upward adjustment. *See Colonial*, 464 A.2d at 743; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) ("Because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'").

c

Factor Four: The Amount Involved and Results Obtained

Scott contends that the amount of fees requested are disproportionate to the results obtained, a recovery in the amount of $29,443.75. (Def.'s Obj. at 17.) Taylor accepted Scott's Offer of Judgment—which included: retaining the vehicle; the sum of $29,443.75 inclusive of her claims "for compensatory damages, incidental and consequential damages, punitive damages, and pre- and post-judgment interest"; and costs including reasonable attorneys' fees—rather than continue to pursue her claims against Scott for rescission, reimbursement, damages (including compensatory, incidental, consequential, and punitive damages), and costs and attorneys' fees. (Second Am. Compl. at 12.; Offer. J. at 1.) According to Scott's expert, the amount involved in the case as sought by Taylor was "approximately $100,000 to $150,000" which in his opinion is "disproportionate to the amount . . . recovered[.]" (Def.'s Obj., Ex. J ¶ 27.)

Scott cites to this Court's decision in *Ferris Avenue Realty, LLC v. Huhtamaki, Inc.*, No. PB 07-1995, 2013 WL 1789488 (R.I. Super. Apr. 22, 2013) to support the proposition that in a private litigation for economic damages, such as the case here, "[i]t shocks the conscience that such an amount could be spent litigating a case with such a comparatively smaller amount in controversy and ultimately awarded." *Ferris*, 2013 WL 1789488, at *7. This Court determined in *Ferris*, however, that the fee request of $1,095,036.57 when compared to the jury award of $251,121.06 for the breach of an indemnity agreement, where the amount recovered was equal to the amount in controversy, was disproportionate and supported a reduction to $734,199.73. *Id.* at *1, 6-7.

Ferris is only persuasive authority and the instant case is different in several respects. First, here, the amount in controversy valued at $100,000 to $150,000 is not equal to the amount

recovered of $29,443.75. *Id.* at *6. Second, Taylor's recovery pursuant to an Offer of Judgment is not reflective of or comparable to a jury award or a damages award after adjudication of claims on the merits, as was the case in *Ferris*. *Id.* at *7. Rather, here, the results achieved were those pursuant to an Offer of Judgment, whereby Taylor *settled* for the amount in the Offer of Judgment rather than pursue the case through trial. Scott was well aware of the five years of contentious litigation when it offered Taylor an amount to which Scott was willing to *settle*. Simply, the proportion of the settled for amount to the requested attorneys' fees in this case is not comparable to an amount obtained at trial to the requested attorneys' fees in *Ferris*. *Id.* Noteworthy is the fact that the amount Taylor settled for included her costs and reasonable attorneys' fees. Scott cannot simply separate the $29,443.75 as the only amount recovered to exasperate its disproportion to the requested attorneys' fees because the attorneys' fees are part of the amount recovered yet left to be determined by the Court.

Finally, although the final number of $29,443.75, at first glance, appears to be out of proportion to the fees requested, Taylor's attorneys were successful in avoiding removal to federal court and transfer to the MDL, which likely would have altered Taylor's preferred relief. In other words, all of the hours expended were required of the attorneys to obtain the results achieved by Taylor albeit pursuant to an Offer of Judgment in a case where Taylor, individually, pursued Scott for relief. *See Hensley*, 461 U.S. at 435 n.11 ("[A] plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.").

In sum, the Court finds no reason, simply based on proportion of $29,443.75 to the requested amount of attorneys' fees, to adjust the lodestar amount.

d

Factor Six: The Nature of the Professional Relationship with the Client

Scott's expert alluded to the nature of the professional relationship between Taylor and her counsel and opined that in light of the familial relationship between Taylor and Attorney Taylor, as husband and wife and as is typical in the community when representing family members, a "substantially discounted hourly rate" is warranted. (Def.'s Obj., Ex. J ¶¶ 24-25.) Scott did not cite to, nor could this Court find, any case law whereby a family relationship warranted a discounted attorney's fee or a downward adjustment of a lodestar amount.

However, the facts of the instant case speak for themselves. Taylor's lead attorney on her case was Attorney Gladstone, a partner of a firm with whom Taylor has no familial relationship. Taylor's husband, Attorney Taylor, provided Attorney Gladstone with litigation support and acted as co-counsel. What at first site appeared to be a simple consumer rescission of contract case, which would have resolved the dispute in 2015, was rejected by Scott and other avenues were pursued. If resolved by Taylor's initial terms, "[t]here would have been no attorneys' fee claim" and may have been no attorneys' fees for Taylor simply from her capacity as a family member of Attorney Taylor. (Pl.'s Mem. at 1-2.)

After five years of engaging a partner of a law firm, with whom Taylor has no family relationship, and counsel with over thirty years of experience, who happens to be Taylor's husband, it is more reasonable for this Court to accept that the quick resolution Taylor sought five years ago would have been attributed a substantial family discount. That very discount has been accounted for because Taylor's attorneys did not provide billing records for filing the Complaint in October of 2015, seeking a prompt resolution with Scott in November of 2015, and drafting of a Motion for Partial Summary Judgment in December of 2015. Rather, the billing record begins

in January of 2016 with a review of Scott's Motion to Dismiss and drafting of a response. (Gladstone Aff., Ex. A.) Therefore, to this Court's better judgment, the billing record—by not including fees for services prior to the case being contested by Scott—reflects Taylor's "family discount."

Therefore, the Court finds that the nature of the professional relationship does not support an adjustment to the lodestar amount.

IV

Conclusion

Having found that none of the factors set forth in *Colonial* warrant an adjustment of the lodestar amount, neither upward nor downward, the Court determines that the reasonable attorneys' fees are the lodestar amount of $208,997.30. *Colonial*, 464 A.2d at 743. Based on the foregoing, the Court finds that Taylor incurred attorneys' fees and costs in connection with this action, and pursuant to the Offer of Judgment, the total due to Taylor equates to $210,404.33.[7] Counsel for Taylor should submit the appropriate order to the Court.

[7] Attorneys' fees in the amount of $208,997.30 plus costs in the amount of $1,407.03 equals $210,404.33.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Catherine Taylor v. Scott Motors, Inc. d/b/a Scott Volkswagen
CASE NO:	PC-2015-4284
COURT:	Providence County Superior Court
DATE DECISION FILED:	February 4, 2021
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Jeffrey H. Gladstone, Esq.; Robert K. Taylor, Esq.
For Defendant:	Stephen P. Cooney, Esq.; Gerald C. DeMaria, Esq.