STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 08 CVS 22632
IRVING EHRENHAUS, On Behalf of Himself and All Others Similarly Situated Plaintiff, v. JOHN D. BAKER, II, PETER C. BROWNING, JOHN T. CASTEEN, III, JERRY GITT, WILLIAM H. GOODWIN, JR., MARYELLEN C. HERRINGER, ROBERT A. INGRAM, DONALD M. JAMES, MACKEY J. MCDONALD, JOSEPH NEUBAUER, TIMOTHY D. PROCTOR, ERNEST S. RADY, VAN L. RICHEY, RUTH G. SHAW, LANTY L. SMITH, DONA DAVIS YOUNG, WACHOVIA CORPORATION and WELLS FARGO & COMPANY Defendants.	**ORDER**

Murphy, Judge.

THIS MATTER is before the Court on Plaintiff Irving Ehrenhaus' ("Ehrenhaus" or "Plaintiff") Motion for Approval of Plaintiff's Renewed Fee Application (the "Motion"). After considering the parties' briefs and arguments of counsel at the August 6, 2013 hearing, the Court **GRANTS** the Motion and approves an award of attorney's fees[1] in the amount of $1,056,067.57, including expenses.

[1] The Court uses the term "attorney's fee(s)" to denote the inclusion of expenses. The term "fee(s)" refers only to the amount of money charged by an attorney for his services and does not encompass the expenses incurred in performing them.

I.

PROCEDURAL AND FACTUAL BACKGROUND

{1} On October 7, 2008, Plaintiff instituted an action in Mecklenburg County Superior Court for breach of fiduciary duty against Defendants Wells Fargo ("Wells Fargo"), Wachovia Corporation ("Wachovia"), and Wachovia's Board of Directors ("the Board") following the announcement of a proposed merger between the two corporations (the "Merger"). As part of the Merger, the merger agreement included a share exchange between Wachovia and Wells Fargo, a fiduciary out provision, and a "tail provision" whereby outstanding shares of Wachovia preferred stock issued to Wells Fargo under the share exchange "would remain outstanding and could not be redeemed for at least 18 months following a shareholder vote disapproving the Merger." (Pl.'s Br. Supp. Mot. 2–3).

{2} Plaintiff retained Wolf Popper, LLP ("Wolf Popper), a New York law firm specializing in complex business litigation, as its lead counsel. In compliance with North Carolina's *pro hac vice* rules, Wolf Popper retained Greg Jones & Associates, P.A. ("Greg Jones"), a Wilmington, North Carolina law firm, on Plaintiff's behalf.

{3} Thereafter, Plaintiff filed a Motion for Preliminary Injunction, seeking to "(1) invalidate the share exchange; and (2) preliminarily enjoin [Wells Fargo and Wachovia] from taking any steps toward consummating the Merger until the parties negotiate a proper and effective 'fiduciary out' clause." (Pl.'s Mot. Prelim. Inj. 2). The Honorable Albert Diaz issued an Order enjoining enforcement of the eighteen-month "tail" on Wells Fargo's voting power and denying preliminary relief as to enforcement of the share exchange and fiduciary out provisions in the merger agreement. *Ehrenhaus v. Baker*, 2008 NCBC 20 ¶ 166 (N.C. Super. Ct. Dec. 5,

2008), http://www.ncbusinesscourt.net/opinions/2008_NCBC_20.pdf (granting in part and denying in part Plaintiff's motion for preliminary injunction); (Pl.'s Br. Supp. Mot. 3).

{4} The parties negotiated a settlement after Judge Diaz entered his Order, entering into a memorandum of understanding ("MOU") and, later, a Stipulation and Agreement of Compromise, Settlement and Release (the "Settlement"). (Pl.'s Br. Supp. Mot. 4–5). In the Settlement, Wachovia and Wells Fargo agreed not to appeal the portion of the Preliminary Injunction Order enjoining the tail provision, to provide additional disclosures to Wachovia shareholders, to "absorb the cost of providing notice to the Class of the Proposed Settlement, and to pay up to $1.975 million in attorney fees to Plaintiff's counsel." *Ehrenhaus v. Baker*, No. 08 CVS 22632 ¶¶ 15–17, 19 (N.C. Super. Ct. Feb. 5, 2010) (approving the Settlement including payment of attorney's fees in the amount of $932,621.98). Plaintiff agreed to dismiss the Complaint with prejudice. *Id.* at ¶ 18.

{5} At the August 20, 2009 hearing on the Settlement, the Court heard from several groups of class members opposed to the Settlement (the "Objectors"). *Id.* at ¶ 32. After the hearing, the parties and many of the Objectors agreed to a modification of the release contained in the Settlement. *Id.* at ¶¶ 34–36.

{6} Judge Diaz entered both an Order and a Final Judgment approving the Settlement on February 5, 2010. However, instead of granting the requested attorney's fee of $1.975 million, Judge Diaz awarded Plaintiff only $932,621.98. *Id.* Two of the Objectors, John H. Loughridge, Jr. and Norwood Robinson, filed notice of appeal on March 5, 2010.

{7} On appeal, the Court of Appeals affirmed in part and reversed in part, leaving the approval of the Settlement intact, but vacating the attorney's fee award and remanding the matter to this Court "for additional findings of fact and conclusions of law, including a reasoned

decision on the issue of how it arrived at the figure to be awarded." *Ehrenhaus v. Baker*, 717 S.E.2d 9, 33–35 (N.C. Ct. App. 2011); (Pl.'s Br. Supp. Mot. 8).

{8} Plaintiff filed the Motion on February 8, 2013, seeking $1.5 million dollars in attorney's fees. (Pl.'s Br. Supp. Mot. 9). Defendants do not object to an award of the requested attorney's fees. (Defs.' Resp. Mot. 1). However, the Objectors contend that Plaintiff is not entitled to an award of attorney's fees because there is no legal basis for one in this case. (Objectors' Resp. Mot. 5).

II.

THE COURT'S TASK ON REMAND

{9} On remand, this Court must "examine additional evidence and . . . make the appropriate findings of fact and conclusions of law, including a reasoned decision on the issue of how it arrived at the figure to be awarded." *Ehrenhaus*, 717 S.E.2d at 35. Specifically, the Court of Appeals expressed concern that this Court had not adequately considered Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar ("RRPC") in granting Plaintiff an award of attorney's fees. *Id.* at 33 ("*For the following reasons*, we vacate that portion of the court's order regarding attorney's fees . . . . The reasonableness of attorney's fees in this state is governed by the factors found in Rule 1.5 . . . .").

{10} Specifically, the Court of Appeals noted that the Court had failed to make adequate findings of fact as to four questions under RRPC 1.5. The questions were: (1) whether there was a written agreement sufficient to constitute a contingent fee agreement; (2) whether there was a fee sharing agreement regarding Plaintiff's local counsel, Greg Jones; (3) the number of hours expended in the case and the hourly rates for the attorneys charged; and (4) the nature of the

contingency fee and the legal basis upon which the parties agreed to the contingency. *See id.* at 34–35.

{11} Inasmuch as the only matter remanded to this Court is a determination of the adequacy of the Court's calculation and award of attorney's fees, the Court's order is limited to consideration of evidence supporting an award of attorney's fees under RRPC 1.5.

III.

ANALYSIS

A.

APPLICABILITY OF THE AMERICAN RULE IN THIS CASE

{12} Although North Carolina follows the American Rule that attorney's fees are "not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them," *Belk v. Belk*, 728 S.E.2d 356, 363 (N.C. Ct. App. 2012), this rule does not apply where the parties have amicably settled the case and one party agrees to pay the attorney's fees of the other party. The Court of Appeals quoted *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814–15 (1980), for the proposition that

> "[t]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." Certainly in the absence of any contractual agreement allocating the costs of *future* litigation, it is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879. Thus the general rule has long obtained that a *successful* litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. Even in the face of a carefully drafted contractual provision *indemnifying* a party for such attorneys' fees *as may be necessitated by a successful action on the contract itself*, our courts have consistently refused to sustain such an award absent statutory authority therefor.

Ehrenhaus, 717 S.E.2d at 32 (alteration in original) (emphasis added).

{13} The proposition relied upon by the North Carolina Supreme Court and Court of Appeals in *Stillwell* and *Ehrenhaus* applies the American Rule to "successful" litigants. This Court does not interpret the scope of the American Rule to reach cases such as this, where the parties have amicably reached an agreement *during the course of litigation* that one party will pay the attorney's fees and expenses of the other and neither party is a "successful" litigant. *See In re Progress Energy Shareholder Litigation*, 2011 NCBC 44 ¶ 52 (N.C. Super. Ct. Nov. 29, 2011), http://www.ncbusinesscourt.net/opinions/2011_NCBC_44.pdf (approving shareholders' action against board of directors); *see also In re Stucco Attorney Fee Petitions*, 2000 NCBC 7 ¶ 7 (N.C. Super. Ct. May 17, 2000), http://www.ncbusinesscourt.net/opinions/2000%20NCBC%207.htm (approving settlement and awarding attorney's fees and expenses).

{14} The parties in this case negotiated a maximum amount of attorney's fees as part of the settlement of this case. Although the agreement of the parties does not obligate the Court to make an award of attorney's fees in this class action, it does support a finding that the attorney's fee requested is reasonable. Therefore, the Court's sole directive, going forward, is to determine whether Plaintiff's attorney's fee award request of $1.5 million is reasonable in light of Rule 1.5 of the RRPC.

B.

REASONABLENESS OF FEES

{15} Because "[a] lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses," the Court, whether approving or determining the amount of fees and expenses, must consider their reasonableness. N.C. Rev. R. Prof. Conduct 1.5 (2011); *see Ehrenhaus*, 717 S.E.2d at 33.

{16} In determining whether a fee is reasonable, it is incumbent upon the Court to consider the following factors:

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

N.C. Rev. R. Prof. Conduct 1.5(a). In addition to the foregoing factors, a contingent fee agreement

> shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.

N.C. Rev. R. Prof. Conduct 1.5(c).

1.

RRPC 1.5(a)(1)

{17} Regarding RRPC 1.5(a)(1), Plaintiff's counsel, Wolf Popper, submitted extensive records for the time period from inception of the action to December 14, 2012. (Stine Aff. Ex. E). In total, Wolf Popper spent a total of 3,328.70 hours representing Plaintiff in this action – 2,538.60 hours were spent through the Settlement hearing and 790.10 hours following the Settlement hearing.

{18} Comparing the facts of this case with the facts of *In re Progress Energy*, a case similar in time requirement and substance, the amount of time expended by Wolf Popper prior to the appeal is reasonable. Both cases concerned complex mergers of publicly-traded companies and both cases culminated in settlement agreements reached within ten months of filing of the

complaints. *See* 2011 NCBC 44 at ¶¶ 1–21. The plaintiff's attorneys in *In re Progress Energy* expended over 3,000 hours in reaching a settlement, whereas here, Wolf Popper expended only 2,538.60 hours in reaching the Settlement. *See id.* at ¶ 54; (Stine Aff. Ex. E).

{19} Wolf Popper also spent 790.10 hours following the Settlement defending against the Objectors' appeal and fielding phone calls from class members. (Stine Aff. Ex. D). There was a three-year time period between Judge Diaz's approval of the Settlement and the filing of the Motion before the Court. Not surprisingly, members of this very large class were interested in the status of the case, especially given the nature of the Objectors' appeal and the Court of Appeals' reversal and remand of part of the Settlement approval. The Court finds that the prosecution of this action required an extensive amount of attorney time and labor, and the novel and complex nature of the issues involved required legal counsel to possess a high level of skill.

2.

RRPC 1.5(a)(2)

{20} Given the complex nature of the case and the large number of class members, the Court finds that Plaintiff understood the prosecution of this action would require the investment of a substantial amount of time and labor by his attorneys, to the extent that it would likely preclude other employment by counsel.

3.

RRPC 1.5(a)(3)

{21} Wolf Popper submitted various documents detailing the rates of attorneys in the Charlotte, North Carolina law firm, Rayburn Cooper & Durham, P.A. ("Rayburn Cooper") in support of its request for fees. (Stine Aff. Ex. F–G). Rayburn Cooper is a firm of similar size to Wolf Popper and has similar practice areas, largely focusing on complex business litigation.

{22} In 2012, four partners at Rayburn Cooper who represented a corporation in Chapter 11 Bankruptcy charged hourly rates ranging from $570.00 to $275.00 for that representation, and their associates charged hourly rates ranging from $265.00 to $180.00 for the same representation. (Stine Aff. Ex. F). Rayburn Cooper's paralegals charged $125.00 per hour for their services in that case. (Stine Aff. Ex. F). In this case, Wolf Popper has submitted partner-level hourly rates of $450.00 to $380.00, associate-level hourly rates of $305.00 to $210.00, and paralegal-level hourly rates of $125.00. (Stine Aff. Ex. E). Bankruptcy defense of corporations and prosecution of class actions both fall within the realm of complex business litigation.

{23} On balance, the Court finds that Wolf Popper's hourly rates are not excessive when compared with the hourly rates of attorneys engaged in complex business litigation in Charlotte, Mecklenburg County, North Carolina.

4.

RRPC 1.5(a)(4)

{24} In this case, Plaintiff's attorneys obtained a favorable result for the Class, albeit a non-monetary one. In reaching the Settlement, Plaintiff's attorneys ensured the Class would receive a more-detailed proxy statement regarding the Wachovia-Wells Fargo Merger and effectively extinguished the tail provision, allowing the shareholders to cast informed votes on the Merger and protect their interests. For this reason, the Court finds that the result obtained by Wolf Popper was highly favorable to Plaintiff.

5.

RRPC 1.5(a)(5)

{25} From the inception of this case, circumstances warranted its speedy resolution. The Board was left between a rock and a hard place during the financial meltdown of 2008. The

declining value of Wachovia stock prompted the federal government to offer the Board the option of being forced into a sale of Wachovia's assets or voluntarily merging with a sound financial institution within a very short period of time. *See Ehrenhaus*, 717 S.E.2d at 14–15.

{26} Because of the narrow window of time available to Wachovia to exercise a viable option for the benefit of the company and its shareholders, Plaintiff's attorneys were under pressure to work swiftly to facilitate a vote on the Merger. Thus, the Court finds that the circumstances of this case imposed stringent time limitations on Plaintiff's attorneys.

6.

RRPC 1.5(a)(6)

{27} There was no professional relationship between Plaintiff and his attorneys prior to the institution of this action. Although the length of the professional relationship was relatively short, it involved a large number of class members and very complex litigation. Therefore, the Court finds that the nature of the professional relationship between Plaintiff and his counsel was complex and expansive.

7.

RRPC 1.5(a)(7)

{28} After reviewing the biographical sketch of Wolf Popper submitted by Plaintiff (Stine Aff. Ex. K), the Court finds that the Wolf Popper attorneys who worked on this case were experienced in class action litigation, that the firm has a reputation of professionalism, experience, and hard work, and that the attorneys were well suited to perform the services required of counsel in a complex case such as this.

8.

RRPC 1.5(a)(8)

{29} Although Wolf Popper has submitted a "Letter of Engagement" from attorney Carl Stine that purports to establish a contingent fee agreement with Plaintiff (Stine Aff. Ex. I), the Letter of Engagement does not contain Plaintiff's signature, a fatal flaw in the realm of contingent fee agreements. The language of RRPC 1.5(c) – "[a] contingent fee agreement shall be in a writing signed by the client…" – is cast in mandatory terms, which the court interprets as a prerequisite in order to create an effective contingent fee agreement. Accordingly, the Court finds that there was no contingent fee agreement between Plaintiff and his attorneys.

{30} The requested attorney's fee award of $1.5 million was calculated based on the use of a contingency multiplier. However, in the absence of a valid contingent fee agreement between Plaintiff and his attorneys, as required by Rule 1.5(c), any award using a contingency multiplier is unreasonable. *See In re Senergy and Thoro Class Action Settlement*, 1999 NCBC 7 ¶ 30 (N.C. Super. Ct. July 14, 1999), http://ncbusinesscourt.net/ncbc_website/opinions/1999%20ncbc%207.htm (awarding class counsel an initial fee); *see also Byers v. Carpenter*, 1998 NCBC 1 ¶ 58 (N.C. Super. Ct. Jan. 30, 1998), http://www.ncbusinesscourt.net/ncbc_website/opinions/1998%20NCBC%201.htm (awarding attorney's fees from class settlement fund).

{31} Because the parties agreed to a maximum amount of attorney's fees, the Court has latitude to award a fee less than that requested by Plaintiff. Considering the measurable time contribution of each attorney and paralegal at Wolf Popper from inception of this case until December 14, 2012, the date of the last record of time expended, and in light of the Court's analysis of the RRPC 1.5(a) factors, the Court concludes that $1,012,326.00 is a reasonable amount of fees in this case.

C.

REASONABLENESS OF EXPENSES

{32} While Rule 1.5(a) prohibits the charging or collection of a "clearly excessive amount for expenses," the rule provides no mechanism for determining whether or not an amount of expenses is clearly excessive. *See* N.C. Rev. R. Prof. Conduct 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in *determining whether a fee is clearly excessive* include the following . . . .") (emphasis added). However, given the complex nature of the case and the expansive number of class members, the Court concludes that the expenses totaling $43,741.57 incurred by Wolf Popper in prosecuting this action are not clearly excessive and should be a part of the attorney's fee award.

D.

DIVISION OF FEES

{33} Attorneys who are not in the same firm may divide a fee only if:

> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

N.C. Rev. R. Prof. Conduct 1.5(e) (2013). Since Wolf Popper and Greg Jones are separate firms, any division of a fee between the two would require compliance with RRPC 1.5(e).

{34} Plaintiff submitted two documents as evidence of Plaintiff's agreement to a division of fees between Wolf Popper and Greg Jones: the Letter of Engagement dated October 14, 2008, and a purported fee-sharing agreement signed by Plaintiff and dated January 31, 2013 ("fee-sharing agreement"). (Stine Aff. Exs. I–J).

{35} First, although no signature by the client is required to effectuate a division of fees between attorneys not in the same firm, the Letter of Engagement is not sufficient to serve as an agreement by the client confirmed in writing. RRPC 1.5(e) requires that the client agree to the arrangement, including the share that each attorney will receive. While the Letter of Engagement authorized Wolf Popper to "retain, employ and utilize such . . . additional counsel . . . as to the firm appear[ed] appropriate to the efficient performance of [the firm's] representation and undertaking," the Letter of Engagement does not confirm the share each attorney would receive. Therefore, the Letter of Engagement is inadequate evidence of Plaintiff's agreement to a division of fees between Wolf Popper and Greg Jones.

{36} Second, Plaintiff is correct that RRPC 1.5(e) provides no time frame or limitation regarding when a client must confirm a division of fees in writing. *See* N.C. Rev. R. Prof. Conduct 1.5(e); (Pl.'s Reply Supp. Mot. 10). Although the fee-sharing agreement did not exist until almost five years after the inception of this action, it does include the share each lawyer will receive. (Stine Aff. Ex. J). Since RRPC 1.5(e) does not explicitly state the time in which attorneys must comply with it, and Wolf Popper and Greg Jones have obtained Plaintiff's consent to the division of fees in a writing that includes the share each attorney will receive, the Court concludes that the fee-sharing agreement complies with RRPC 1.5(e).

{37} However, even though there is a valid fee-sharing agreement between Wolf Popper and Greg Jones, Plaintiff has submitted no evidence of the time expended, the rate charged, or the expenses incurred by Greg Jones in prosecuting this action as local counsel.[2] (*See* Stine Aff. Exs. A–Q). Although the attorneys agreed that Greg Jones would receive five percent of the total fee, there is no way for the Court to determine whether the division of fees is actually in

[2] Although Plaintiff references an affidavit of Greg Jones throughout his Brief in Support of the Motion, there is no affidavit of Greg Jones in the record before the Court.

proportion to the services performed by each lawyer. The only time records before the Court are solely those of Wolf Popper. As a result, the Court is unable to determine whether any division of fees with Greg Jones is reasonable.

{38} Therefore, the Court concludes that until such time as there is sufficient evidence before the Court to support a proper analysis regarding the services rendered by Greg Jones to Plaintiff, this Court does not award any portion of attorney's fees to Greg Jones.

IV.

CONCLUSION

{39} For the reasons set forth above, the Court **GRANTS** the Motion, except that it shall approve a total attorney's fee award of $1,056,067.57, including expenses.

SO ORDERED, this the 25th day of March, 2014.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge