APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JANUARY 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1921

AMOS N. JONES,

Petitioner-Appellant,

v.

CAMPBELL UNIVERSITY; JOHN BRADLEY CREED; ROBERT CLYDE COGSWELL, JR.; TIMOTHY ZINNECKER; CATHOLIC UNIVERSITY OF AMERICA,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:20-cv-00029-BO)

Submitted: November 29, 2022
Decided: January 4, 2023

Before THACKER and HEYTENS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Amos N. Jones appeals the district court's orders awarding him only $500 in sanctions for the Defendants' violation of the district court's local rules, awarding the Defendants sanctions based on Jones' failure to attend his deposition, and denying his motion for sanctions as moot after he requested that the district court dismiss his case. Finding no reversible error, we affirm.

We review for abuse of discretion a district court's imposition of sanctions under Fed. R. Civ. P. 37, *see Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003), and for a violation of the district court's local rules, *see Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009). "A court abuses its discretion when its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *In re Jemsek Clinic, P.A.*, 850 F.3d 150, 156 (4th Cir. 2017) (internal quotation marks omitted). When determining what sanctions to impose under Rule 37,* a court must consider "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective." *Anderson v. Found. for Advancement, Educ., & Emp. of Am. Indians*, 155 F.3d 500, 504 (4th Cir. 1998).

* The district court's local alternative dispute resolution (ADR) rules incorporate the sanctions listed in Rule 37. *See* E.D.N.C. ADR R. 101.1d(h).

We discern no abuse of discretion in the district court's decisions. As for the Defendants' failure to comply with the local ADR rules, the Defendants did not act in bad faith—the mediation occurred during the peak of the pandemic, the insurance carrier had a no-travel policy because of the pandemic, and the university officials had official tasks to which they were attending on the day of the mediation. Moreover, the defense parties present had full authority to settle the case on behalf of all the Defendants. Thus, Jones was not prejudiced by the absence of the parties who failed to appear.

This is in contrast to Jones' conduct in failing to attend his deposition. There is a significant need to deter parties from unilaterally deciding not to attend a properly scheduled deposition. Although Jones compares his conduct to how the Defendants handled the mediation, this is not an apt comparison. The Defendants could accomplish nothing at the deposition but to identify exhibits for the record, whereas Jones was able to engage in settlement discussions during the mediation. And Jones took no steps to notify either the Defendants or the district court of his decision not to attend his deposition.

Finally, Jones concedes that a motion for sanctions seeking substantive relief becomes moot when a case is dismissed. The only sanction Jones sought in his motion for sanctions was a default judgment against the Defendants. Thus, his motion sought substantive relief and the district court appropriately denied it as moot when it granted his request to dismiss his case.

Accordingly, we affirm the district court's orders. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, DATED AUGUST 19, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:20-CV-29-BO

AMOS N. JONES,

Plaintiff,

v.

CAMPBELL UNIVERSITY, *et al.*,

Defendants.

ORDER

This cause comes before the Court on plaintiff's Rule 59(e) motion to amend judgment as to [186] order. Defendants have responded, plaintiff has replied, and the matter is ripe for ruling. For the reasons that follow, plaintiff's motion is denied.

BACKGROUND

The Court dispenses with a full recitation of the procedural and factual background of this matter. On

Appendix B

July 20, 2021, the Court adopted in part and rejected in part the memorandum and recommendation of United States Magistrate Judge Jones and dismissed plaintiff's complaint without prejudice. The Court further affirmed the order of Magistrate Judge Jones awarding reasonable costs and attorney fees to defendants associated with a November 10, 2020, deposition of plaintiff which plaintiff failed to attend. On July 22, 2021, plaintiff filed the instant motion. Plaintiff contends that the Court's order and judgment should be altered in light of evidence he contends is entirely dispositive which was not before the undersigned. Plaintiff asks that the June 20, 2021, order be amended to "'disaffirm the magistrate judge's decision to award fees and costs associated with the Nov. 10, 2020, deposition' as 'not adequately supported by the full record.'" [DE 189 at 19]. Plaintiff requests in the alternative that the Court certify the dispute for immediate appeal pursuant to 28 U.S.C. § 1292.

DISCUSSION

A party may move a court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e). Reconsideration of a judgment is an extraordinary remedy, *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998), and the decision to alter or amend a judgment is committed to the discretion of the district court. *See Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). The Fourth Circuit has recognized three bases for granting such a motion: when the court is shown (1) an intervening change in controlling law; (2) new evidence that was not previously available; or (3) that

the court has committed a clear error of law or manifest injustice. *Robinson v. Wix Filtration Corp., LLC,* 599 F.3d 403, 407 (4th Cir. 2010). A party may not use a Rule 59(e) motion to raise arguments which could have been raised prior to entry of judgment or argue a novel legal theory that was previously available; "if a party relies on newly discovered evidence in its Rule 59(e) motion, the party must produce a legitimate justification for not presenting the evidence during the earlier proceeding." *Pac. Ins. Co.,* 148 F.3d at 403 (internal quotation and citation omitted).

Plaintiff primarily asserts that a letter sent by his counsel to counsel for defendants on September 14, 2020, was not before the undersigned when considering the order and memorandum and recommendation (M&R) of Magistrate Judge Jones and that it is entirely dispositive of the issue of whether sanctions were warranted for his failure to appear at the November 10, 2020, deposition. [DE 189-1]. The letter plaintiff relies on is attached as Exhibit A to the instant motion. The same letter was also filed by plaintiff in support of his objections to the order and M&R of Magistrate Judge Jones. [DE 164-3]. Plaintiff's objections to the order and M&R and his attachments have already been considered and the letter does not amount to any new evidence. Moreover, plaintiff does not argue, nor could he as he does concede that it was attached to his opposition to defendants' motion for attorney fees [DE 17 6-1], that the evidence was previously unavailable.

Plaintiff has identified no intervening change in controlling law. Plaintiff also fails to demonstrate that the Court has committed a clear error of law or manifest

injustice. The Court reviewed the order of Magistrate Judge Jones assessing reasonable costs and attorney fees for plaintiff's failure to attend his properly noticed deposition for clear error and discerned none. *See also Flame SA. v. Indus. Carriers, Inc.*, 39 F. Supp. 3d 752, 756 (E.D. Va. 2014) (citation omitted) ("sanctions ordered per Federal Rule of Civil Procedure 37, so long as they do not involve dismissal, fall squarely within the jurisdiction of a magistrate judge."). As discussed in the Court's prior order, [DE 186], "the Federal Rules do not allow a party to decide unilaterally that they will not attend a properly noticed deposition." *Johnson v. N Carolina Dep't of Just.*, No. 5:16-CV-00679-FL, 2018 WL 5831997, at *3 (E.D.N.C. Nov. 7, 2018). The Federal Rules of Civil Procedure further contemplate assessment of reasonable expenses, including attorney fees, caused by the failure to attend. Fed. R. Civ. P. 37(d)(1)(3). The instant motion merely rehashes arguments previously made by plaintiff that his failure to attend was substantially justified because he was obligated to appear before a different tribunal on the day of the deposition and that the sanction would otherwise be unjust. However, plaintiff has failed to come forward with any argument or evidence that would support a finding that this Court has committed a clear error of law in affirming the magistrate judge's order. Nor has he demonstrated any manifest injustice.

Finally, the Court denies plaintiff's request to certify this matter for interlocutory appeal pursuant to 28 U.S.C. § 1292. Courts may certify interlocutory orders for appeal when they "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order

may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136-37 (4th Cir. 1997). Section 1292(6) certification is left to a court's discretion but, given the final judgment rule's aversion to piecemeal review, it is best reserved for exceptional cases. *See James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993).

Plaintiff has identified no controlling question of law as to which there is a substantial ground for difference of opinion. Rather, he argues that this Court misapplied the settled law to the facts and evidence in this case, which is inappropriate for certification under § 1292(6). *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 341 (4th Cir. 2017). The requirements for certification under § 1292(6) must be strictly construed. *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). Plaintiff's request is therefore denied.[1]

CONCLUSION

In sum, plaintiff has failed to satisfy his burden to show the extraordinary remedy of altering or amending the Court's judgment is warranted or that certification of an appeal pursuant to 28 U.S.C. § 1292(b) is appropriate. Plaintiff's Rule 59(e) motion to amend judgment [DE 188] is DENIED.

SO ORDERED, this 19 day of August, 2021.

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1. Moreover, just prior to the filing of this order, plaintiff noticed an appeal of this Court's 20 July 2021 order. [DE 196].

Appendix B

/s/TERRENCE W. BOYLE
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, DATED AUGUST 16, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA, WESTERN DIVISION

No. 5:20-CV-29-BO

AMOS N. JONES,

Plaintiff,

v.

CAMPBELL UNIVERSITY, INC., ET AL.,

Defendants.

August 16, 2021, Decided;
August 16, 2021, Filed

ORDER

This matter is before the court on Defendants' Motion for Attorneys' Fees and Costs. [DE-169]. Plaintiff filed a memorandum in opposition to the motion, [DE-176], and the time for further briefing has expired. For the reasons that follow, the motion is allowed and Plaintiff or his counsel shall pay Defendants the sum of $7,014.65 as a sanction for failing to attend Plaintiff's properly noticed

deposition. This order is stayed pending the court's ruling on Plaintiff's motion to alter judgment.[1] [DE-188].

I. Background

The procedural history of this case is well-documented in prior orders, [DE-163, -186], and is incorporated here by reference. Particularly relevant to the instant motion is the following case history.

On November 13, 2020, Defendants moved to dismiss Plaintiff's amended complaint with prejudice pursuant to Fed. R. Civ. P. 37(d) and 41(b) based on Plaintiff's failure to attend his deposition noticed for November 10, 2020, his lack of diligence in prosecuting his claims, and his failure to meaningfully participate in the discovery process. [DE-134]. Part of the relief sought in the motion was for an award of attorney's fees and costs associated with Plaintiff's failure to attend his deposition and with bringing the motion to dismiss. *Id.* On November 16, 2020, Plaintiff filed a notice regarding the motion to dismiss indicating that a fuller memorandum would be filed in the coming days, [DE-136], but no such memorandum was filed. The motion was referred to the undersigned on April 14, 2021. [DE-155]. On May 14, 2021, the undersigned entered an Order and Memorandum and Recommendation that, in relevant part, recommended allowing Defendants'

1. Plaintiff in his response requests the district court certify "the disputed magistrate's order for immediate appeal under § 1292[.]" Pl.'s Mem. [DE-176] at 17. Plaintiffs motion to amend judgment [DE-188], pending before Judge Boyle, seeks the same certification and, accordingly, it is not addressed here.

motion to dismiss with prejudice and ordered Plaintiff to pay Defendants' reasonable costs and attorney's fees associated with Plaintiff's failure to attend his November 10, 2020 deposition. [DE-163]. Defendants, in response to the court's order, filed the instant motion for fees and costs seeking payment of $30,422.01, [DE-169], to which Plaintiff filed a response in opposition, [DE-176]. Plaintiff also objected to the recommendation that the dismissal be *with prejudice* and appealed the award of fees and costs to Judge Boyle. [DE-164]. The court sustained in part the objection, dismissing Plaintiff's claims *without* prejudice, and affirmed the award of fees and costs. [DE-186]. Plaintiff then filed a motion to amend the court's judgment, asking the court to disaffirm the award of fees and costs, which is pending before Judge Boyle. [DE-188].

II. Analysis

The court may sanction a party who fails to appear for his deposition after being served with proper notice, Fed. R. Civ. P. 37(d)(1)(A)(i), and among the available sanctions is dismissal, Fed. R. Civ. P. 37(b)(2)(A)(v), which the court imposed against Plaintiff The rule further provides that

> Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d)(3).

Appendix C

Defendants sought not only dismissal of Plaintiff's action for his unjustified failure to appear at his properly noticed deposition, but they also requested the court award reasonable attorney's fees and expenses incurred due to Plaintiffs failure to appear for his deposition and in bringing the motion to dismiss. These costs include, among other things, the expenses for the court reporter, videographer, and Defendants' expert Dr. Tabrizi, who Plaintiff had notice would be in attendance. Defs.' Mot. [DE-134] at 4; Defs.' Mem. [DE-135] at 5. Plaintiffs notice in response to the motion did not address Defendants' request for attorney's fees and costs. Pl.'s Notice [DE-136].

The undersigned found an award of attorney's fees and costs associated with Plaintiff's failure to attend his deposition was appropriate, reasoning as follows:

> Plaintiff has presented no grounds from which the court could find that his failure to appear at the November 10, 2020 deposition was substantially justified or that the circumstances would make an award of expenses unjust. Plaintiff simply prioritized other matters, failed to appear, and failed to provide notice that he would not appear, causing Defendants to unnecessarily expend substantial resources on a deposition that did not occur.

Jones v. Campbell Univ., Inc., No. 5:20-CV-29-BO, 2021 U.S. Dist. LEXIS 135655, 2021 WL 3087652, at *3 (E.D.N.C. May 14, 2021), *adopted in part, rejected in part* 2021 U.S. Dist. LEXIS 134762, 2021 WL 3053314

(E.D.N.C. July 20, 2021). The undersigned declined to award attorney's fees and costs associated with bringing the motion. 2021 U.S. Dist. LEXIS 135655, [WL] at *4. Defendants were ordered to file an affidavit setting out their attorney's fees and costs associated with the deposition and a supportive memorandum of law, and Plaintiff was given an opportunity to file a response. *Id.*

Plaintiff appealed the award of fees and costs on the grounds that the deposition was conjured and unreasonable, but Judge Boyle affirmed the award as "both contemplated by the Federal Rules of Civil Procedure and adequately supported by this record." *Jones*, 2021 U.S. Dist. LEXIS 134762, 2021 WL 3053314, at *4. The court explained that Plaintiff

> failed to demonstrate that the magistrate judge's order is contrary to law or is based on clearly erroneous factual findings. As discussed above, plaintiff does not contest that he received notice of the November 10, 2020, deposition or that he failed to seek protection from the Court from having to attend. Plaintiff has further provided no evidence which would demonstrate that defense counsel was aware of any conflict in plaintiff's schedule; indeed, defense counsel offered alternative dates to plaintiff should he have a conflict with November 10.

Id. Accordingly, the court has already determined that the award of attorney's fees and costs is appropriate, and the court must now determine whether the $30,422.01 requested by Defendants is reasonable.

Appendix C

When calculating attorney's fees, the court must "determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Brodziak v. Runyon*, 145 F .3d 194, 196 (4th Cir. 1998) (quotations and alteration omitted); *see Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243-44 (4th Cir. 2009); *Grissom v. Mills Corp.*, 549 F.3d 313, 320-21 (4th Cir. 2008). The court does so by applying the *Johnson/Barber* factors. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S. Ct. 1933, 76 L. Ed. 2d 40 & n.9 (1983) (explaining lodestar calculations and approving the twelve-factor test set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989)); *Barber v. Kimbrell's, Inc.*, 577 F .2d 216, 226 n.28 (4th Cir. 1978) (adopting *Johnson's* twelve-factor test).

The *Johnson/Barber* factors include:

> (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) attorney's fees awards in similar cases.

Grissom, 549 F.3d at 321 (citation omitted). Although the *Johnson/Barber* factors often are subsumed in the district court's determination of the lodestar figure, the court also may consider those factors in evaluating whether the lodestar figure is reasonable. *Hensley*, 461 U.S. at 434 n.9. However, a court need not list each *Johnson/Barber* factor or comment on those factors that do not apply. *See, e.g., Bergstrom v. Dalkon Shield Claimants Trust (In re A.H Robins Co.)*, 86 F.3d 364, 376 (4th Cir. 1996) ("the district court considered those factors of the litany that are applicable to the present fee determination, and the district court is under no obligation to go through the inquiry of those factors that do not fit").

Defendants seek payment of $30,422.01, consisting of $23,432.85 in attorney's fees and $6,989.16 in costs associated with Plaintiff's November 10, 2020 deposition that he failed to attend. Defs.' Mot. [DE-169] at 2. In support of the motion, Defendants provided declarations from defense counsel regarding their rates and time expended, a declaration from the defense's expert regarding his rate and time expended, and declarations of two attorneys not associated with this case regarding the reasonableness of defense counsel's market rates and time expended. Defs.' Mem., Exs. 1-6 [DE-170-1 through - 6].

Plaintiff's response largely focuses on arguments related to the court's decision to award fees and costs rather than the reasonableness of the amount Defendants requested. Pl.'s Mem. [DE-176] at 1-17. Plaintiff had an opportunity to raise these arguments in response to Defendants' motion to dismiss in which they requested that attorney's fees and costs be awarded against Plaintiff, but Plaintiff failed to do so. *See* Pl.'s Notice [DE-136]. Plaintiff did raise many of these arguments in his appeal of the award, and the arguments were rejected. *See Jones*, 2021 U.S. Dist. LEXIS 134762, 2021 WL 3053314, at *4. Notwithstanding, the court will recount why Plaintiff's arguments lack merit.

First, Plaintiff argues that he provided written notice to Defendants by letter of September 14, 2020 that he was not available for deposition and that the parties had agreed on August 17, 2020 to defer discovery pending ruling by the court on certain motions. Pl.'s Mem. [DE-176] at 2-9. The September 14 letter from Jones's counsel to defense counsel stated that Jones was "not available to visit Raleigh to be deposed over several days starting October 5," exhibited orders indicating Jones must be in trial in Washington, D.C. on October 7-8, and affirmed that they would schedule depositions once the court ruled on Plaintiff's motion to stay discovery. Pl.'s Mem., Ex. A [DE-176-1] at 3-4. The September 14 letter does not demonstrate that Plaintiff was unavailable for deposition on November 10, and it was not until October 22, 2020, *after* the time Plaintiff indicated he was unavailable due to a conflict, that Defendants noticed Plaintiff's deposition for November 10, 2020.

Appendix C

In a letter accompanying the deposition notice, defense counsel indicated they were "open to agreeing to the alternate dates of November 11 or November 12 if those dates work better for Mr. Jones" and requested that "[i]f Mr. Jones is still too ill to attend a deposition on November 10, and subsequent IME the week of November 16, 2020, please let us know as soon as possible, but no later than October 30, 2020." [DE-134-1] at 3. Even assuming Defendants had previously agreed to defer discovery until after the court's ruling on certain motions, it was apparent from Defendants' notice of deposition and letter that their position had changed. Importantly, as the district court observed in rejecting this argument, "although plaintiff filed a motion to stay discovery on August 19, 2020, [DE 103], no stay of discovery was ordered by the Court. Accordingly, all discovery deadlines remained applicable at the time defendants noticed plaintiff[']s deposition on November 10, 2020," and "[t]he Federal Rules do not allow a party to decide unilaterally that they will not attend a properly noticed deposition." *Jones*, 2021 U.S. Dist. LEXIS 134762, 2021 WL 3053314, at *3. Plaintiff neither lodged an objection with Defendants nor sought protection from the court in response to the deposition notice. Accordingly, the court again finds Plaintiff's failure to appear at the properly noticed deposition was not substantially justified.

Next, Plaintiff argues that it would be unjust to reward Defendants with monetary payments, essentially expounding on arguments made to the court on appeal of the award of fees and costs. Pl.'s Mem. [DE-176] at 9-14. Plaintiff points again to the September 14 letter and

August 17 agreement to defer discovery, as well as his medical problems and an order for Plaintiff to appear at a mediation in Washington, D.C. on November 10, 2020. *Id.* The September 14 letter and August 17 agreement to defer discovery do not support a finding that a monetary sanction would be unjust for the same reasons they do not justify Plaintiff's failure to attend the deposition discussed above. Plaintiff's medical problems, as the court previously recognized, did not prevent him from participating in other matters which he prioritized over this case. *See Jones*, 2021 U.S. Dist. LEXIS 135655, 2021 WL 3087652, at *2 ("[R]ather than participate in discovery, Plaintiff has sought multiple stays and voluntary dismissals without prejudice, largely bringing this case to a standstill, while pursuing litigation in other courts." (citing Pl.'s Notice [DE-136] at 1-2 (citing Plaintiff's schedule in a trio of other federal cases and his appearance at a mediation in another case as reasons he did not appear at his deposition); Apr. 14, 2021 Order [DE-155] (denying motion to stay for medical reasons where Plaintiff is represented by multiple counsel and recently filed a new action in the U.S. District Court for the District of Columbia))). If Plaintiff had a pre-existing court appearance on November 10, he could have notified Defendants of his need to reschedule or, if necessary, sought relief from the court, but Plaintiff did neither. Accordingly, it was Plaintiff's unjustified inactivity that caused Defendants to "unnecessarily expend substantial resources on a deposition that did not occur," 2021 U.S. Dist. LEXIS 135655, [WL] at *3, and he has failed to demonstrate that an award of fees and costs would be unjust.

Finally, Plaintiff argues that Defendants' motion fails under the text of Rule 37 and the equities. Pl.'s Mem. [DE-176] at 14-17. Plaintiff first argues that because there was no order compelling Plaintiff to attend a deposition, he violated no order and cannot be sanctioned under Rule 37. *Id.* at 14. This is an indefensible reading of the Rule.[2] While Rule 37(b) governs failures to comply with a court order, subsection (d) expressly allows the court to order sanctions if a party failed to appear for that person's properly noticed deposition. Fed. R. Civ. P. 37(d)(1) . Plaintiff also argues that he cannot be sanctioned under Rule 37(d) because the notice was not reasonable for the reasons Plaintiff previously asserted. Plaintiff's objections to the reasonableness of the notice lack merit for the reasons stated above. The notice was both reasonable and procedurally proper, and the equities do not favor Plaintiff.

Turning to the reasonableness of the attorney's fees and costs requested, other than making the conclusory assertion that an award of more than $30,000 would be unjust, Plaintiff makes no specific argument as to the reasonableness of the hourly rate, number of hours expended, or costs. Nonetheless, the court must be satisfied that any award is reasonable.

Defense counsel assert they expended 52.3 hours of attorney time related to Plaintiff's deposition—Thomas

2. As noted previously by the court, Plaintiff has exhibited a pattern in this case of violating the Federal and Local Civil Rules, as well as filing a "specious notice of voluntary dismissal" and a notice of forthcoming stipulated dismissal *with prejudice* that Defendants disavowed. *See Jones*, 2021 U.S. Dist. LEXIS 135655, 2021 WL 3087652, at *3, n.1.

Farr, 42.8 hours at $477.00 per hour; Regina Calabro, 1.7 hours at $391.50 per hour; and Alyssa Riggins, 7.8 hours at $301.50 per hour—for a total of $23,432.85 in attorney's fees. Decl. [DE-170-1 to 170-3]. Defendants provided declarations from two experienced attorneys with employment and labor law practices in this district who opined that defense counsel's rates charged in this matter are reasonable and customary for the legal market in Raleigh, North Carolina. Decl. [DE-170-5 to 170-6]. Plaintiff presented no argument or evidence that would demonstrate these rates are unreasonable, and the court has found similar rates reasonable in the past. *See Lorenzo v. Prime Commc'ns, L.P.*, No. 5:12-CV-69-H-KS, 2018 U.S. Dist. LEXIS 236186, 2018 WL 10689708, at *6 (E.D.N.C. Sept. 28, 2018) (finding rates ranging from $250 to $425 per hour were reasonable hourly rates in employment litigation case). Mr. Farr, during the time at issue, was a shareholder at Ogletree Deakins and had been practicing employment law for nearly forty years. Decl. [DE-170-1] ¶ 3. Ms. Calabro was also a shareholder at Ogletree Deakins with approximately twenty-five years of employment law experience. Decl. [DE-170-2] ¶ 3. Ms. Riggins was an associate at Ogletree Deakins with four years of employment law experience. Decl. [DE-170-3] ¶ 3. The court finds the rates charged were reasonable and in line with the market rate in Raleigh, North Carolina for employment law litigation in federal court.

Turning to the number of hours expended, the court in its discretion declines to award attorney's fees for the full 52.3 hours expended. Plaintiff has already suffered the harsh sanction of dismissal for, among other

reasons, failing to appear at his deposition. The court finds under the circumstances and having considered the *Johnson/Barber* factors that an award of $5,888.70 in attorney's fees based on 10.5 hours of time for Mr. Farr (consisting of deposition preparation on November 9 and attendance at the deposition on November 10), 0.4 hours for Ms. Calabro (consisting of deposition preparation on November 9), and 2.4 hours for Ms. Riggins (consisting of deposition preparation on November 9 and attendance at the deposition on November 10) is reasonable.

Defendants also seek $6,989.16 in costs, consisting of $485.00 for the deposition videographer, $1,131.46 for the deposition transcript, $322.70 for deposition exhibit copies, and $5,050.00 for the defense expert's fee. Decl., Ex. B [DE-170-1] at 8-11. The court declines to award certain charges related to the stenographic transcript for expedited processing, per diem, processing, and exhibit reproduction and scanning, consistent with its treatment of fee requests under 28 U.S.C. § 1920 and Local Civil Rule 54.1. *See Benjamin v. Sparks*, No. 4:14-CV-186-D, 2020 U.S. Dist. LEXIS 70847, 2020 WL 1943474, at *2 (E.D.N.C. Apr. 22, 2020) (excluding, in the context of a Bill of Costs, transcript fee charges for exhibits, delivery, shipping and handling, litigation support packages, room rentals, and condensed transcript services). However, Plaintiff had notice that the deposition would be recorded by both video and stenographic means and did not object; therefore, he is reasonably charged with the cost of both. *See SAS Inst., Inc. v. World Programming Ltd..*, No. 5:10-CV-25-FL, 2016 U.S. Dist. LEXIS 192055, 2016 WL 4995071, at *2 (E.D.N.C. Sept. 19, 2016) ("Where a party

notices a deposition to be recorded by both electronic and stenographic means, and the other party raises no objections at that time, the court will award the costs of both recordings."). The court declines to award the cost of the expert's fee. While having the expert present at deposition may have been helpful at the deposition and when the expert conducted the IME, the court finds it was not necessary for the conduct of the deposition. Finally, the copy costs of deposition exhibits are reasonable. Accordingly, the court finds costs of $1,125.95 to be reasonable.

III. Conclusion

In sum, for the reasons stated above, Defendants' motion is allowed, and Plaintiff or his counsel shall pay Defendants the sum of $7,014.65 as a sanction for failing to attend Plaintiff's properly noticed deposition. This order is stayed pending the court's ruling on Plaintiff's motion to alter judgment. [DE-188].

So ordered, the 16th day of August 2021.

/s/ Robert B. Jones, Jr.
Robert B. Jones, Jr.
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION, FILED JULY 20, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

No. 5:20-CV-29-BO

AMOS N. JONES,

Plaintiff,

v.

CAMPBELL UNIVERSITY, *et al.*,

Defendants.

ORDER

This cause comes before the Court on an order and memorandum and recommendation of United States Magistrate Judge Robert B. Jones, Jr. Since entry of the memorandum and recommendation (M&R), several other motions have been filed. For the reasons that follow, the memorandum and recommendation of Magistrate Judge Jones is adopted in part, the order of Magistrate Judge Jones is affirmed, and this matter is dismissed without prejudice.

Appendix D

BACKGROUND

Plaintiff is a former professor of law at Campbell University Law School. He filed this lawsuit on December 12, 2017, in the Superior Court for the District of Columbia alleging, among other things, that he was discriminated against on the basis of his race when he was not granted tenure, and further that he was discharged from his employment in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission. *See, generally*, [DE 14; 36]. The superior court action was removed to the United States District Court for the District of Columbia and the claims against Campbell University and the Campbell Law School defendants were ultimately transferred to this Court. [DE 45; 48]. The District Court for the District of Columbia also imposed a $2,500 sanction against plaintiff's counsel under Fed. R. Civ. P. 11 for his arguments made in support of that court's jurisdiction. [DE 45].

Following its transfer to this Court, discovery disputes arose, some of which were adjudicated by Magistrate Judge Jones, some of which were adjudicated by the undersigned, and some of which remain pending. On September 30, 2020, plaintiff filed a motion to dismiss his case without prejudice due to health concerns, including his exposure to and symptoms consistent with COVID-19. [DE 118]. Plaintiff stated that he intended to reinstitute the suit as soon as possible "when he is physically healthy and fit again." *Id.* Defendants immediately notified the Court that they intended to respond to the motion to dismiss and filed their response in opposition shortly

thereafter. [DE 124]. At bottom, defendants opposed dismissal of the action, asked that plaintiff's claims be dismissed with prejudice, and further requested that, should dismissal without prejudice be allowed, certain conditions be imposed on plaintiff should he refile his complaint. *Id.*

Defendants then filed their own motion to dismiss plaintiff's complaint with prejudice, or in the alternative compel plaintiff's deposition and independent medical examination. [DE 134]. Approximately two weeks later, plaintiff moved to convert his motion to dismiss to a motion to stay. [DE 140]. Plaintiff informed the Court that he had identified the cause of some of his health concerns and was to receive surgical treatment; plaintiff asked that instead of dismissing the case without prejudice the Court stay the case for a period of six months to allow for plaintiff's recovery. [DE 140]. On December 3, 2020, the Court granted the motion to convert the motion to dismiss to a motion to stay, granted the motion to stay, and stayed the case for a period of 120 days.

Well-prior to the actual expiration of the stay, plaintiff moved to extend the stay. [DE 145]. The Court denied that request and referred all pending motions in this matter to Magistrate Judge Jones for ruling or entry of a memorandum and recommendation as appropriate. [DE 155]. The next day, plaintiff filed a notice of voluntary dismissal pursuant to Rule 41(a)(1)(A)(i). [DE 156]. Plaintiff states that "This Notice Dismisses this Action Immediately." *Id.* Plaintiff argues that, although defendants have answered the complaint, no motion for

summary judgment has been filed and thus he could dismiss his pleading absent a court order or a stipulation by defendants. *Id.* Plaintiff also argues that his prior Rule 41(a) motion has been pending since it was filed on September 30, 2020, and that he has renewed his request for ruling in his brief filed at [DE 153]. Plaintiff has also moved to allow each of his current attorneys to withdraw. [DE 162].

Magistrate Judge Jones entered his order and M&R on May 14, 2021. [DE 163]. Defendants then moved for Rule 11 sanctions against plaintiff and plaintiff moved to disqualify defense counsel. [DE 165; 172]. On July 15, 2021, plaintiff moved for Rule 26(g) sanctions against defendants.

DISCUSSION

A district court is required to review *de novo* those portions of an M&R to which a party timely files specific objections or where there is plain error. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149-50, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). "[I]n the absence of a timely filed objection, a district court need not conduct *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation and citation omitted). The district court is only required to make a *de novo* determination of those specific findings to which the plaintiff has actually objected. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983).

The M&R recommends granting defendants' motion to dismiss [DE 134] and dismissal of plaintiff's complaint with prejudice as a sanction for failing to appear for his deposition despite being served with proper notice. The M&R further recommends denial of the remainder of the pending motions as moot. Plaintiff objects to dismissal of his complaint with prejudice. Magistrate Judge Jones also awarded defendants their fees and costs associated with the deposition. This award was well-within the authority of the magistrate judge pursuant to 28 U.S.C. § 636 and Local Civil Rule 72.3. Accordingly, to the extent plaintiff objects to the award of fees and costs, the Court construes such an objection as an appeal seeking review of the magistrate judge's order. *See* Local Civil Rule 72.4.

A. Dismissal plaintiff's claims.

The most specific objections raised by plaintiff to the recommendation that his complaint be dismissed with prejudice concern the facts and circumstances which surround plaintiff's failure to appear for his deposition on November 10, 2020. Plaintiff argues that the deposition was scheduled without consulting with or obtaining an agreement from plaintiff and that plaintiff had a conflict with the deposition date because he had been ordered by a judge to attend a conference in Washington that had been previously scheduled.

Defendants' motion to dismiss includes as an exhibit a letter and amended notice of deposition of plaintiff on November 10, 2020. [DE 134-1]. The letter indicates that defendants are open to agreeing to the alternate dates of

November 11 or November 12 if those dates work better for plaintiff. *Id.* The letter further states that if plaintiff was still too ill to attend the deposition on November 10 to please alert defense counsel as soon as possible but not later than October 30, 2020. *Id.*

Plaintiff does not contend that he did not receive notice of the November 10, 2020, deposition. Nor does he contend that he attempted to contact defense counsel to alert them of a conflict and was unable to do so. Plaintiff has not identified in his objection to the M&R any exhibit which would support a finding that defendants were aware of his scheduling conflict. And, finally, the record does not reflect the filing of a motion for protective order to prevent plaintiff from having to attend the November 10, 2020, deposition.

Plaintiff points to an apparent "agreed-nonparticipation in discovery dated August 17, 2020" provided at Exhibit A, Part 1. This exhibit contains an email from defense counsel regarding versions of a draft consent protective order governing confidential information and well as a recap of a meeting during which plaintiff apparently agreed to supplement his discovery production and further expressed objections to two of defendants' discovery requests. [DE 164-1 at 3-4]. Although the email reflects that both sides apparently believed further discovery should not be supplied until they finalized a proposed consent protective order, any agreement between the parties would be insufficient to stay any deadlines

imposed by this Court.[1] *See* Fed. R. Civ. P. 16(b)(4); *Powell v. Kamireddy*, No. 7:13-CV-00267-F , 2015 U.S. Dist. LEXIS 9026, 2015 WL 333015, at *2 (E.D.N.C. Jan. 26, 2015). Moreover, although plaintiff filed a motion to stay discovery on August 19, 2020, [DE 103], no stay of discovery was ordered by the Court. Accordingly, all discovery deadlines remained applicable at the time defendants noticed plaintiff's deposition on November 10, 2020.

"[T]he Federal Rules do not allow a party to decide unilaterally that they will not attend a properly noticed deposition." *Johnson v. N. Carolina Dep't of Just.*, No. 5:16-CV-00679-FL, 2018 U.S. Dist. LEXIS 190494, 2018 WL 5831997, at *3 (E.D.N.C. Nov. 7, 2018). Rule 30(d) permits a court to impose sanctions on a party who fails to appear for a deposition that has been properly noticed. Fed. R. Civ. P. 30(d)(2). Rule 37 further permits a court to impose sanctions, including dismissal, for failure to comply with discovery obligations, including a party's attendance of a properly noticed deposition. Fed. R. Civ. P. 37(d)(1)(A); (d)(1)(A)(3); *see also Riggins v. Steel Techs.*, 48 F. App'x 460, 462 (4th Cir. 2002).

Prior to imposing dismissal of an action as a discovery sanction, a court must consider (1) whether there has been bad faith on the part of the non-complying party, (2) the amount of prejudice the non-compliance has caused the other party, (3) the need for deterrence of this sort of non-

1. To that end, defendants filed their own motion for entry of a standard protective order governing confidential information. [DE 112].

compliance, and (4) whether less drastic sanctions would be effective. *Hillig v. Comm'r*, 916 F.2d 171, 174 (4th Cir. 1990); *see also Carter v. Univ. of W. Virginia Sys., Bd. of Trustees*, 23 F.3d 400 (4th Cir. 1994) ("The legal standard for dismissals under Rule 37 is virtually the same as that for dismissals for failure to prosecute under Rule 41.").

What makes this case somewhat unusual is that plaintiff himself seeks dismissal of this action, albeit without prejudice. Indeed, plaintiff has attempted to voluntarily dismiss the case as recently as April 15, 2021, and continues to request dismissal in his objections to the recommendations of the magistrate judge. [DE 164 at 7] ("all plaintiff seeks here and now (again) is Rule 41(a)(2) voluntary dismissal without prejudice"). Thus, the Court need only to consider whether dismissal of this action with or without prejudice is appropriate. The Court in its discretion determines that dismissal without prejudice is the appropriate resolution to this case. As discussed below, the Court affirms the magistrate judge's decision to award fees and costs associated with the November 10, 2020, deposition. This is a sufficient sanction for plaintiff's unwarranted failure to appear. Plaintiff's agreement that his case should be dismissed further supports that a sanction less drastic than dismissal with prejudice is appropriate.

Accordingly, the Court adopts the portion of the memorandum and recommendation finding that plaintiff failed to attend his properly noticed deposition. However, the Court rejects the magistrate judge's recommendation to grant defendants' motion to dismiss the complaint with

prejudice as a sanction for failure to comply with discovery or diligently prosecute this action. [DE 134]. The Court will, however, dismiss this action without prejudice in light of plaintiff's repeated request to do so.

B. Award of fees and costs.

On review of an order of a magistrate judge, the district court must determine whether the magistrate's judge's order is clearly erroneous or contrary to law. Local Civil Rule 72.4(a); *Stonecrest Partners, LLC v. Bank of Hampton Roads*, 770 F. Supp. 2d 778, 782 (E.D.N.C. 2011). "A factual finding is clearly erroneous when [a court is] 'left with the definite and firm conviction that a mistake has been committed.'" *TFWS, Inc. v. Franchot*, 572 F.3d 186, 196 (4th Cir. 2009) (citation omitted). A ruling that is contrary to law is one where "the magistrate judge has misinterpreted or misapplied applicable law." *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 518 (D.N.J. 2008).

Plaintiff's objection to Magistrate Judge Jones's award of reasonable costs and attorney fees associated with the November 10, 2020, deposition consists primarily of an argument that those costs should be "in the negative" because the deposition was conjured and unreasonable. Plaintiff further argues that defendants should be equitably estopped from received the costs associated with the deposition plaintiff unilaterally failed to attend. Plaintiff has failed to demonstrate that the magistrate judge's order is contrary to law or is based on clearly erroneous factual findings. As discussed above, plaintiff does not contest that he received notice of the November

10, 2020, deposition or that he failed to seek protection from the Court from having to attend. Plaintiff has further provided no evidence which would demonstrate that defense counsel was aware of any conflict in plaintiff's schedule; indeed, defense counsel offered alternative dates to plaintiff should he have a conflict with November 10.

The magistrate judge's order assessing reasonable fees and costs is both contemplated by the Federal Rules of Civil Procedure and adequately supported by this record. The Court declines to disturb this decision.

C. Motion for Rule 11 sanctions and Motion for Rule 26(g) sanctions

In light of the above dismissal of this action without prejudice, the Court determines that the majority of the remaining motions are moot, including plaintiff's recently filed request for sanctions under Fed. R. Civ. P. 26(g). Defendants' motion for Rule 11 sanctions is not, however, mooted by dismissal of this action. *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990). Defendants seek sanctions against plaintiff for the filing of a specious notice of voluntary dismissal pursuant to Rule 41(a)(1)(A)(i). [DE 156].

Federal Rule of Civil Procedure 11(c) provides that sanctions are appropriate if a party violates Rule 11(b). Rule 11(b) provides that, by submitting documents to the Court, a party certifies that, to the best of his knowledge, (1) they are not submitted for an improper purpose; (2) the claims, defenses, and other legal contentions are

warranted by existing law or a nonfrivolous argument for extending the law; (3) the factual contentions have evidentiary support; and (4) the denials of factual contentions are warranted on the evidence. Fed. R. Civ. P. 11(b). "Motions for sanctions are to be filed sparingly." *Thomas v. Treasury Mgmt. Ass'n., Inc.*, 158 F.R.D. 364, 366 (D. Md. 1994). Whether to impose sanctions for conduct which violates Rule 11 is within the discretion of the court. *Id.* at 369.

Despite there being no basis for plaintiff's attempt to unilaterally dismiss his complaint without prejudice in April 2021 after defendants had answered his complaint, the Court in its discretion declines to impose sanctions for plaintiff's conduct. The Court has already determined that dismissal of this action without prejudice is appropriate, and accordingly determines that no additional sanction is necessary under the facts and circumstances presented here.

CONCLUSION

The Memorandum and Recommendation entered by Magistrate Judge Jones is ADOPTED IN PART and REJECTED IN PART. On plaintiff's request, his complaint is hereby DISMISSED WITHOUT PREJUDICE.

The Court AFFIRMS Magistrate Judge Jones' order awarding reasonable fees and costs associated with the November 10, 2020, deposition to defendants. The clerk is DIRECTED to refer defendants' motion for attorney

fees and costs [DE 169] to Magistrate Judge Jones for entry of an order.

Defendants' motion for sanctions under Fed. R. Civ. P. 11 [DE 165] is DENIED. The remainder of the motions pending in the case are DENIED AS MOOT. The clerk is DIRECTED to close this case. The Court retains jurisdiction over the matter for entry of an order by the magistrate judge of the amount of attorney fees and costs awarded.

SO ORDERED, this 19 day of July, 2021.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION, FILED MAY 14, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:20-CV-29-BO

AMOS N. JONES,

Plaintiff,

v.

CAMPBELL UNIVERSITY, INC., *et al.*,

Defendants.

May 14, 2021, Decided
May 14, 2021, Filed

ORDER AND MEMORANDUM AND RECOMMENDATION

This matter is before the court on the following motions: Plaintiff's Cross Motion for Partial Summary Judgment, [DE-101], Motion to Stay Discovery, [DE-103], Motion for Leave to File Excess Pages, [DE-108], Motion for Extension of Time to File Response/Reply, [DE-120], First Motion to Quash Subpoenas, [DE-137], and Motion to Quash Amended Subpoenas, [DE-143]; and Defendants'

Motion for leave to deposit property pursuant to Fed. R. Civ. P. 67, [DE-99], Motion for Protective Order Regarding Confidentiality of Documents, [DE-111], Motion to Strike, [DE-115], Motion to Compel Production of Documents and Responses to Interrogatories, [DE-122], Motion for Extension of Time to Conduct Plaintiff's Independent Medical Exam and Serve the Corresponding Expert Report, [DE-125], Motion for Leave to File Surreply, [DE-130], Motion to Dismiss Plaintiff's Amended Complaint with Prejudice or Compel Plaintiff's Deposition and IME, [DE-134], and Motion for Clarification of Scheduling Order and an Expedited Briefing Schedule, [DE-154]. For the reasons that follow, it is recommended that Defendants' motion to dismiss with prejudice be allowed and that all other motions be denied as moot. It is further ordered that Plaintiff pay Defendants' reasonable costs and attorney's fees associated with the November 10, 2020 deposition.

I. Background

This case was ordered transferred to this court from the U.S. District Court for the District of Columbia and was received on January 23, 2020. [DE-51]. Plaintiff; a former law professor at Campbell University Law School in Raleigh, North Carolina from July 2011 to May 2017, alleged that he was discriminated against on the basis of his race in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, when Campbell University and its officers and employees failed to appoint him as a tenured professor on the law school faculty for the 2015-16 and 2016-17 academic years and that he was discharged from his employment in retaliation for filing

a charge of discrimination with the Equal Employment Opportunity Commission. Plaintiff also alleged claims for breach of contract, defamation, negligent supervision, common law fraud/false pretenses, intentional infliction of emotional distress, and conversion. The claim for intentional infliction of emotional distress was dismissed on Defendants' motion. [DE-79]. The parties engaged in mediation in June 2020, but were ultimately unsuccessful. [DE-89, -91].

The parties began discovery and several disputes arose. On August 3, 2020, the court issued a protective order precluding compliance with several subpoenas issued by Plaintiff and ordering Plaintiff to submit to a Rule 35 Independent Medical Examination ("IME") during the week of October 12, 2020. [DE-98]. Six motions related to discovery are now pending before the court. [DE-103, -111, -122, -125, -137, -143]. The parties were unable to come to an agreement about how Plaintiff's personal property consisting of 96 books and a chair should be returned to him and filed two motions concerning this dilemma in August 2020, which are also pending before the court. [DE-99, -101].

On September 30, 2020, Plaintiff filed a motion to dismiss the case without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), [DE-118], and while that motion was pending Defendants filed a motion to dismiss Plaintiff's case with prejudice or to alternatively compel Plaintiff's deposition and IME, [DE-134]. On November 30, 2020, Plaintiff filed a motion to convert his motion to dismiss to a motion to stay. [DE-140]. On December 3, 2020, the

court allowed Plaintiff's motion to convert and found good cause to stay this matter for 120 days, until April 2, 2021, in light of Plaintiff's health conditions. Prior to the expiration of the stay, on February 26, 2021, Plaintiff sought another stay for medical reasons. [DE-145]. On April 14, 2021, the court denied Plaintiff's stay motion, lifted the stay, and referred all pending motions to the undersigned. [DE-155]. On April 15, 2021, Plaintiff filed a notice of voluntary dismissal, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), which purported to automatically terminate this case. [DE-156]. Plaintiff then, on April 27, 2021, filed a notice of intent to "file an all-parties-signed joint stipulation to the dismissal with prejudice of this action, including all claims and counter-claims stated against all parties. The signatures of the Parties and counsel were being affixed starting today, with the expectation that the final stipulation to be filed very soon." [DE-158]. Two days later, Defendants filed a notice indicating that the parties had not agreed to a stipulated dismissal with prejudice and that Plaintiff's notice of voluntary dismissal without prejudice was improper and had no effect on this action. [DE-159]. Finally, on May 10, 2021, Plaintiff's counsel filed a motion to withdraw from representation in this case. [DE-162].

II. Analysis

Defendants move to dismiss the amended complaint with prejudice pursuant to Fed. R. Civ. P. 37(d) and 41(b) based on Plaintiff's failure to attend his November 10, 2020 deposition, his lack of diligence in prosecuting his claims, and his failure to meaningfully participate in the discovery

process. [DE-134]. On November 16, 2020, Plaintiff filed a notice regarding the motion to dismiss indicating that a fuller memorandum would be filed in the coming days, [DE-136], but no such memorandum was filed.

The court may sanction a party who fails to appear for his deposition after being served with proper notice. Fed. R. Civ. P. 37(d)(1)(A)(i). Among the available sanctions is dismissal with prejudice. Fed. R. Civ. P. 37(b)(2)(A)(v). The court may also dismiss an action on a defendant's motion "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order[.]" Fed. R. Civ. P. 41(b). "The legal standard for dismissals under Rule 37 is virtually the same as that for dismissals for failure to prosecute under Rule 41." *Carter v. Univ. of W Va. Sys., Bd. of Trustees*, 23 F.3d 400 (4th Cir. 1994). The court must consider the following four factors before imposing the ultimate sanction of dismissal: "(1) the Plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *Id.* "While the district court clearly has the authority to dismiss complaints, . . . this authority should be exercised with restraint and [a]gainst the power to prevent delays must be weighed the sound public policy of deciding cases on their merits.'" *Id.* (citations omitted).

As to the first factor, Plaintiff bears full responsibility for failing to appear at his November 10, 2020 deposition. After attempting to confer with Plaintiff's counsel for more than two months regarding the scheduling of

Plaintiff's deposition, on October 22, 2020, Defendants noticed Plaintiff's deposition for November 10, 2020. Defs.' Mot. [DE-134] ¶¶ 3-10. In a letter accompanying the deposition notice, defense counsel indicated they were "open to agreeing to the alternate dates of November 11 or November 12 if those dates work better for Mr. Jones" and requested that "If Mr. Jones is still too ill to attend a deposition on November 10, and subsequent IME the week of November 16, 2020, please let us know as soon as possible, but no later than October 30, 2020." [DE-134-1] at 3. Hearing nothing from Plaintiff's counsel in response to the deposition notice, Defendants appeared at the noticed deposition with a court reporter, videographer, and expert witness, but Plaintiff failed to appear. Defs.' Mot. [DE-134] ¶ 13-14.

Plaintiff in his "notice" in response to Defendants' motion to dismiss asserts that Defendants knew of (1) Plaintiff's other obligations, including "a trio of federal cases in Washington, D.C." during September, October, and November 2020, that required a "re-shuffling" of his schedule in light of his medical challenges; (2) Plaintiff's non-assent to Defendants' unilateral scheduling of the November 10, 2020 deposition in Raleigh, North Carolina given that Plaintiff's home and office are 266 miles away; and (3) an order for Plaintiff to appear at a mediation in Washington, D.C. on November 10, 2020. Pl.'s Notice [DE-136] at 1-2. Plaintiff also stated he would file briefing with "documentary evidence" exhibiting Defendants' knowledge. *Id.* at 1. Plaintiff failed to file said briefing with evidence, and, in any event, none of the reasons presented in the notice justifies Plaintiff's unilateral decision to

not appear at the deposition. *See Wilson v. Fairfield Inn Suites-Marriott, RDU*, No. 1:16CV899, 2017 U.S. Dist. LEXIS 173985, 2017 WL 4772425, at *6 n.9 (M.D.N.C. Oct. 20, 2017) (noting a plaintiff's disagreement with the deposition schedule of the noticing party does not excuse compliance with a properly noticed deposition), *subsequently aff'd*, 727 F. App'x 784 (4th Cir. 2018). Plaintiff did not challenge the sufficiency of the notice, object in substance to the discovery sought, request a continuance of the deposition, or seek a protective order. *See* Fed. R. Civ. P. 37(d)(2) ("A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)."). Defendants' letter included with the deposition notice invited alternative dates but Plaintiff did not respond and then simply failed to attend. Rather than work with Defendants to find a mutually-convenient date for the deposition, Plaintiff, who himself is an attorney, chose to do nothing and has given the court no basis on which to apportion the responsibility elsewhere.

The second and third factors also support dismissal. Defendants were greatly prejudiced by Plaintiff's failure to attend the deposition and larger failure to meaningfully engage in discovery. In addition to the costs associated with the court reporter and videographer and the defense attorneys' and their expert's time related to the deposition, Defendants have spent more than a year attempting to conduct discovery that Plaintiff has largely sought to avoid. *See Bland v. Booth*, No. 7:19-CV-63-BO, 2020 U.S. Dist. LEXIS 89542, 2020 WL 2575556, at *2 (E.D.N.C.

May 21, 2020) (finding Plaintiff's non-compliance, including failing to attend a deposition, prejudiced defendants where the defendants' lawyers spent a year attempting to conduct discovery with an opposing party who showed little interest in seriously participating in his own case). For example, the court allowed a motion to compel and ordered an IME of Plaintiff to occur the week of October 12, 2020. [DE-98]. Plaintiff's counsel informed Defendants' counsel that Plaintiff was ill and could not appear for the IME but never sought court leave to extend the time in which to appear for the court-ordered IME, forcing Defendants to seek an extension. Neither the IME nor the deposition has taken place, and Defendants have filed three additional discovery motions in an attempt to move discovery in this case forward. Importantly, rather than participate in discovery, Plaintiff has sought multiple stays and voluntary dismissals without prejudice, largely bringing this case to a standstill, while pursuing litigation in other courts. Pl.'s Notice [DE-136] at 1-2 (citing Plaintiff's schedule in a trio of other federal cases and his appearance at a mediation in another case as reasons he did not appear at his deposition); Apr. 14, 2021 Order [DE-155] (denying motion to stay for medical reasons where Plaintiff is represented by multiple counsel and recently filed a new action in the U.S. District Court for the District of Columbia). Defendants have spent significant resources attempting to defend Plaintiff's claims already and should not have to expend further resources, in this case or a future case, defending claims Plaintiff is not interested in prosecuting.

As to the fourth factor, given Plaintiff's lack of interest in moving this case forward on any terms but his own, a lesser sanction would not be effective. Since the court denied Plaintiff's last motion to stay one month ago, Plaintiff has filed a specious notice of voluntary dismissal and a notice of forthcoming stipulated dismissal *with prejudice* that Defendants have disavowed,[1] and Plaintiff's counsel have moved to withdraw from the case. Plaintiff's latest filings are strong evidence that he has no interest in moving this case forward and that nothing short of a dismissal with prejudice is appropriate. *See Williams v. PUMA N. Am., Inc.*, No. CV TJS-19-3340, 2020 U.S. Dist. LEXIS 212147, 2020 WL 6684901, at *5 (D. Md. Nov. 12, 2020) (finding "dismissal with prejudice will ensure that Williams is unable to refile her claims against PUMA. This will save PUMA the future expense of defending

1. Plaintiff has a history of violating the Federal and Local Civil Rules in this case. For example, Plaintiff was sanctioned by the D.C. District Court for violating Rule 11 by pressing a frivolous legal argument. *See* Sept. 4, 2018 Order [DE-45] at 4-6 ("The decision to continue pressing this frivolous assertion of jurisdiction exceeds the bounds of creative advocacy and some monetary sanction is necessary to deter this sort of behavior in the future."). Plaintiff's "corrected" response brief was stricken by this court for failure to comply with Local Rule 7.1(f). [DE-73, -74, -79]. Plaintiff inexplicably filed a cross-motion for summary judgment in response to Defendants' motion to deposit property with the court, which could not be reasonably construed as a motion for summary judgment. [DE-101]. Plaintiff's cross-motion for summary judgment failed to comply with Local Civil Rule 56.1(a). This is not an exhaustive list, and Plaintiff's repeated failure to comply with the rules both prejudices Defendants and is a drain on the court's valuable resources.

itself against a litigant who does not comply with the rules . . . ."). Accordingly, it is recommended Plaintiff's amended complaint be dismissed with prejudice and all remaining motions be denied as moot.

Finally, pursuant to Fed. R. Civ. P. 37(d)(1)(3), the court in its discretion finds an award of fees and costs associated with the deposition is appropriate. The rule provides that "the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(1)(3). Plaintiff has presented no grounds from which the court could find that his failure to appear at the November 10, 2020 deposition was substantially justified or that the circumstances would make an award of expenses unjust. Plaintiff simply prioritized other matters, failed to appear, and failed to provide notice that he would not appear, causing Defendants to unnecessarily expend substantial resources on a deposition that did not occur. *See Gaston v. Anson Cnty. Sch. Dist.*, No. 3:17-CV-00232-RJC-DSC, 2019 U.S. Dist. LEXIS 109233, 2019 WL 2745854, at *8 (W.D.N.C. July 1, 2019) (awarding attorneys' fees and court reporting costs for the deposition Plaintiff refused to attend), *aff'd sub nom. Gaston v. Anson Cnty. Bd. of Educ.*, 788 F. App'x 189 (4th Cir. 2019).

However, the court declines to award fees and costs associated with the filing of the motion. Circumstances at the time the motion was filed were such that dismissal may

not have been warranted on the failure to appear at the deposition alone. Plaintiff's subsequent actions informed the court's decision to recommended dismissal of this case, and thus the court will not award fees and costs associated with bringing the motion. Accordingly, the court orders Plaintiff to pay the Defendants' *reasonable* costs and attorney's fees associated with the November 10, 2020 deposition. Defendants shall file by **June 4, 2021**, an affidavit setting out such costs and attorney's fees and a supportive memorandum of law, which includes information that will help the court apply the *Johnson/Barber* factors.[1] *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S. Ct. 1933, 76 L. Ed. 2d 40 & n.9 (1983) (explaining lodestar calculations and approving the twelve-factor test set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d

1. The *Johnson/Barber* factors include:

> (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) attorney's fees awards in similar cases.

Grissom v. Mills Corp., 549 F.3d 313, 321 (4th Cir. 2008) (quotation omitted).

714, 717-19 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989)); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978) (adopting *Johnson's* twelve-factor test); *see also Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (party seeking an award of fees must "produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates" are in accord with the prevailing market rates). Plaintiff may file a response to Defendants' filing by **June 18, 2021**. If Plaintiff does not file a response by that date, the court will deem him to have no objection to the costs and attorney's fees claimed by Defendant.

III. Conclusion

For the reasons stated herein, it is recommended that Defendants' motion to dismiss, [DE-134], be allowed and all remaining motions be denied as moot. Additionally, the court orders Plaintiff to pay Defendants' *reasonable* costs and attorney's fees associated with the November 10, 2020 deposition.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on each of the parties or, if represented, their counsel. Each party shall have until **May 28, 2021** to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct his or her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in

the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. *See, e.g.*, 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b), E.D.N.C. Any response to objections shall be filed by within **14 days** of the filing of the objections.

If a party does not file written objections to the Memorandum and Recommendation by the foregoing deadline, the party will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, the party's failure to file written objections by the foregoing deadline will bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

This the 14 day of May, 2021.

/s/ Robert B. Jones, Jr.
Robert B. Jones, Jr.
United States Magistrate Judge

APPENDIX F — DENIAL OF REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED FEBRUARY 14, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

February 14, 2023, Filed

No. 21-1921
(5:20-cv-00029-BO).

AMOS N. JONES,

Petitioner-Appellant

v.

CAMPBELL UNIVERSITY; JOHN BRADLEY CREED; ROBERT CLYDE COGSWELL, JR.; TIMOTHY ZINNECKER; CATHOLIC UNIVERSITY OF AMERICA,

Respondents-Appellees.

ORDER

The court denies the petition for rehearing and rehearing en banc and the motion to disqualify appellees' counsel. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Heytens, and Senior Judge Floyd.

For the Court
/s/ Patricia S. Connor, Clerk