UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Re SunTrust Banks, Inc. ERISA Litigation	**CIVIL ACTION FILE No. 1:08-cv-03384-RWS**

PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CASE CONTRIBUTION AWARDS

Pursuant to Federal Rule of Civil Procedure 23(h), Plaintiffs Dennis Erwin, William Fisch, Chrys Trau, and Donna Smothermon ("Named Plaintiffs") respectfully move for an Order:[1]

A. Awarding attorneys' fees of one third of the Settlement Fund, or $1,583,333.33, together with the interest earned thereon for the same time period and at the same rate as that earned on the Settlement Fund until paid;

[1] A form of [Proposed] Order and Final Judgment was filed as Exhibit 1-C to the Stipulation of Settlement, dated March 9, 2018 (the "Settlement Agreement") (Dkt. 285-3). Capitalized terms used herein are defined in the Settlement Agreement. Plaintiffs have, to the extent possible, filled in the blanks (without making any other changes) and have filed that version of the [Proposed] Order and Final Judgment as the proposed order for Plaintiffs' pending motions to be heard at the Fairness Hearing. Blanks remain in ¶¶ 14 (amount of Attorneys' Fees), 15 (amount of Attorneys' Expenses), and 16 (amount of Case Contribution Awards). The relief sought herein can be effectuated by filling in the blanks left in ¶¶ 14-16 of that [Proposed] Order and Final Judgment, which is filed as the proposed order for Plaintiffs' contemporaneous motion seeking final judicial approval of the Settlement Agreement under FED. R. CIV. P. 23(e).

B. Reimbursing Plaintiffs' Counsel's litigation expenses in the amount of $462,810.18; and

C. Awarding Case Contribution Awards of $10,000 to each of the four Named Plaintiffs.

The grounds for the Motion are set forth in the supporting Memorandum of Law filed herewith, as well as in the contemporaneously filed Joint Declaration of Mark K. Gyandoh, Michael J. Klein, and Stephen J. Fearon, Jr., and all of the exhibits attached thereto, as well as the Record in this Action.

Dated: May 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1C. This Motion was prepared on a computer using the Times New Roman font (14 point).

Date: May 24, 2018

/s/ Mark K. Gyandoh
Mark K. Gyandoh

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE SUNTRUST BANKS, INC. ERISA LITIGATION	)	**CIVIL ACTION FILE NO. 1:08-CV-3384-RWS**

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which serves notification of such filing to all counsel of record. I further certify that the foregoing will published on the website identified in the Class Notice as soon as practicable.

/s/ Mark K. Gyandoh
Mark K. Gyandoh

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Re SunTrust Banks, Inc. ERISA Litigation	**CIVIL ACTION FILE No. 1:08-cv-03384-RWS**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CASE CONTRIBUTION AWARDS

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Named Plaintiffs,[1] participants in SunTrust Banks, Inc.'s 401(k) Plan, respectfully submit this memorandum in support of their motion for an award of attorneys' fees to Class Counsel for services rendered in this Action, reimbursement of litigation costs and expenses incurred in successfully prosecuting this Action and administrating this Settlement, and Case Contribution Awards to the four Named Plaintiffs (the "Fee Motion").[2]

I. INTRODUCTION

After nearly ten years of litigation, the Parties reached a proposed settlement, resolving all claims asserted on behalf of the Plan and Settlement Class that provides for a monetary payment of $4,750,000, plus certain non-monetary relief.

Class Counsel and Liaison Class Counsel expended over fifteen thousand hours litigating the Action, and expended hundreds of thousands of dollars in unreimbursed costs and expenses reasonably incurred in successfully prosecuting it. Additionally, as shown by their declarations, Named Plaintiffs produced documents, answered interrogatories, sat for deposition, and expended significant time prosecuting the Class's claims.

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[1] Capitalized terms used herein are defined in the Stipulation of Settlement, dated March 9, 2018 (the "Settlement Agreement") (ECF 285-3).

[2] Class Counsel is concurrently filing a motion and supporting memorandum of law for final judicial approval of the Settlement Agreement under FED. R. CIV. P. 23(e) (the "Settlement Memorandum"), and the Joint Declaration of Mark K. Gyandoh, Michael J. Klein and Stephen J. Fearon, Jr. in support of the Settlement Motion and the Fee Motion (the "Joint Declaration" or "Joint Decl.").

A. Brief Procedural History

Class Counsel vigorously prosecuted this Action on behalf of Plaintiffs, the Plan and the Class. If the Settlement becomes Final, the Docket for this Action will consist of almost three hundred entries at that time. As set-out more fully in Recitals A-DD of the Settlement Agreement, Class Counsel engaged in significant motion practice, prosecuted two appeals, completed factual discovery (including fourteen depositions taken by Plaintiffs' counsel after reviewing hundreds of thousands of pages of documents) and were preparing for expert discovery and summary judgment when they agreed to the proposed Settlement. Joint Decl. ¶ 4.

B. Settlement Negotiations

Although the Parties had informal settlement negotiations at various times over the course of the last nine and a half years, the Parties' positions were sufficiently divergent that such discussions were unproductive until 2017. Joint Decl. ¶ 4. In late 2016, while the Parties were preparing to serve expert reports and brief summary judgment motions, counsel opened direct negotiations, during which they debated the strengths and weaknesses of each other's case, and the arguments and counterarguments each side intended to advance. Joint Decl. ¶ 7. Ultimately, counsel agreed to enlist the assistance of an experienced mediator and, on January 12, 2018, the Parties jointly filed a motion to stay the Action and refer this matter to Robert A. Meyer, Esq. of JAMS, an experienced and well-respected mediator. ECF

281. Both requests were granted. *See* ECF 282. On January 24, 2018, the Parties participated in a full-day mediation under the auspices of Mr. Meyer, and ultimately reached an agreement in principle to settle the Action and signed a term sheet reflecting their agreement. Joint Decl. ¶ 7.

C. Settlement and Preliminary Approval

Over the course of the subsequent weeks, counsel continued to negotiate the precise terms of the Settlement, which were incorporated into the Settlement Agreement presented to the Court on March 9, 2018, along with a motion for preliminary approval. ECF 285. On March 12, 2018, the Court issued an Order Preliminarily Approving Settlement (ECF 286) which, *inter alia*, directed sending the Class Notice and set a schedule of events including the Fairness Hearing.

D. The Fees, Expenses and Case Contribution Awards Sought

As discussed below, the Fee Motion is premised on a number of factors including the substantial result Class Counsel have achieved for members of the Class, the numerous and substantial risks undertaken on a wholly contingent basis by Class Counsel, Class Counsel's vigorous and skillful prosecution of the Action, and the overwhelmingly positive response to date by members of the Class to the requested fees, expenses, and Case Contribution Awards.

As compensation for their efforts on behalf of the Class, Class Counsel respectfully request that the Court award attorneys' fees equal to one third of the

$4,750,000 Settlement Fund, or $1,583,333.33, and reimbursement of $462,810.18 in out-of-pocket expenses reasonably and necessarily incurred in litigating Class members' claims. Joint Decl. ¶¶ 10(d), 11(d), 12(d), 14. Notably, the $1,583,333.33, while representing one third of the Settlement Fund, does not represent one third of the Settlement's value because Plaintiffs also achieved non-monetary concessions from Defendants. The Court need not consider the precise value of the non-monetary concessions because, as shown below, the requested fees are easily justified without them, but the requested fees are *not* one third of the Settlement, but rather one third of the cash portion thereof.

Under every applicable analysis, the requested fees are fair and reasonable when considered under the applicable standards. As discussed below, the fees requested are well within a reasonable range of awards made in contingent class actions in this Circuit and in ERISA Actions across the country, particularly in view of the time spent litigating this Action and the considerable risks of prosecuting it. Additionally, as demonstrated below, Class Counsel's expenses are fair and reasonable, as are the Case Contribution Awards sought for each Named Plaintiff.

The Class Notice was sent to 51,569 Settlement Class members[3] based upon the Plan's records. The Class Notice stated that Class Counsel would seek an award of attorneys' fees not in excess of one third of the Settlement Fund and actual case

[3] *See* Declaration of Settlement Administrator Jennifer M. Keough (the "JND Decl."), attached as Exhibit O to the Joint Declaration, at ¶ 3.

expenses incurred, as well as Case Contribution Awards not to exceed $10,000 for each Named Plaintiff. June 14, 2018 is the deadline for objections.[4]

II. THE FEES REQUESTED ARE FAIR AND REASONABLE AND SHOULD BE APPROVED

A. A Reasonable Percentage of the Fund Recovered is an Appropriate Approach to Awarding Attorneys' Fees in Common Fund Cases

In this Circuit, attorneys' fees sought from a common fund "shall be based upon a reasonable percentage of the fund" recovered for a class. *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (rejecting the use of a lodestar analysis). Such an award is fact-sensitive, and the Court established 25% "as a 'bench mark' percentage fee award which may be adjusted in accordance with the individual circumstances of each case[,]" while recognizing that "[t]he majority of common fund fee awards fall between 20% to 30% of the [common] fund." *Id.* at 774-75. This Court has recognized that a "high percentage fee award" when compared with the benchmark of 25% would have been warranted (but was not negotiated for) when a "settlement confer[ed] unprecedented non-monetary benefits in the form of programmatic changes within the [Company]," no objection to the fee was filed, and "Class Counsel expended significant resources in prosecuting the class action, both in terms of out-of-pocket costs and thousands of hours of attorney

[4] Pursuant to the schedule established in the Preliminary Approval Order, any objections filed will be addressed in a supplemental filing to the Court on June 21st in advance of the June 28, 2018 Fairness Hearing.

time with no guarantee the litigation would succeed." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001). Here, Plaintiffs have likewise received significant (albeit not unprecedented) non-monetary benefits, there is minimal objection to the fee request as of this filing, and the resources expended were similarly tremendous.

B. The *Johnson* and *Camden I* Factors Easily Justify Granting the Fee Motion

Camden I held that in addition to the twelve-factor method of determining court-awarded attorneys' fees explained in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974) (the "*Johnson* factors"),[5] "[o]ther pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Camden I*, 946 F.2d at 772-75 (further holding that "[i]n most instances, there will also be

[5] The *Johnson* factors are: (i) "the time and labor required"; (ii) "the novelty and difficulty of the questions"; (iii) "the skill requisite to perform the legal service properly"; (iv) "the preclusion of other employment by the attorney due to acceptance of the case"; (v) "the customary fee"; (vi) "whether the fee is fixed or contingent"; (vii) "time limitations imposed by the client or the circumstances"; (viii) "the amount involved and the results obtained"; (ix) "the experience, reputation, and ability of the attorneys"; (x) "the 'undesirability' of the case"; (xi) "the nature and length of the professional relationship with the client"; and (xii) "awards in similar cases." *Id.* at 717-19.

additional factors unique to a particular case which will be relevant to the district court's consideration.")

As discussed below, the requested fees are reasonable under the *Johnson* factors and the other pertinent factors identified in *Camden I* because of the extraordinary result, which Class Counsel achieved by vigorously prosecuting the case for nearly a decade even after having all of the claims dismissed, successfully pursuing two appeals to the Eleventh Circuit, and navigating two potentially case-ending seminal shifts of the legal landscape. At times it looked like there would be no recovery for Plaintiffs or the Class. But Class Counsel persisted when many others would have quit. They continued fighting for the Class with absolutely no guarantee of a recovery for the Class or of recovering a fee or being reimbursed for their expenses. Now they are seeking approval for a fee that is a fraction of the time they actually devoted to achieving a remarkable result for the Class.[6]

1. The Time And Labor Required

Johnson held that "[a]lthough hours claimed or spent on a case should not be the sole basis for determining a fee, they are a necessary ingredient to be considered." 488 F.2d at 717 (internal citations omitted) (cautioning that duplication of effort should be scrutinized and that non-legal work may command a lesser rate).

[6] Additionally, Class Counsel's fee request does not take into account the significant time they will spend in the administration of the Settlement should this Court grant final approval.

Class Counsel unquestionably spent significant time on this case. Joint Decl. ¶¶ 10(a)-(b), 11(a)-(b), 12(a)-(b), 14. This was an almost ten-year-long litigation against well-financed Defendants who spared no expense aggressively defending the claims under the supervision of prominent lawyers at one of the nation's leading law firms. Joint Decl. ¶ 4. The unusually long docket and two appeals here were buttressed by intense fact discovery (including fourteen depositions taken by Class Counsel after reviewing hundreds of thousands of pages of documents) as well as expert-related discovery. Class Counsel litigated this case on a contingent basis with no guarantee that they would ever be paid, and thus were not incentivized to duplicate time or spend time unproductively. This factor thus supports the fee request.

2. The Novelty And Difficulty Of The Questions

Johnson recognized that "[c]ases of first impression generally require more time and effort on the attorney's part. Although this greater expenditure of time in research and preparation is an investment by counsel in obtaining knowledge which can be used in similar later cases, he should not be penalized for undertaking a case which may 'make new law.' Instead, he should be appropriately compensated for accepting the challenge." 488 F.2d at 718 (citation omitted).

Class Counsel achieved the proposed Settlement even though this was an incredibly difficult case that became even more difficult as it progressed. After Class

Counsel pursued the claims for years, this Court granted Defendants' second motion to dismiss and entered judgment against Plaintiffs. ECF 161. If that judgment stood, Plaintiffs and the Class would have recovered nothing. But Class Counsel continued to fight for Plaintiffs and the Class, appealing the decision to the Eleventh Circuit. Eventually the Court of Appeals vacated the judgment and remanded the Action to this Court for further proceedings.

But during this same time, there were significant changes to the case law about these types of ERISA claims that made it much more difficult for Plaintiffs and the Class to succeed. For example, the Court of Appeals in *Lanfear*[7] established an almost insurmountable burden in these types of cases and the Supreme Court in *Dudenhoeffer*[8] set forth other factors that made it more difficult for plaintiffs to succeed after abrogating *Lanfear* in part. As a result, the claims here were novel and difficult, supporting the fee request.

3. The Skill Requisite To Perform The Legal Service Properly

Johnson held that "[t]he trial judge should closely observe the attorney's work product, his preparation, and general ability before the court. The trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work become highly important in this consideration." 488 F.2d

[7] *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012).

[8] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).

at 718. On October 5, 2009, the Court designated Class Counsel as Interim Co-Lead Class Counsel, finding that: "(i) they have ample experience in successfully handling class action litigation in general and ERISA class actions in particular; (ii) they have knowledge of the applicable law; and (iii) they will devote substantial resources to the representation of the proposed class." ECF 53.

Throughout this litigation Class Counsel consistently demonstrated their skill and ability to vigorously represent the Class and achieve a remarkable result for the Class against strong opposition and long odds. Class Counsel were able to revive a case that had been dismissed and resolve it favorably for the Class. Perhaps the best indication of Class Counsel's skill is that this is one of very few ERISA class actions like this since the Supreme Court's *Dudenhoeffer* decision in which Class Counsel has defeated multiple motions to dismiss, obtained class certification, and achieved a class-wide settlement. Joint Decl. ¶ 8. Class Counsel's skill and persistence directly resulted in a favorable outcome for the Class, supporting the fees requested.

4. The Preclusion Of Other Employment By The Attorney Due To Acceptance Of The Case

"This guideline involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson,* 488 F.2d at 718. As concluded in similar circumstances, "given the considerable

discovery required and numerous pleadings filed in this action, class counsel obviously dedicated substantial resources to this action to the likely preclusion of other opportunities." *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1270 (N.D. Ga. 2008). Indeed, Class Counsel declare as much here. Joint Decl. ¶¶ 10(a), 11(a), 12(a). This factor thus supports the fees requested.

5. The Customary Fee

Johnson recognized that "[t]he customary fee for similar work in the community should be considered. It is open knowledge that various types of legal work command differing scales of compensation." 488 F.2d at 718. As then-Chief Judge Carnes, who now sits on the Eleventh Circuit, concluded in similar circumstances, "[t]he customary fee in class actions is a contingency fee, because it is not practical to find any individual that will pay attorneys on an hourly basis to prosecute the claims of numerous strangers and take on the significant additional expenses of fighting with the defendants over class certification." *Columbus Drywall & Insulation v. Masco Corp.*, 2012 WL 12540344, at *4 (N.D. Ga. Oct. 26, 2012) (further recognizing that "a fee of one-third of the common fund (or more) has been awarded in a number of other antitrust class actions no more complicated than

this one, most of which settled at earlier stages of litigation.") The same is true of ERISA actions.[9] This factor thus supports the fees requested.

6. Whether The Fee Is Fixed Or Contingent

Class Counsel undertook this Action on a wholly contingent basis and took the risk from the outset that they might spend significant time and money pursuing this Action, yet risk receiving no compensation whatsoever, and indeed being out of pocket significant expenses, if the Action ultimately failed. Joint Decl. ¶¶ 10(e), 11(e), 12(e). In the face of this substantial risk, Class Counsel has dedicated significant time and resources litigating this Action. Joint Decl. ¶¶ 10-12. As then-Chief Judge Carnes recognized in *Columbus Drywall*, "[e]ven the 'ordinary' antitrust class action (if there is such a thing) is always 'uncertain in outcome[,]'"

[9] *See, e.g.*, *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (concluding, in an ERISA action to recover for a 401(k) plan based upon ERISA's fiduciary duties, that "[a] one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) ("Courts have also awarded percentage fees of one-third or higher in ERISA company stock cases in appropriate circumstances, and especially when, as here, the fund is not a 'mega' recovery'" and collecting cases, noting percentage of the fund and lodestar awarded in each); *Will v. General Dynamics Corp.*, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (finding that in ERISA 401(k) fee litigation, "a one-third fee is consistent with the market rate"); *George v. Kraft Foods Global, Inc.*, 2012 U.S. Dist. LEXIS 166816, at *8 (N.D. Ill. June 26, 2012) ("A one-third fee is consistent both with the market rate for settlements of this size and in settlements concerning this particularly complex area of law."); *In re Merck & Co. Vytorin ERISA Litig.*, 2010 WL 547613, at *9-14 (D.N.J. Feb. 9, 2010) (awarding one third of a settlement fund as attorneys' fees); *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762, at *14 (D.N.J. Sept. 10, 2009), *aff'd*, 423 Fed. App'x 131 (3d Cir. 2011) (same).

and especially so "in the absence of any criminal indictments or pleas[.]" 2012 WL 12540344, at *5. As with antitrust actions, there is no "ordinary" ERISA imprudence action, especially given the ever-changing law as discussed above.

This case has always involved a high degree of risk of nonpayment, and the "substantial contingency risk favors the requested fee." *Id.* (further quoting *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990), for the proposition that "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees" because, otherwise "very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.") Here, although Class Counsel requests no lodestar multiplier, the general notion of contingency fee arrangements justifying an increased fee supports the fees requested.

7. Time Limitations Imposed By The Client Or The Circumstances

The seventh *Johnson* factor recognizes that "priority work that delays the lawyer's other legal work is entitled to some premium." *Johnson,* 488 F.2d at 718. In considering this factor, many courts have found that "time pressures" warrant an increased fee award. *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1215 (S.D. Fla. 2006) (citations omitted). Much of the work performed, including

preparation for depositions and substantive motion practice, involved significant time pressures. This factor thus supports the fees requested.

8. The Amount Involved And The Results Obtained

The eighth *Johnson* factor recognizes that "the Court should consider the amount of damages … that consideration should not obviate court scrutiny of the decision's effect on the law. If the decision corrects across-the-board discrimination affecting a large class of an employer's employees, the attorney's fee award should reflect the relief granted." 488 F.2d at 718. As the Supreme Court recognized, this factor "indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded." *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983).

Here, as noted in Plaintiffs' memorandum of law in support of their Preliminary Approval Motion, Defendants estimated that if everything possible in the case was resolved in Plaintiffs' favor – an unlikely proposition – Plaintiffs' best-case recovery on the remaining claims could be $36 million. ECF 285-1 at 17. Plaintiffs estimate their best-case recovery – again, assuming everything was resolved in their favor -- on the remaining claims as about twice that. That makes the recovery in the Settlement between 6.5% and 13% of estimated maximum potential damages, which is a very good recovery under the circumstances and recognizing the risks faced by the Class, especially in light of the difficulty that Class Counsel would have faced in establishing the Class' claims at trial.

By way of comparison, while not a perfect analogy, in 2016, securities class actions settled for an average of nine percent of estimated damages. *See P. Van Hove BVBA v. Universal Travel Grp., Inc.*, 2017 WL 2734714, at *11 (D.N.J. June 26, 2017) ("the average percentage of estimated damages that were recovered through securities class action settlements in 2016 was nine percent.").[10] This factor thus supports the fees requested.

9. The Experience, Reputation, And Ability Of The Attorneys

As discussed above with respect to the third *Johnson* factor, in appointing the firms as Interim Co-Lead Class Counsel, the Court previously recognized Class Counsel has ample experience, knowledge, and resources to prosecute these claims. Class Counsel's firm résumés, attached to the Joint Declaration, further demonstrate their experience, reputation, and abilities. *See* Exhibits B, C, and D. This factor thus supports the fees requested.

10. The "Undesirability" Of The Case

While several firms filed and prosecuted this action, this is an almost decades-long action in a shifting legal framework. In an analogous situation, the Court recognized the "risk and difficulty inherent in antitrust class actions, as well as

[10] Plaintiffs' surviving claim at this time is "that Defendants violated ERISA by allowing the Plan to invest in SunTrust stock during a time when its market price was 'artificially inflated' by 'severe mismanagement' that Defendants knew or should have known about, but that was concealed from the market[.]" *In re SunTrust Banks, Inc. ERISA Litig.*, 2015 WL 12724074, at *2 (N.D. Ga. June 18, 2015).

the particular obstacles to recovery in this case[,]" observed that "[t]here are a limited number of firms that both possess the required skills and would undertake this representation, knowing that it would likely require expenditure of tens of thousands of hours (on a contingent basis) and the advancement of [significant] out-of-pocket expenses", and concluded that "Class [C]ounsels' willingness to assume those risks should be reflected in the fee." *Columbus Drywall*, 2012 WL 12540344, at *6. Moreover, prosecuting this case, when any recovery was far from guaranteed, prevented them from devoting their time to other cases. This factor thus supports the fees requested.

11. The Nature And Length Of The Professional Relationship With The Client

Plaintiffs first retained Class Counsel in 2008 and have been represented by Class Counsel since then. The length of representation in this Action supports the fees requested.

12. Awards In Similar Cases

Comparable awards are often granted in similar cases, as noted with respect to the fifth *Johnson* factor, *supra.* This factor thus supports the fees requested.

13. The Time Required To Reach A Settlement

Camden I instructs the Court to consider the time required to reach a settlement. *See* 946 F.2d at 775. Here, the time and labor expended, contingently, by Class Counsel unquestionably supports the requested fees. *See* Joint Decl.¶¶ ¶¶

10(a)-(b), 11(a)-(b), 12(a)-(b); *see also Thorpe v. Walter Inv. Mgmt. Corp.*, 2016 WL 10518902, at *8 (S.D. Fla. Oct. 14, 2016) ("The significant time and labor … expended on behalf of the Class with no assurance of ultimately being paid supports some upward adjustment to the benchmark percentage.")

14. The Lack Of Objections

Camden I also instructs the Court to consider objections. *See* 946 F.2d at 775. To date, there have been relatively few objections from members of the Settlement Class. The deadline for Settlement Class members to object to the Stipulation is June 14, 2018. Any objections filed will be addressed in a supplemental filing on or before June 21, 2018, in accordance with the Preliminary Approval Order ¶ 13.

15. The Non-Monetary Benefits Of The Settlement

Camden I further instructs the Court to consider non-monetary benefits of the Settlement. *See* 946 F.2d at 775. The Settlement includes additional non-monetary relief that will benefit the Class. *See* Settlement Agreement § 7.4 (including accelerated vesting, matching contributions being funded in cash instead of stock, and enhanced fiduciary training). This factor thus supports the fees requested.

16. The Economics Involved In Prosecuting This Action

Camden I instructs the Court to consider the economics involved in prosecuting a class action. *See* 946 F.2d at 775. As described herein, Class Counsel have dedicated significant time and money to prosecuting the Settlement Class's

claims on a fully contingent basis over nearly a decade, supporting the fees requested.

17. Public Policy Considerations Further Support The Requested Fees

Lastly, *Camden I* recognized that "[i]n most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration." 946 F.2d at 772-75. Here, there is a strong public policy of encouraging skilled attorneys to bring colorable ERISA suits such as this, which is an additional factor supporting this motion.

Congress passed ERISA to promote the important goal of protecting and preserving the retirement savings of American workers. Given that "[d]efined contribution plans dominate the retirement plan scene today," *LaRue v. DeWolff, Boberg & Assocs., Inc*., 552 U.S. 248, 255 (2008)), ensuring that ERISA fiduciaries fully comply with their obligations – including the duty to select and maintain prudent investment alternatives – is of paramount importance in protecting the retirement savings of millions of workers throughout the country. *See also Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000) (ERISA's "most important purpose" was to "assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them

as human beings within our society."). Vindicating these critical rights requires skilled and dedicated counsel.

To make certain that the public interest continues to be represented by talented and experienced trial counsel willing to undertake representation in complex ERISA breach of fiduciary class actions on a contingent basis, remuneration should reward counsel for the risk and effort involved in the litigation. *See, e.g.*, *Wolff v. Cash 4 Titles*, 2012 WL 5290155, at *5 (S.D. Fla. Sept. 26, 2012), *report and recommendation adopted*, 2012 WL 5289628 (S.D. Fla. Oct. 25, 2012) ("Mindful of the need to attract counsel of this high caliber, courts have recognized the importance of providing incentives to experienced counsel who take on complex litigation cases on a contingent fee basis so those cases can be prosecuted both efficiently and effectively.").Thus, "[i]n accordance with this sentiment, the Court finds that public policy supports the award of a 33% fee in this case, the better to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so." *In re Giant Interactive Group, Inc. SEC Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (internal citation omitted).

Indeed, "[w]ithout a fee that reflects the risk and effort involved in this litigation, future plaintiffs' attorneys might hesitate to be similarly aggressive and persistent when faced with a similarly complicated, risky case and similarly intransigent defendants." *In re Tyco, Int'l, Ltd.*, 535 F. Supp. 2d 249, 270 (D.N.H.

2007) (citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d. 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis … on behalf of those who otherwise could not afford to prosecute."); *Spann v. AOL Time Warner*, 2005 WL 1330937, at *3-4 (S.D.N.Y. June 7, 2005) (awarding 33.33% fee, noting that lawsuits such as this create incentives for fiduciaries to comply with ERISA). Accordingly, public policy considerations support the fees requested.

18. A Lodestar Cross-Check Confirms The Reasonableness Of The Requested Fees

As stated above, the Eleventh Circuit has held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774. In the interest of caution,[11] Class Counsel note that the fees requested represents a small fraction of their *submitted* lodestar. Joint Decl. ¶ 14. A lodestar cross-check thus further confirms the reasonableness of the fees requested.

[11] *See, e.g.*, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison.").

C. Plaintiffs' Counsel's Out-of-Pocket Litigation Expenses Should Be Reimbursed

"It is appropriate to reimburse the out-of-pocket expenses of counsel whose efforts created substantial benefit for the class." *Columbus Drywall*, 2012 WL 12540344, at *7.

In *Columbus Drywall*, the Court recognized that "unreimbursed expenditures include[ing] court and court reporter fees; legal research; document and database reproduction and analysis; expert witnesses; travel for meetings, mediations, and depositions; trial consultants; and other customary expenditures" were "reasonable and necessary to prosecute the case and obtain the settlement." 2012 WL 12540344, at *7. As there, here the notices mailed to class members informed them class counsel would seek a reimbursement of expenses. *Id.* Moreover, as *Columbus Drywall* recognized, "class counsel advanced a significant portion of these expenses, including expert payments, over a period of years prior to this settlement. However, counsel will receive no interest to compensate them for the time value of this money. For all of these reasons, the Court finds class counsels' request for reimbursement of out-of-pocket expenses reasonable." *Id.*

Class Counsel requests reimbursement of $460,810.18 in costs and expenses incurred in connection with the litigation. Joint Decl. ¶¶ 10(d), 11(d), 12(d), 14. This amount also includes expenses for other Plaintiffs' Counsel who did work and incurred costs at the direction of Class Counsel. *See* Joint Decl. ¶¶ 15-17, and

Exhibits K-M. The submitted expenses were all reasonable, necessary, and directly related to the prosecution of this action and include standard litigation related costs and expenses such as costs for experts, travel, court transcripts, court reporters, copying and postage. The expenses incurred in this litigation are described in detail in the accompanying declaration and should be approved as reasonable and necessary. These are the type of expenses typically billed to paying clients in the marketplace and were reasonable and necessary for prosecuting this class action.

Here, Class Counsel was motivated to, and did, minimize expenditures to what was reasonable. Class Counsel stood not be reimbursed for such expenditures absent a settlement, and thus were incentivized not to undertake unreasonable expenses. Joint Decl. ¶¶ 10(e), 11(e), 12(e). Class Counsel have further declared that such expenses were reasonable, customary and necessary in the prosecution of this Action. Joint Decl. ¶¶ 10(d), 11(d), 12(d).

Class Counsel's request for reimbursement of out-of-pocket expenses is thus reasonable and should be granted.

D. Case Contribution Awards Should Be Awarded to the Named Plaintiffs

At the conclusion of a successful class action case, it is common for courts, exercising their discretion, to award special compensation to the class representatives in recognition of the time and effort they have invested for the benefit of the class. Courts may grant case contribution awards as a class action

expense to particular members of the class and routinely do so "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram*, 200 F.R.D. at 694.

The Named Plaintiffs have made significant contributions to the litigation of this action, stepping forward to bring this action on behalf of the Settlement Class, participating in discovery by providing documents, answering interrogatories and sitting for deposition, and conferring with class counsel throughout this almost decade-long litigation. Joint Decl. ¶¶ 5-6 & Exhibits E-H. "Plaintiffs who undertake litigation against sophisticated defendants also 'undert[ake] substantial risk … that [the defendant might] pursue[] cost-shifting remedies had a settlement not been reached or Plaintiff[s] not prevailed.'" *Id.* (citation omitted).[12]

In addition, where the class action involves employees, courts should also consider the risks of possible workplace retaliation. *See Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *9 (S.D.N.Y. June 7, 2011) (holding that "awards are particularly appropriate in the employment context … [where] the plaintiff is often a former or current employee of the defendant, and thus, undertaken the risk of adverse actions by the employer or co-workers."); *In re Compact Disc*

[12] In awarding case contribution awards to named plaintiffs in class actions, "courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement of laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves." *Bussie v. Allmerica Fin. Corp.*, 1999 U.S. Dist. LEXIS 7793, at *11-12 (D. Mass. May 19, 1999).

Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 189 (D. Me. 2003) (noting that, in cases involving employment, plaintiffs may expose themselves to risk of retaliation); *see also Godshall v. Franklin Mint Co.*, 2004 WL 2745890, at *6 (E.D. Pa. Dec. 1, 2004) (noting, in an ERISA action, "[f]actors to consider when assessing incentive awards are: (a) the risk to the plaintiff in commencing suit, both financially and otherwise; (b) the notoriety and/or personal difficulties encountered by the representative plaintiff; (c) the extent of the plaintiff's personal involvement in the suit in terms of discovery responsibilities and/or testimony at depositions or trial; (d) the duration of the litigation; and (e) the plaintiff's personal benefit (or lack thereof) purely in his capacity as a member of the class" and awarding the named plaintiffs $20,000 each).

Here, each Plaintiff devoted substantial effort and time assisting in the prosecution of this case, as demonstrated by their declarations, which are filed herewith as Exhibits E-H of the Joint Declaration. Each Plaintiff communicated regularly with Class Counsel. They were sent copies of all material filings and letters describing the case progress, they reviewed these documents as they were received and they frequently discussed them with counsel.

The requested amount for the Plaintiffs is in line with or less than amounts which have been awarded by courts in similar types of cases. *See, e.g.*, *Cross v. Wells Fargo Bank, N.A.*, No. 15-cv-1270, Final Approval Order slip op. at ¶ 18

(N.D. Ga. Feb. 10, 2017) (Story, J.)[13] (awarding plaintiff $15,000 as a compensation award).[14] Taking these considerations into account, the requested Case Contribution Awards of $10,000 to each of the four Named Plaintiffs is reasonable and should be approved.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their request for an award of Attorneys' Fees of one third of the Settlement Fund ($1,583,333.33), reimbursement of expenses in the amount of $462,810.18 incurred in connection with prosecuting the case, and Case Contribution Awards in the amount of $10,000 to each of the four Named Plaintiffs.

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13 Attached as Exhibit N-1 to the Joint Declaration.

14 *See also In re Giant Interactive Group, Inc. SEC Litig.*, 279 F.R.D. at 166 (awarding three named plaintiffs contribution awards of $10,000 each and fourth named plaintiff award of $5,400); *Castagna*, 2011 WL 2208614, at *12 (finding awards of $10,000 each to three named plaintiffs and $15,000 to fourth named plaintiff to be reasonable); *Bozak v. FedEx Ground Package Sys.*, 2014 WL 3778211, at *8 (D. Conn. July 31, 2014) (approving a service award of $10,000 for the plaintiff and collecting cases discussing the same); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving an incentive award of $25,000 in an ERISA action based upon, *inter alia*, the risks the plaintiff faced and the plaintiff's reasonable fear of workplace retaliation); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) ("named plaintiffs, they bore the risks of counterclaim or collateral attack, and consulted with class counsel throughout the suit. Individual awards of $15,000 are appropriate.").

Dated: May 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1C. This Motion was prepared on a computer using the Times New Roman font (14 point).

Date: May 24, 2018

/s/ Mark K. Gyandoh
Mark K. Gyandoh

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE SUNTRUST BANKS, INC. ERISA LITIGATION	)	**CIVIL ACTION FILE NO. 1:08-CV-3384-RWS**

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which serves notification of such filing to all counsel of record. I further certify that the foregoing will published on the website identified in the Class Notice as soon as practicable.

/s/ Mark K. Gyandoh
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