UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

LAURA A. OWENS, Individually and on Behalf of a Class of All Other Similarly Situated, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, Defendants.	)))))))))))))	Civil Action File No. 2:14-cv-00074-RWS

MOTION TO DETERMINE ALLOCATION OF ATTORNEY FEE AWARD TO FORMER COUNSEL

COME NOW Former Class Counsel M. Scott Barrett (Barrett) and his firm Barrett Wylie, LLC, and file this Motion and Supporting Brief to Determine Allocation of Attorney Fee Award and in support hereof, show unto the Court the following:

INTRODUCTION

Scott Barrett and John Bell have a history spanning more than (17) years of working jointly on class actions, sharing in the profits (and losses) of each case.[1] In

[1] *See*, *UNUM Life Ins. Co. of America v. Crutchfield*, 256 Ga. App. 582, 568 S.E.2d 767 (2002).

May 2017, however, Bell orchestrated Barrett's termination as co-counsel in this action. Interestingly, this occurred shortly after Barrett refused to accede to Bell's demands for total, unbridled authority to decide how much, if anything, Barrett's firm would receive. Bell now seeks to deprive Barrett of his share of attorneys' fees earned prior to his manufactured termination. Because Barrett must be compensated for his legal services to the class, the Court's intervention is necessary to determine Barrett's fee interests.

FACTUAL BACKGROUND

For more than twelve (12) years, Barrett and Bell partnered together in the prosecution of Retained Asset Account ("RAA") class action lawsuits. During this time, while they won some cases, they lost others. As such, they shared in the successes on the cases they won and the losses in those they did not.

Initially, Bell and Barrett, along with three other attorneys, Jeffrey G. Casurella, Helen Cleveland, and Stuart T. Rossman (and his firm, the National Consumer Law Center ("NCLC")) operated under a co-counseling agreement. This co-counseling agreement set forth how fees, if any, would be disbursed among the various law firms as well as how expenses would be paid. The original agreement provided that fees would be split by first allocating 10 percent of the award to each firm. The remaining fee was then allocated based on the number of hours billed.

For example, if there was an award of $100,000.00, each firm received an initial allocation of $10,000.00. Moreover, if one firm recorded 25 percent of the total hours, that firm would receive an additional allocation representing 25 percent of the remaining $50,000.00, or $12,500.00.

Eventually, Bell became dissatisfied with his allocation under the co-counseling agreement. Feeling his contributions were worth more than those of his co-counsel, Bell sought out to renegotiate how fees were disbursed. Under this agreement, NCLC's fees were paid off the top. The remainder of the fees would then be split 50-30-20, with 50 percent to Bell's firm (Bell & Brigham), 30 percent to Barrett's firm, and 20 percent to Casurella's firm.[2] It was, however, only a matter of time before Bell became unhappy with this arrangement.

In April 2013, Bell expressed his displeasure with the written co-counseling agreement in the *Otte v. Cigna* case.[3] As such, Bell proposed a fee allocation methodology that would have increased his share significantly. Casurella's share, on the other hand, would have been reduced dramatically. Eventually, this resulted in a lawsuit filed by J.C. Bell against his law firm (Bell & Brigham) and Casurella. In early 2015, the case was settled and dismissed.

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[2] By this time, Helen Cleveland had dropped out of the enterprise.
[3] *See*, April 2, 2013 letter from John C. Bell, Jr. attached hereto as **Exhibit A.**

On April 21, 2014, while the Casurella case was pending and before Met. Life had been served in this action, Bell associated Barrett and Rossman (NCLC) as co-counsel for the proposed class.[4] On September 16, 2014, Barrett filed his initial application for *pro hac* admission.[5] Barrett's application, however, was not granted until January 14, 2015.[6] Moreover, Bell repeatedly spurned Rossman's efforts to obtain admission *pro hac vice*. Rossman finally gave up sometime in or around February 2015.

In June 2015, Bell informed Barrett that he would not agree to split the fee, if any, based on percentages.[7] In fact, Bell demanded absolute and final authority to decide what, if anything, Barrett would receive.[8] As the basis for this absolutism, Bell touted his authority as "lead counsel" to "control…who does what" in the this case.[9]

For almost two years, while actively working on this matter, Barrett reached out to Bell repeatedly in an effort to reach a consensus on fee allocation. In a letter dated September 3, 2015, Barrett rejected Bell's June 10, 2015 autocratic demand

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[4] *See*, April 21, 2014 email from Bell to Barrett attached hereto as **Exhibit B**.
[5] Doc. 26.
[6] Doc. 39.
[7] *See*, June 10, 2015 Letter from John Bell to Scott Barrett attached hereto as **Exhibit C**.
[8] *Id*.
[9] Ex. C-2.

for full and complete control of fee allocation. Barrett nonetheless requested that they meet face-to-face in an attempt "to restore the harmony, trust, collegiality and camaraderie that [they had] enjoyed for many years."[10] By late November 2015, not only had Bell and Barrett not reached an agreement, Bell outright refused to "discuss fee divisions 'past present or future.'"[11]

Barrett reached out to Bell again in a letter dated December 29, 2015. After Bell failed to respond to this letter, Barrett sent him another letter on February 23, 2016.[12] Again, Barrett received no response from Bell. Barrett nonetheless reached out to Bell again on August 16, 2016.[13] This letter also fell on deaf ears.

On February 21, 2017, Barrett wrote yet another letter to Bell "in the spirit of friendship and compromise" with the "hope that [they could] discuss an amicable resolution of the matters that separate[d]" them.[14] Finally, on April 4, 2017, Bell responded.[15] Bell's response was, however, far from amicable. Bell reasserted his absolute authority "as lead counsel" "in charge of the conduct of the [*Owens*] case."[16]

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[10] *See*, Sept. 3, 2015 letter from Scott Barrett to John Bell attached hereto as **Exhibit D**.

[11] *See*, Dec. 29, 2015 letter from Barrett to Bell attached hereto as **Exhibit E**.

[12] *See*, Feb. 23, 2016 letter from Barrett to Bell attached hereto as **Exhibit F**.

[13] *See*, Aug. 16, 2016 letter from Barrett to Bell attached hereto as **Exhibit G**.

[14] *See*, Feb. 21, 2017 letter from Barrett to Bell attached hereto as **Exhibit H**.

[15] *See*, email chain ending with April 19, 2017 11:15 email from Bell to Barrett regarding "The sounds of silence" attached hereto as **Exhibit I** at Ex. I-6.

[16] Ex. I-6.

Bell even went so far as to claim Barrett had "agreed" "with [his June 10, 2015] requirement … that any fee to [Barrett] would be totally at [Bell's] discretion to be determined if and when there might be a fee."[17] Bell then concluded by demanding Barrett's "unambiguous confirmation of [such an] agreement without delay."[18]

On April 8, 2017, Barrett replied to Bell's April 4 email.[19] In his email back to Bell, Barrett recognized that while he "agreed that [Bell] would be lead counsel," he "categorically den[ied] that [he] ever agreed 'that any fee to [him] would be totally at [Bell's] discretion to be determined if an when there might be a fee."[20] Barrett stated further that "[g]iven [their] ugly dispute with Jeff Casurella, it is hard to imagine anyone making such an agreement."[21]

On April 10, 2017, Bell responded by refusing "to agree to fee divisions tied to who can record the most hours."[22] Despite absolutely no mention of a fee split based on hours during the previous three (3) years, Bell asserted that "[t]hese continuing unpleasantries convince[d him] that [he] was right then [(June 10, 2015)]

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[17] Ex. I-6.
[18] Ex. I-6.
[19] *See*, April 8, 2017 1:33 PM email at Ex. I-5.
[20] Ex. I-5.
[21] Ex. I-5.
[22] Ex. I-4.

and that [he was] right now to insist that [Barrett] confirm that this is how [they] are proceeding."[23]

Barrett wrote back to Bell on April 14, 2017 by pointing out that they "both know that [they] are not talking a fee split based solely on relative hours."[24] Barrett then stated "I [Barrett] am unable to acquiesce in your [Bell's] request 'that any fee to me [Barrett] be totally at your [Bell's] discretion to be determined if and when there might be a fee' because, as you [Bell] state … 'I [Barrett] don't trust you [Bell]."[25] Barrett concluded by reiterating his "suggestion" that they "discuss a mutually convenient time to meet."[26]

Bell and Barrett continued to email back and forth through April 19, 2017.[27] During that time, Bell deflected Barrett's requests to meet. Finally, on April 19, 2017 at 11: 15 AM , Bell communicated with Barrett for the last time.[28]

On May 8, 2017, Barrett received an email from Todd L. Lord. [29] Attached to Lord's email was a letter from Lord to Barrett.[30] Enclosed with Lord's letter was

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[23] *Id.*
[24] *See*, April 14, 2017 1:06 email from Barrett to Bell at Ex. I-3.
[25] Ex. I-4.
[26] *Id.*
[27] *See*, Ex. I-1 – Ex. I-3.
[28] Ex. I-1.
[29] *See*, May 8, 2017 3:24 email from Todd Lord to Barrett attached hereto as **Exhibit J**.
[30] Ex. J-2.

a handwritten note from the class representative, Laura A. Owens.[31] Although Ms. Owens' handwritten note was addressed to Mr. Barrett's Bloomington, Indiana Post Office box, it was sent to Barrett via email as an enclosure to Lord's letter. After writing out the style of the case, Ms. Owens stated:

> Please be advised that I am terminating your services in my case. I no longer want you working on my case. I ask that you file a withdrawal with the above-stated case with the court and send my lawyers a file-stamped copy of your filing with the court. With best regards [signed] Laura Owens 5-8-17.[32]

Prior to May 8, 2017, Barrett had no dealings with Ms. Owens. In fact, to this day, Barrett has never talked to or met Ms. Owens personally. Because Bell, as asserted in his communications with Barrett, is "lead counsel" "in charge of the conduct of the case," Ms. Owens would not have sent her May 8, 2017 letter absent Bell's direction and explicit involvement.

Per Ms. Owens' directive, Barrett filed a Motion to Withdraw on May 11, 2017.[33] Between April 24, 2014 and May 8, 2017, Barrett was actively involved in the prosecution of this matter. During that time, over 140 docket entries were made, including multiple declarations from Barrett. Motions to dismiss and for summary

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[31] Ex. J-3.
[32] Ex. J-3.
[33] Doc. 141.

judgment had been filed, responded to, and successfully defeated. Discovery had been completed and an initial motion to certify the class had been filed.

ARGUMENT AND CITATION TO AUTHORITY

A. <u>This Court Has Ancillary Jurisdiction Over Claim for Fees From Discharge Co-Class Counsel</u>.

As a related matter necessary to the final disposition of the case, this Court has ancillary jurisdiction to resolve Barrett's fee interests. The doctrine of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them."[34] "There is no debate that a federal court properly may exercise ancillary jurisdiction 'over attorney fee disputes collateral to the underlying litigation.'"[35]

Pursuant to Rule 23, this Court has the responsibility to approve as fair and reasonable any attorney fee award for legal work performed on behalf of the class.[36]

> To be sure, in a class action, whether the attorney's fees come from a common fund or are otherwise paid, the district court must exercise its

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[34] *Kokkonen v. Guardian Life Ins. Co. of Am*, 511 US. 375, 378 (1994).

[35] *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 968 (9th Cir. 2014) (quoting *Fed. Sav. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1041 (9th Cir. 2004)); *see also*, *Jacobs v. Bank of American Corp.*, Civil Action File No. 1:15-cv-24585-UU, 2019 WL 2268976 (S.D. Fla. Feb. 26, 2019); *Kaplan v. Reed Smith LLP*, 919 F.3d 154, 157 (2d Cir. 2019) (district court has ancillary jurisdiction to adjudicate collateral matters such as claims for attorneys' fees by former class-counsel).

[36] *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999) ("In considering a fee award in the class action context, the district court has a significant supervisory role.").

> inherent authority to assure that the amount and mode of payment of attorney's fees are fair and proper. Thus, when a dispute concerning attorney's fees arises, the district court must have continuing jurisdiction to resolve the dispute in order to protect the continued integrity of its order approving fair and reasonable fees in the first instance. Moreover, just resolution of the issues raised by attorney's fees disputes requires both an intimate working knowledge of what occurred during the course of the class action and a uniform dispute resolution process.[37]

Federal courts have recognized that while attorneys' fee arrangements are "matters of primarily sate contract law," ancillary jurisdiction covers this type of dispute because the 'federal forum has a vital interest in those arrangements because they bear directly upon the ability of the court to dispose of cases before it in a fair manner."[38] "It is true that there is a long tradition of sustaining jurisdiction to determine fees due an attorney dismissed by a client in a pending action."[39] "The basis for the exercise of this ancillary jurisdiction is the responsibility of the court to protect its officers."[40] "If, upon withdrawal, counsel is unable to secure payment for his services, the court may assume jurisdiction over a claim based on a charging lien over the proceeds of the lawsuit."[41]

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[37] *Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746, 753 (4th Cir. 2003).
[38] *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217 (3d Cir. 1987).
[39] *Broughten v. Voss*, 634 F.2d 880, 882 (5th Cir. 1981).
[40] *Broughten*, 634 F.2d at 882.
[41] *Id*. at 883.

B. **<u>The Amount of Fee Owed to Former Co-Counsel Must Be Determined Based on the Totality of the Circumstances</u>.**

"[I]n calculating the proper amount of fees for work performed…prior to being discharged, the trial court must consider 'the totality of the circumstances surrounding the professional relationship,' taking 'into account the actual value of the services to the client.'"[42]

> Unlike an award of attorney's fees to a prevailing party, a quantum meruit award must take into account the actual value of the services to the client. Thus, while the time reasonably devoted to the representation and a reasonable hourly rate are factors to be considered in determining a proper quantum meruit award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair to both the attorney and client.[43]

"The court must consider any other factors surrounding the professional relationship that would assist the court in fashioning an award that is fair to both the attorney and client."[44] These factors may include "the fee agreement itself, the reason the attorney was discharged, actions taken by the attorney or client before or after discharge, and the benefit actually conferred on the client…."[45]

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[42] *O'Malley v. Freeman*, 241 So.3d 204 (Fla.App. 2018) (quoting *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So.2d 366, 369 (Fla. 1995)).
[43] *Poltez*, 652 So.2d at 369.
[44] *Id.*
[45] *Id.*

1. Prior Fee Allocations Between Bell and Barrett.

Here, the relevant "fee agreement" is between Bell and Barrett rather than between the plaintiff class and class counsel. As stated above, Bell adamantly opposed Barrett's continued efforts to reach an agreement on fees for this case. Accordingly, how Bell and Barrett have allocated fees between them in other RAA cases is relevant to this consideration. In prior RAA cases, after Rossman (NCLC) was paid off the top, 20 percent was allocated to local and other counsel. Whatever was left after that was split by allocating 50 percent to Bell, 25 percent to Barrett, and 25 percent to Rossman.[46] Moreover, while Bell refused to agree to this methodology here, it is relevant to show what Bell has considered fair and reasonable in prior similar cases.

Bell and other Class Counsel may argue that there was never an agreement as to how fees would be split in this case. If so, Georgia law holds unambiguously that law firms share equally in fees in the absence of an agreement.[47] Thus, in the absence of an agreement, Georgia law provides that any fee awarded here be disbursed with

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[46] By this time, Casurella was no longer participating in the enterprise.

[47] *Nickerson v. Holloway*, 220 Ga. App. 553, 469 S.E.2d 209 (1996) ("Georgia has historically followed the majority rule that 'lawyers undertaking to represent a client without a contract as to the division of fees share equally.'") (quoting *Glover v. Maddox*, 98 Ga. App. 548, 557, 106 S.E.2d 288 (1958)).

25 percent to each of the four class counsel law firms. Of course, the manufactured termination of Barrett complicates matters.

2. Reason for Barrett's Termination.

The Court must also consider the reasons for Barrett's termination. As shown above, Barrett made numerous attempts over a period of years to reach an agreement with Bell. Not only did Bell refuse to agree or even discuss a fee allocation methodology, he demanded absolute authority to determine if and how much Barrett would receive. Moreover, it was only after Barrett refused to go along with this that the class representative terminated Barrett. Accordingly, the only discernable reason for Barrett's termination is that Bell did not want to pay Barrett what he would be rightfully owed.

3. Barrett's Involvement Prior to Termination.

At the time of Barrett's termination, approximately 140 docket entries had been made. As of the date of this filing, 221 docket entries have been made. As such, 64 percent of docket entries were entered prior to Barrett's termination. Moreover, this included three (3) affidavit/declarations from Barrett filed in support of Motion to Certify Class.[48]

[48] *See*, Doc. 113-3, Doc. 113-4, and Doc. 113-5.

4. Benefit to the Class.

There should be no question regarding Barrett's contribution to the class. Having participated in numerous other RAA class actions, Barrett brought a wealth of knowledge and experience to this matter. In fact, Bell acknowledged that Barrett's experience was "quite valuable" to the instant matter.[49]

C. <u>Bell's Actions Constitute Wrongful Dissolution of a Partnership</u>

It is well-established that "[p]arties who join together as partners, promoters, joint venturers, or otherwise to achieve a common business objective may owe each other a fiduciary duty."[50] Here, Bell manufactured Barrett's termination in violation of the fiduciary duties he owed him. Moreover, Bell did this for the sole and exclusive purpose of reaping the lion's share of the attorneys' fees recovered in this action. The facts of this case fit squarely within those of *Jordan v. Moses*, 291 Ga. 39 (2012), for the tort of wrongful dissolution. As explained by the Supreme Court, the measure of damages in a wrongful dissolution case would be Barrett's share of income from the continuing business of the partnership but for the wrongful dissolution:

> Accordingly, although this Court in *Wilensky* did not amplify the distinction between the terms "the prosperity of the partnership" and

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[49] Ex. C-2.

[50] *Cushing v. Cohen*, 323 Ga. App. 497, 508 (2013) (citing *Vitner v. Funk*, 182 Ga. App. 39, 42–43 (1987)).

> "the new prosperity of the partnership," when discussing wrongful dissolution, this Court saw a distinction, and rejected a formulation of the tort that required a showing of a bad faith attempt to appropriate solely the 'new prosperity' of the business. And, our intentional omission of the term was warranted; not only is the definition of what constitutes "new prosperity" of an ongoing business enterprise pragmatically elusive, it does not properly account for matters such as a wrongful attempt to appropriate an existing, or continuing, business opportunity, or wrongful acts coincident to the dissolution. Accordingly, this Court's opinion in *Wilensky* stands for the proposition that if a partner acts in bad faith and violates his fiduciary duty by attempting, through the dissolution, to appropriate for himself partnership prosperity, he will be liable for wrongful dissolution. Thus, in *Wilensky* ..., we recognized that the damages owed to Blalock could include his share of income from the continuing business of the partnership, as well as those material business assets wrongfully kept by Arford; recovery was not confined to something that could be labeled 'new prosperity.'[51]

There is little doubt that in orchestrating Barrett's termination, Bell acted with the specific intent to cause harm to Scott Barrett.

D. Equity Mandates that between 16 and 19 Percent of Attorneys' Fee Be Allocated to Barrett.

Because *quantum meruit* is an equitable doctrine, any award thereon must be based on fairness. As stated above, 64 percent of the docket entries in this action were made prior to Barrett's discharge. Moreover, based on Bell and Barrett's prior agreements, 30 percent of the work performed on behalf of the class during that time can be attributed to Barrett. Accordingly, equity provides that 64 percent of that

[51] 291 Ga. at 42.

agreed upon fee of 30 percent, or 19 percent of the total award, be allocated to Barrett.

Alternatively, in the absence of an agreement, Georgia law provides that Barrett be allocated 25 percent of the fee as one of the four class counsel law firms. Under this approach, Barrett would receive 16 percent of the total fee. (64 percent of 25 percent equal 16 percent of the total fee).

CONCLUSION

WHEREFORE Former class co-counsel M. Scott Barrett prays upon this Court for an order allocating between 16 and 19 percent of any attorneys' fees awarded in this matter to his law firm as reasonable and fair compensation for his firm's legal services provided prior to his manufactured termination.

This 18th day of September, 2019.

/s/ Paul A. Piland

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LOCAL RULE 7.1D CERTIFICATION

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

/s/ Paul A. Piland

Paul A. Piland
Georgia Bar No. 558748

CERTIFICATE OF SERVICE

This is to certify that on this day I electronically filed the within and foregoing **MOTION TO DETERMINE ALLOCATION OF ATTORNEY FEE AWARD TO FORMER COUNSEL** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

John Chapman Bell, Jr.
John W. Oxendine
Leroy Weathers Brigham
M. Scott Barrett
Michael Jordan Lober
Todd L. Lord
William Gregory Dodson
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