5-20-2021

Thomas Collentine, Jr., et al., Order Granting In Part and Denying in Part Merrill Lynch's Evidentiary Application for Attorney's Fees

John J. Goger
Senior Judge, Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

THOMAS COLLENTINE, JR. et al.,	)	
	)	CIVIL ACTION
Plaintiff,	)	FILE NO. 2012CV214140
	)	
v.	)	
	)	Bus. Case Div. 4
MORGAN STANLEY & CO., INC., et al.	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYNG IN PART MERRILL LYNCH'S EVIDENTIARY APPLICATION FOR ATTORNEY'S FEES

This matter comes before the Court for an evidentiary determination on the amount of attorney's fees owed by a subset of Plaintiffs in accordance with this Court's Order on Defendant Merrill Lynch's Motion for Attorney's Fees, entered October 16, 2020. Having reviewed the record and having considered the argument and evidence presented during an April 6, 2021 hearing, the Court enters the following order.

1. BACKGROUND

1.1 Case History

The case commenced in April of 2012 when Raser Technologies, Inc. ("Raser") and other Plaintiffs filed their initial complaint asserting Georgia statutory

and common-law claims against Merrill Lynch, Pierce, Fenner & Smith, LLC ("Merrill Lynch") and three other brokers. Plaintiffs alleged Merrill Lynch and the other Defendants engaged in, or facilitated, a pattern of "naked" short selling that created "counterfeit" or "fictitious" shares of Raser stock and artificially depressed Raser's stock price. Raser was dismissed early in the action, and another party was subsequently added. Of the 40 Plaintiffs, 11 resided in Georgia and 29 outside the state. Five Plaintiffs resided in Utah: Mark Sansom, Maasai, Inc., Ocean Fund, LLC, Kelly Trimble, and Warner Investments, LLC. (collectively, the "Utah Plaintiffs"). On December 5, 2012, Merrill Lynch made individual offers of a $1,000 settlement under O.C.G.A. §9-11-68 to all of the Utah Plaintiffs. These offers were not accepted.

The case had a long and complex history whereby Plaintiffs amended their complaint several times, necessitating multiple motions to dismiss, a motion for reconsideration, an interlocutory appeal, and several motions for final judgment.[1] On June 14, 2015, when the case had been pending more than three years, the Court entered a final judgment against 14 of the non-Georgia Plaintiffs including one Utah Plaintiff, Mark Swanson. On April 16, 2016, when the case had been pending

[1] A more detailed history of the case may be found in the Order on Defendant Merrill Lynch's Motion for Attorney's Fees, entered October 16, 2020, pp. 2-8.

approximately 4 years, the Court entered a final judgment against the remaining four Utah Plaintiffs.

1.2 Merrill Lynch's Motion Seeking Attorney's Fees

On May 2, 2017 Merrill Lynch filed its Motion for Attorney's Fees and Expenses under O.C.G.A. § 9-11-68 (the "Motion") seeking to recover its attorney's fees under what is commonly referred to as "Georgia's offer of settlement" statute. At the parties' request, the Motion was held in abeyance pending a ruling from the Supreme Court of Utah in a related action. On October 16, 2020, this Court issued an order on the Motion, determining the statutory conditions had been met and an award of fees was merited. Referring to the limitations on fee awards expressed in the applicable statutory provision, O.C.G.A. § 9-11-68(b)(1), the Court issued the following directive:

> [t]he Court strongly cautions that such [fee award] will be limited to the 'reasonable attorney's fees and expenses of litigation' that Merrill Lynch incurred in defending itself against the specific claims of the Utah Plaintiffs 'from the date of the rejection of the [Settlement Offers] through the entry of judgment.'

(Ord. on Def. Merrill Lynch's Mot. for Atty's. Fees, p. 17.)

As part of its October 16, 2020 order, the Court directed the parties to pursue a conferral process in an attempt to amicably resolve the amount of the fee award. After the parties' representation they had conferred in good faith and required

additional time to continue their discussions, the Court extended the deadline for the conferral process. (Joint Motion to Extend, Time, p. 1.)

On January 21, 2021, after that conferral process proved unsuccessful, Merrill Lynch filed two affidavits in support of its fee request including: (1) the affidavit of Abby F. Rudzin, a partner at O'Melveny & Myers LLP ("O'Melveny"), a New York-based law firm that defended Merrill Lynch and (2) the affidavit of Dan F. Laney, a partner at the firm of Rogers & Hardin, LLP ("Rogers & Hardin"), Georgia counsel who also defended Merrill Lynch. For the work of both firms, Merrill Lynch seeks $172,256 in attorney's fees from the Utah Plaintiffs. (Rudzin Aff., ¶ 45.) Over opposition, the Court agreed to accept the Utah Plaintiffs' late written response objecting to Merrill Lynch's fee evidence. (Order on Utah Pls. Mot. for Ord. Allowing Ext. to File Resps., entered April 5, 2021.)

The Court conducted an evidentiary hearing on April 6, 2021. All parties were allowed to present and cross-examine witnesses. Merrill Lynch was permitted to submit a post-hearing brief which was filed on April 13, 2021. Upon its receipt, the Utah Plaintiffs were permitted to submit their own post-hearing brief which was filed on April 20, 2021.

2. THE DISTINCT NATURE OF MERRILL LYNCH'S FEE EVIDENCE

Merrill Lynch's fee request is distinct in three key respects.

2.1 Merrill Lynch's Alternate Fee Arrangement with O'Melveny.

As for its lead counsel, Merrill Lynch is seeking to recover its defense costs based, not on a standard hourly billing agreement, but on an alternate fee arrangement ("AFA") it reached with O'Melveny. Pursuant to the AFA, for its defense of this action, O'Melveny billed Merrill Lynch quarterly. (Rudzin Aff., ¶ 21.) Rudzin described this process:

> Each quarter, O'Melveny submitted an AFA proposal supported by detailed assumptions about the anticipated tasks for the upcoming quarter. O'Melveny also provided the previous quarter's time-keeping data, i.e., the number of hours billed by each class of timekeeper. O'Melveny's proposals took into account whether the work in the previous quarter turned out to be less than or greater than anticipated, which meant that sometimes O'Melveny would ask for no fee at all for an upcoming quarter . . .[2]
>
> Once Merrill Lynch and O'Melveny had agreed upon the quarter's fee, O'Melveny would issue an invoice to Merrill Lynch for that quarter's fee – less an agreed-upon discount based on billing volume[3] . . . and Merrill Lynch would pay the invoice. Typically, the invoice was paid mid-quarter, i.e., contemporaneously with the work in the quarter. . .

(Id., ¶¶ 1, 2-23; 25.)

Merrill Lynch seeks to recover fees incurred during the period beginning on January 7. 2013, when the Merrill Lynch settlement offers to the Utah Plaintiffs

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[2] Quarterly billings of $0 happened twice during the period at issue. (Rudzin Aff., ¶ 22.) During oral argument, Rudzin described that during these quarters with $0 bills, O'Melveny was "truing up" from the previous quarter because the projected estimate proved erroneously large. (Tr., p. 59.)

[3] During the period at issue, quarterly invoices would be subject to volume discounts ranging from 5% to 12.5% that were "based on the volume of billings by O'Melveny for all matters for Merrill Lynch or any other Bank of America affiliate." (Rudzin Aff., ¶ 25.)

expired, and continuing until April 8, 2016 when final judgment was entered against the last of the Utah Plaintiffs (the "Relevant Period"). (Id., ¶¶ 4, 17.)

2.2 Merrill Lynch's Fee-Splitting Arrangement Concerning Rogers & Hardin.

Merrill Lynch's needed Georgia counsel, and it coordinated with the other Defendants to retain Rogers & Hardin and to split its fees so that each Defendant, including Merrill Lynch, was only responsible for 25% of the Georgia firm's fees. (Id., ¶ 13.)

2.3. Merrill Lynch's Pro Rata Calculation of its Fees. Attributable to the Utah Plaintiffs.

Because of the nature of its AFA and the numerous overlapping claims lodged by the Plaintiffs, Merrill Lynch asserts it is unable to specifically allocate any of its fees to defending the claims of the Utah Plaintiffs. (Id., ¶ 35.) "Under these circumstances, Merrill Lynch believes that the most reasonable approach to calculating reasonable attorney's fees recoverable by Merrill Lynch is to allocate a portion of Merrill Lynch's total attorney's fees . . . to the Utah Plaintiffs on a pro rata basis." (Id., ¶ 36.)

The Rudzin Affidavit outlines in detail how Merrill Lynch determined this pro rata allocation. First, Merrill Lynch divided the Relevant Period into three sub-periods that were each based on the number of Utah Plaintiffs in relation to the total number of Plaintiffs. (Id., ¶ 37.) Period 1 begins on January 7, 2013 when there

were 5 Utah Plaintiffs among the 39 total Plaintiffs with Merrill Lynch attributing 12.82% of the total fee expense incurred during this time to the Utah Plaintiffs. Period 1 ends on February 25, 2014 when a 40th Plaintiff (Peter Emily) joined the case. During this second period where the Utah Plaintiffs comprised 5 of the 40 Plaintiffs, Merrill Lynch attributes 12.5% of its attorney's fees to the Utah Plaintiffs. The second period ends on June 30, 2015 when final judgment was entered against a number of Plaintiffs including Utah Plaintiff Mark Swanson. Thus, during this third and final sub-period, there were 4 Utah Plaintiffs among the remaining 26 Plaintiffs such that Merrill Lynch attributes 15.38% of its attorney's fees bill to those 4 Utah Plaintiffs. Finally, Merrill Lynch outlines the specific amount of fees it claims are attributable to the Utah Plaintiffs who remained in the case during each sub-period. (Rudzin Aff., ¶¶ 26, 38-39.)

During the Relevant Period, Merrill Lynch paid fees to O'Melveny in the amount of $1,038,346, and, applying its pro rata analysis, it seeks to recover $136,233.04 of that amount from the Utah Plaintiffs. The Laney Affidavit, offered in support of Roger & Hardin's fees, did include more traditional billing records. (Laney Aff., ¶ 4; Ex. 2.) Merrill Lynch paid Rogers & Hardin a total of $269,486 in fees, and, applying the same pro rata analysis described above, it seeks to recover $36,022.96 of those fees from the Utah Plaintiffs. (Laney Aff., ¶¶ 5-6.)

3. ANALYSIS

3.1 The Statutory Prerequisites for an Award of Fee under O.C.G.A. § 9-11-68(b)(1)

O.C.G.A. § 9-11-68(b)(1) provides that if a defendant makes an offer of settlement that complies with the statutory requirements and which is rejected by the plaintiff,

> the defendant shall be entitled to recover *reasonable* attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement. (Emphasis added)

Georgia law offers little guidance on how to determine the reasonableness of attorney's fees arising from alternate fee agreements that do not rely on traditional hourly billing.

Analogous authority is found in the area of contingent fee agreements where the fees owed pursuant to that agreement can evidence but do not control the reasonableness of the fee. "While certainly a guidepost to the reasonable value of the services the lawyer performed, the contingency fee agreement is not conclusive" on that point. Georgia Dept. of Corrections v. Couch, 295 Ga. 469, 484 (2014). "[T]he the party seeking fees must also introduce evidence of hours, rates, or *some*

other indication of the value of the professional services actually rendered." Id. at 483 (emphasis supplied).[4]

3.2 *Assessing the Reasonable Value of Legal Services Provided by O'Melveny.*

Merrill Lynch offered general evidence describing how it negotiated its bills with O'Melveny, stating the "quarterly fixed fee [was] designed to approximate the cost done at an hourly rate." (Rudzin Aff., ¶¶ 21-23.) During oral argument, Merrill Lynch acknowledged that these quarterly negotiations involved "actual time records and billing rates." (Tr., p. 59.) However, Merrill Lynch has not provided any of the underlying information regarding these quarterly bills, just the resulting, single-page billing statements. (Rudzin Aff., ¶ 24; Ex. C.) Merrill Lynch did supply a 43-page spreadsheet providing a list of individual time-keeper entries with cursory descriptions of the work performed throughout the Relevant Period but it does not include corresponding billing rates for those timekeepers.[5] (Id., ¶ 3, Ex. A.) Only a

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[4] As recent case law reflects, when determining the reasonableness of fees to be awarded under contingent fee contracts, the devil is in the details. In the last two years the Georgia Court of Appeals has issued two non-binding opinions concerning how to evaluate the reasonableness of a fee awards under O.C.G.A. § 9-11-68(b) arising from contingent fee agreements. These opinions reflect differing judicial views on the application of Couch and how courts should evaluate fee reasonableness in the absence of hourly billing records. Kennison v. Mayfield, No. A20A2074, 2021 WL 1116258, at *8-12 (Ga. App. March 16, 2021) petition for certiorari filed No. SC21C0872 (Ga. March 23, 2021), is a full court decision that remanded the trial court's fee award in a highly fractured opinion. See also Khalia, Inc. v. Rosebud, 353 Ga App. 350 (2019) (division of opinion affirming award of fees is physical precedent only based on one panel member's dissent). See n. 10, *infra*.

[5] The Utah Plaintiffs have taken issue with a number of these different time entries as being either unrelated to the defense of the Utah Plaintiffs' claims, too vague or indefinite, or an unnecessary expense that occurred after the last Utah Plaintiffs filed their voluntary dismissal on September 8, 2015 but before April 16, 2016 when the Court granted Defendants' motion for entry of a final judgment pursuant to O.C.G.A. § 9-11-54(b). (Tr., pp. 24-31; Pl. Ex. 3.)

small amount of evidence is found in the record about O'Melveny billing rates, and it was offered towards the end of the evidentiary hearing.[6]

The Court agrees with Merrill Lynch that a party is not necessarily required to provide evidence of their attorney's hours or rates to establish the value of the legal services for which they seek recompense. Couch, p. 483. It also agrees with Merrill Lynch's position that traditional forms of legal billing are on the decline and courts should be receptive to alternate forms of attorney fee evidence. (Tr., pp. 13-14.) However, based on the record before it, the Court finds that alternate evidence of reasonableness offered by Merrill Lynch is not wholly satisfying.

Rather than provide the Court with actual evidence of the information and negotiations that led to its quarterly bills, Merrill Lynch asks the Court to rely on an inference that the resulting product of its negotiations with O'Melveny reflects the reasonable value of the legal services the firm provided. (Post-Hearing Memo. in Supp., p. 5-6.) As its counsel bluntly stated during oral argument, Merrill Lynch is a "sophisticated repeat litigation client" and it "does not overpay for legal services." (Tr., pp. 13-14.) Evidence of this billing process, particularly when considered with the evidence of other cost-saving measures pursued by Merrill Lynch, is

[6] Standing in her place, Rudvin stated in 2016, as the litigation was concluding, her billing rate was $950 per hour and her senior partner who worked on the file had a rate of $1,175 per hour. (Tr. 59-60.)

compelling.[7] However, without more supporting information, the Court does not find it entirely persuasive.

Merrill Lynch argues that the "best evidence" of the reasonableness of its fees is the fact that it agreed to pay them. (Tr., p. 14; Post-Hearing Memo. in Support, p. 6.) Merrill Lynch relies on Wright v. Metro. Atlanta Rapid Transit Auth., 248 Ga. 372, 375 (1981) which found, "[f]air market value is the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all the elements reasonably affecting value." Wright reiterates a long-standing measure of determining the fair market value of real property. Merrill Lynch has not cited any law where this free market idea of value is applied in the context of attorney's fee awards. More importantly, this argument misconceives the role of the Court in considering a fee-shifting award under O.C.G.A 9-11-68(b) where, in disputed cases, it is required to make an independent determination as to the reasonableness of a fee. While the payment of an agreed-upon bill from an attorney is certainly evidence suggesting the fee is reasonable, it does not conclusively establish the fact.

[7] Among the other cost-saving measures employed by Merrill Lynch was the decision to hire O'Melveny. The firm had expertise litigating these types of "naked" short-selling claims. (Rudzin Aff., ¶ 10.) Further, O'Melveny had previously defended Merrill Lynch in similar, prior lawsuits, and thus had already gained "valuable knowledge about Merrill Lynch's internal trade-processing systems, as well as identities of knowledgeable employees and the sources of relevant reports and data." (Id.) Rudzin contends that this experience and familiarity resulted "in lower attorneys' fees than Merrill Lynch would have incurred had it hired a firm without this knowledge." (Id.)

Merrill Lynch offers a second approach to evaluating the reasonable value of its legal services, urging the Court to apply a "lodestar method as a check on the reasonableness of [this] fee request." (Post-Hearing Memo. in Support, p. 8.) Georgia does not have a well-developed body of law on the lodestar method of computing fees, but to begin, "the trial court must multiply the number of hours reasonably spent by trial counsel by an hourly reasonable rate." Friedrich v. Fidelity Nat. Bank, 247 Ga. App. 704, 706 (2001).[8] Merrill Lynch argues that averaging the amount of money it spent in attorney's fees and the number of hours lawyers and professional staff spent defending this case, equates into an hourly rate of $648.00. (Post-Hearing Memo. in Supp., pp. 8-9.) Testimony was then elicited that $648.00 was a reasonable hourly rate "consistent with the rate that would be charged in the Atlanta metropolitan area for a case of this complexity."[9] (Tr. p. 64.) The Court finds this approach to confirming the reasonableness of the O'Melveny fees creates more questions than answers.

First, the legal support for this proposition is lacking. Merrill Lynch relies upon Khalia, Inc. v. Rosebud, 353 Ga. App. 350 (2019) as an example of where Georgia courts have "used the lodestar method as a check on the reasonableness of a fee." (Id.) The portion of the opinion concerning attorney's fees is non-binding

[8] While not at issue in the analysis proposed by Merrill Lynch, this "lodestar amount" can then be adjusted upwards or downwards based on certain factors known as multipliers. Id.

[9] Notably, the witness testified this was a reasonable rate for "attorney time" although staff time is included in O'Melveny's fee application. (Tr., p. 62; Rudzin Aff., ¶ 12.)

physical precedent, and it does expressly adopt or even outline the lodestar methodology. Moreover, Khalia is based on an entirely dissimilar set of facts.[10] Second, despite testimony that $648.00 was a reasonable hourly rate, the Court is not persuaded by the methodology used in establishing this rate. The $648 per hour figure was merely an average of the approximate $1.3 million in defense costs paid by Merrill Lynch and the hours spent providing that defense -- 1,450 professional hours spent by O'Melveny partners, associates, paralegals and support staff and 580 hours (25% of the 2,323.8 hours) spent by Rogers and Hardin's partners and associates. (Post-Hearing Memo. in Support, pp. 9-10; Rudzin Aff., ¶ 12; Laney Aff., ¶¶ 3, 5.) While a simple average might provide persuasive evidence of a reasonable hourly rate in some cases, here, the attorney rates charged to Merrill Lynch ranged from $240 to $1,175 per hour. (Laney Aff., ¶ 12; Tr., p. 60.) The Court has no evidence of any staff rates. In a case which involves such large amounts of legal time spanning a period of years (some spent addressing sophisticated legal issues and some spent on more customary litigation concerns)

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[10] Khalia is a thorny contingency fee case where plaintiff's counsel had a 45% contingent fee agreement. Plaintiff received a jury verdict over $1.1 million that eclipsed his $50,000 settlement demand. Plaintiff appealed the trial court's decision to award him approximately $140,000 in attorney's fees under O.C.G.A. § 9-11-68(b)(2) when he had sought an award exceeding $400,000. The majority opinion affirming the award noted an expert had testified that 200 hours was a reasonable amount of time for counsel to spend on the case during the relevant timeframe and $250 was a reasonable rate under the particular circumstances thus supporting the reasonableness of a $50,000 fee. The majority then concluded, "[o]n this record, which includes an award of nearly three times the amount due according to this evidence, we cannot say that the trial court erred when it awarded [plaintiff] more than $140,000 in reasonable fees and costs." Id. at 356. Khalia. does not formally endorse of the lodestar method. Indeed, the dissenting opinion objected to the majority's "tacit" approval of the lodestar method in making fee determinations under O.C.G.A. § 9-11-68(b). Id. at 356-359.

and significantly divergent billing rates, the Court does not place much credence on this rudimentary calculation of an "average" hourly rate. As presented to the Court, this average hourly rate seems more like a hindsight attempt to justify the desired fee award than an illuminating measure of its reasonableness.[11]

The Court has previously determined that the Utah Plaintiffs' rejection of Merrill Lynch's good-faith settlement offer makes them liable for an award of attorney's fees under O.C.G.A. ¶ 9-11-68(b)(1), and while O'Melveny clearly performed a significant amount of sophisticated legal work on behalf Merrill Lynch, an aura of mystery surrounds the general $1 million fee from which this particular fee application is derived. Because of that mystery, the Court is unable to award the amount of fees sought. Further, while evidence of billing rates is not legally required to support the fee application, in its absence, the Court cannot, in any principled way, look beyond the evidentiary deficiencies it has identified and independently calculate an appropriate fee award. In light of the foregoing, the Court is unable to grant the fee request as concerns work performed by O'Melveny.

3.3 *Assessing the Reasonable Value of Legal Services Provided by Rogers & Hardin.*

Unlike the O'Melveny time entries, the Utah Plaintiffs have not objected to a single entry in the time-keeping records provided by Rogers & Hardin. (Tr., p. 64.)

[11] Merrill Lynch's initial evidentiary materials in support of a fee award made no mention of an average hourly rate or the lodestar method of analysis. This average and the accompanying argument were first presented to the Court during the April 6, 2021 hearing. (Tr., p. 18.)

However, the Utah Plaintiffs have objected to "the entire Merrill Lynch proration and allocation analysis . . ." (Pls. Mot. for Ord. Allowing Ext. to File Resps., p. 13.)[12]

"[B]ecause any statute that provides for the award of attorney fees is in derogation of common law, it must be strictly construed against the award of such damages." CaseMetrix, LLC v. Sherpa Web Studios, Inc., 353 Ga. App. 768, 770–71 (2020). Against this backdrop of strict construction, Georgia's jurisprudence on shifting attorney's fees has developed to demand a certain specificity in fee evidence.

In Canton Plaza, Inc. v. Regions Bank, Inc., 325 Ga. App. 361 (2013) which also concerned an award of fees under O.C.G.A. § 9-11-68(b)(1), the Court of Appeals remanded the trial court's attorney's fee award because the record did not reveal, either through testimony or billing statements, how much the defendant spent successfully defending claims as opposed to unsuccessfully pursuing its counterclaims. Canton Plaza relied Citadel Corp. v. All–South Subcontractors, Inc., 217 Ga. App. 736, 738 (1995) and Southern Cellular Telecom v. Banks, 209 Ga. App. 401, 402 (1993), two cases which outline longstanding Georgia law regarding the specific nature of evidence required to support an award of attorney's

[12] During oral argument, counsel for the Utah Plaintiffs stated, "we didn't necessarily object to Rogers & Hardin's records and we didn't object to the way in which Rogers & Hardin did the analysis." (Tr., p. 64.) Accordingly, it appears to the Court that the Utah Plaintiffs do not stand by this objection to the pro rata allocation as concerns Roger & Hardin's fees which was outlined in the Utah Plaintiffs' initial written response to Merrill Lynch's fee evidence. In an abundance of caution, the Court will address the argument.

fees. In Citadel, the jury verdict awarding $0 fees was affirmed because the evidence presented did not allow the fact finder to determine what portion of legal time was spent on defense matters where the law allowed the recovery of fees as opposed to time spent pursuing claims where fee shifting was not permitted. Similarly, in Southern Cellular, an award of fees was reversed because the supporting time sheets contained many entries with only broad, cursory descriptions of work performed, leaving the trial court was unable to segregate time counsel spent pursuing successful versus unsuccessful claims. Based on this body of law, the Utah Plaintiffs argue Merrill Lynch's pro rata allocation of attorney's fees must be disregarded because it fails to specifically identify work performed on the Utah plaintiffs' claims. (Utah Pls. Mot. for Ord. Allowing Ext. to Rile Resps., pp. 5-8; Utah Pls. Post-Hearing Opp., pp. 17-21.)

The Court finds this body of case law has developed to insure that fees awards are entered only on claims where fee-shifting is permitted, and they are supported with evidence displaying a "degree of certainty" so as to achieve this end. Dave Lucas Co., Inc. v. Lewis, 293 Ga. App. 288, 294 (2008). The requirement for specific evidence of fees should be viewed through this lens.

Here, based upon the peculiar circumstances of this case, the Court is convinced that the pro rata allocation of Rogers & Hardin's fees arrives at a figure that is not only reasonable but is less than the Utah Plaintiffs would otherwise owe

Merrill Lynch if the fees allocated to defending their particular claims had been segregated. In support of this conclusion, the Court finds that the defense of all the non-Georgia Plaintiffs' claims substantially overlapped. The pro rata allocation simply used the percentage of Utah Plaintiffs within the entire Plaintiff group even though the evidence and record reflect that significantly more of Merrill Lynch's defense work was targeted towards the non-Georgia Plaintiffs. Accordingly, under this pro rata allocation, which treats the Georgia and non-Georgia Plaintiffs uniformly, the Utah Plaintiffs pay less than their fair share of defense work related solely to the non-Georgia Plaintiffs. Indeed, they particularly benefit as to that defense work which solely concerned the Utah Plaintiffs as Merrill Lynch only seeks to recover the Utah Plaintiffs' pro rata share -- ranging from 12.5% to 15.38% -- rather than 100% the fees incurred. (Rudzin Aff., ¶ 37.)

4. **CONCLUSION**

In light of the foregoing, it is hereby ordered and adjudged:

(a) Merrill Lynch's request for an award of attorney's fees arising from the work performed by O'Melveny is **DENIED**, and

(b) Merrill Lynch's request for an award of attorney's fees arising from the work performed by Rogers & Hardin is **GRANTED** in the amount of $36,022.96 with $26,669.77 of that amount to be recovered from all of the Utah Plaintiffs and the remaining $9,353.19 of that amount to be recovered

from all of the Utah Plaintiffs but for Mark Swanson.

SO ORDERED this 20 day of May, 2021.

John J. Goger, Senior Judge
Superior Court of Fulton County
Metro Atlanta Business Case Division

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