AlaFile E-Notice

01-CV-2003-006630.00

Judge: PAT BALLARD

To: SOMERVILLE JOHN QUINCEY
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NOTICE OF COURT ACTION

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO VS CAREMARK RX LLC
01-CV-2003-006630.00

A court action was entered in the above case on 8/15/2016 4:41:06 PM

ORDER

[Filer:]

Disposition: GRANTED
Judge: PJB

Notice Date: 8/15/2016 4:41:06 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL 35203

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01-CV-2003-006630.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

SAM JOHNSON, ET AL.,	)	
Plaintiffs,	)	
	)	
v.	)	**01-CV-2003-6630**
	)	
CAREMARK RX, LLC, ET AL.,	)	
Defendants.	)	

ORDER ON CLASS COUNSEL'S FEE AND EXPENSE APPLICATION AND APPLICATION FOR SERVICE AWARDS TO PLAINTIFFS

This matter came before the Court for hearing on August 8, 2016, on CLASS COUNSEL'S FEE AND EXPENSE APPLICATION AND APPLICATION FOR SERVICE AWARDS TO PLAINTIFFS. For the reasons stated below, each request made in CLASS COUNSEL'S FEE AND EXPENSE APPLICATION AND APPLICATION FOR SERVICE AWARDS TO PLAINTIFFS is GRANTED.

Four objections were filed regarding certain aspects of the proposed settlement and/or the requests for fees, expenses, and service awards which will be overruled by separate orders. Each of the four objectors were suspect as to standing or were untimely in the filing of their objections. However, even if the objections were not due to be stricken for lack of standing or for being filed untimely, they were due to be denied on the merits as explained more fully below.

A trial court, in making an attorneys' fees award, should articulate its reasons in a written order. See *Major Millworks, Inc. v. MAE Hardwoods, Inc*., 187 So. 3d 714, 722–23 (Ala. Civ. App. 2015):

> "'The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.' *Ex parte Edwards*, 601 So. 2d 82, 85 (Ala. 1992). Our deference to the trial court in attorney-fee cases is based upon our recognition that the trial

> court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in fee determinations. See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Nevertheless, the trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation. *American Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999); see also *Hensley,* 461 U.S. at 437.'"
>
> *Beal Bank, SSB v. Schilleci*, 896 So. 2d 395, 404 (Ala. 2004) (quoting *City of Birmingham v. Horn*, 810 So. 2d 667, 681–82 (Ala. 2001)).

Peebles v. Miley, 439 So. 2d 137, 140-41 (Ala. 1983) (a collection suit pursuant to a contract), which was neither a class action nor a common-fund case, adopted a series of factors for a court to consider in deciding the amount of a reasonable fee. *Edelman & Combs vs Law*, 633 So. 2d 960 (Ala. 1995), held that the *Peebles* factors were relevant for consideration by courts in setting the percentage fee in a common-fund class action: "This Court has recognized the use of the *Peebles* factors in setting a percentage fee in common fund cases and has allowed percentages even higher than one-third in some cases." The *Peebles* factors are: (1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances. "Of course, not all of the criteria will be applicable. Indeed, there would hardly ever be a case where the determination of attorney's fees brought into play every criterion." *Wehle v. Bradley*, __ So. 3d __, No. 1101290, 2015 WL 6618633, *12 (Ala. Oct. 30, 2015) (quoting earlier cases).

As explained below, the Court finds that every *Peebles* factor weighs very heavily on the

side of class counsel's request for a 40% fee, and there are no other relevant countervailing considerations. The putative objectors put forth no evidence whatsoever as to the appropriate fee. They offered no testimony, documents, or affidavits from experts. Thus, there is literally no evidence contradicting the Plaintiff Class's evidentiary submissions.

THE 12 PEEBLES FACTORS SUPPORT THE 40% FEE REQUEST

1. The nature and value of the subject matter of the employment

This factor weighs in favor of the request for 40%. This was a unique and one-time case. No lawyer anywhere had any prior experience and expertise in this specific type of litigation (a class action about a class action; a fraud on a certified class). Thus, there was no cookie-cutter, go-by briefs or research that class counsel could borrow. When class counsel filed this case, they knew they were entering uncertain and unchartered waters where there was no guarantee of any recovery. They knew this case would involve novel, difficult, and complex legal questions and facts at every turn. And, it is highly unlikely that the research, work, and experience gained in this case can be used in future litigation because the facts and law of this case are singular. So, the value of employment in this case is just solely for this one-off case, which weighs on the side of awarding a fee on the high end of the permissible scale.

2. The learning, skill, and labor requisite to its proper discharge

Judge Clemon's declaration, Exhibit 3, at ¶¶ 35-43, summarizes the experience of principal class counsel. The learning and skill of class counsel are of the highest order. Various examples of the extraordinary labor required of class counsel are found, e.g., in Prof. Rubenstein's declaration and class counsel's affidavit. Just as a few examples from the overall task, class counsel successfully defended motions to dismiss; secured class certification after drafting lengthy briefing and conducting five days of hearings; conducted extensive discovery;

participated in over 50 depositions; defended multiple appeals to the Alabama Supreme Court; defended eight motions for summary judgment; successfully won partial summary judgment on behalf of the class; engaged in considerable pre-trial motion practice; and fully prepared this case for trial. Mr. Walker's brief of August 5th was Document number 3332 on the docket sheet of this civil action, which was commenced in 2003. The total number of pages of exhibits for the class certification hearing in May-June 2012 was 28,543.

But, this litigation is not just about quantity of labor, it is even more concerned with the quality of the legal representation provided by class counsel. Defendants are represented by some of the most skillful attorneys in the nation from some of its most prestigious law firms. Class counsel fought vigorously with these defense counsel to overcome complicated legal issues resulting in a settlement that provides real and substantial benefits to all class members. The law recognizes that such effective lawyering justifies an award to class counsel of a significant percentage of the common fund. See *Behrens v. Wometco Enters*., 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."). Here, class counsel have created substantial benefits -- an immediate all-cash settlement fund of $310 million. The results achieved, standing alone, demonstrate the skills of class counsel, and weigh heavily in favor of the requested 40% fee award.

Aside from the benefits obtained for the class, this factor supports a 40% fee award because the issues involved in this case were unique and complex. To prosecute the claims of the investor class against formidable defendants like CVS and AIG, represented by capable counsel with extensive resources, it was necessary that the class have equally-skilled lawyers with experience in complex commercial and class litigation. Were it not for class counsel's efforts,

these MedPartners investors would not have been compensated for the alleged fraud-in-the-settlement that occurred in 1999. Professor Miller stated: "I find the procedural history of this class action to be remarkably extensive and complex, fraught with daunting obstacles for Class Counsel in trying to prosecute it. In my opinion the work of Class Counsel throughout this matter has been relentlessly energetic and of an extremely high quality." Exhibit 2, ¶ 17.

Throughout this long process, class counsel have effectively, and vigorously represented the interests of the class in the most efficient manner possible, dividing up responsibilities and avoiding duplication of effort. The Court is able to make its own assessment of the skills of class counsel, having conducted many hearings, considered and ruled upon many motions on various subjects, and closely supervised this case throughout pretrial and summary judgment proceedings. See *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) ("Class Counsel who have worked on this case are talented and experienced attorneys with excellent reputations in the legal community. I conclude this is a very strong factor in favor of the percentage sought. After seven years, I am very familiar with the quality and representation of Class Counsel."). Another important aspect of a court's evaluation of the skill required of the fee applicants is "[t]he trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work." *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F.Supp.2d 732, 789 (S.D. Tex. 2008), quoting *Johnson v Georgia Highway Express, Inc*., 488 F.2d 714, 718 (5th Cir. 1974).

Novel and complex issues were the norm in this case, not the exception. Many of the questions of law presented herein had never been tried in any court. The primary certification appeal in this case required the Alabama Supreme Court to decide an issue of first impression (e.g., individual class member reliance versus the so-called "entity theory)." "Cases of first

impression generally require more time and effort on the attorney's part." *Johnson*, *supra*, 488 F.2d at 717.

It is undisputed that, until the case was finally settled, the Defendants litigated this action aggressively and opposed the class at every step. In summary, this case presented many novel and difficult issues, both factual and legal, that presented tremendous challenges to class counsel. The factual investigation alone was daunting. Mastery of the novel legal and factual issues involved in this case fully supports the 40% fee requested by class counsel.

Another consideration for assessing the quality of the services rendered is the quality of the opposing counsel. The Defendants in this matter were represented by highly-experienced counsel from some of the most prestigious litigation firms here in Birmingham as well as nationally. The class's success in the face of formidable legal opposition confirms the quality of its representation. See, e.g., *Schwartz v. TXU Corp*., No. 3:02-CV-2243, 2005 WL 3148350, *30 (N.D. Tex. Nov. 8, 2005) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."); *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 467 (S.D. N.Y. 2004) ("'The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work.'"); and *Clark v. Cameron-Brown Co.,* 1981 WL 1637, *3-4 (M.D. N.C. Apr. 6, 1981) (awarding a 37% fee and noting that the fee was deserved in part because of the undesirability of the case "not only due to the risk of achieving no recovery for the burdensome amount of work involved, but also because of the reputation and pervasive influence of the defendants."). This factor further supports the requested percentage.

Finally, the Court is well-aware of the fact that part of class counsel's "skill" to be rewarded here is the highly-unusual fact that class counsel themselves are the detectives who

first discovered the unlimited insurance and the fraud within the 1999 settlement. Without those initial efforts, the fraud would never have been discovered and no class action complaint would ever have been filed. In Professor Rubenstein's words: "[T]his is likely the single most extraordinary class action that I have ever witnessed.... It is exceedingly rare that a class action firm itself detects a legal concern that affects many individuals but which remains hidden, and then tackles it notwithstanding its intricacy, long odds, and sui generis nature.... Class Counsel should be rewarded for investing enormous sums of money in this class's exceptionally risky suit as their work here exemplifies the legal system's core aspiration for class action attorneys: that they serve as private attorneys general." Exhibit 1, at ¶ 2. Professor Miller said: "Unlike most other cases in which a class action may result from public disclosures of fraud or an investigation of law enforcement or the Securities and Exchange Commission, this case stemmed from Class Counsel's discovery in unrelated litigation of the unlimited coverage that was provided by policies that had been issued by AIG. Therefore, there would be no case without the efforts of Class Counsel." Exhibit 2, ¶ 16.a.

3. The time consumed

Because common-fund recoveries are judged purely on a percentage basis, this factor is either totally irrelevant or of minor importance. Mr. Walker's principle objection to the fee request is that class counsel failed to file time sheets to prove the total collective lawyer hours expended on this case since 2003. The Court rejects this objection.

Edelman & Combs v. Law, 663 So.2d 957, 959 (Ala. 1995) (emphasis added), specifically held "that in a class action where the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by way of settlement or trial, a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial." There

are two methods of determining fee awards in class action cases, and the two methods are diametrically opposed. In non-fund cases, where the lodestar method is used, the number of hours spent is the keystone factor; while, in the percentage method, used in common-fund cases, hours are irrelevant. See *City of Birmingham v. Horn*, 810 So.2d 667, 680 (Ala. 2001) (emphasis added):

> Under Alabama law, there are currently two methods available for the determination of fee awards for attorneys who have litigated successfully on behalf of a class: (1) the common-fund approach and (2) the lodestar approach. See *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 189–90 (Ala. 2000) (discussing the discretion of the trial court in determining which approach is appropriate in any given case). Under the lodestar approach, the trial court must determine the number of hours reasonably expended by counsel on the matter, and then multiply those hours by an hourly rate of compensation set by the court. *Union Fid.*, 781 So.2d at 191–92. The court may then adjust that figure by using a multiplier determined by considering a variety of factors, including the complexity of the case and counsel's experience. *Id*. Under the common-fund approach, the trial court decides upon a percentage and then applies that figure to the fund obtained as a recovery. Although we have held that the existence of a separate fund is unnecessary, *Union Fid.*, 781 So. 2d at 190, we have employed the common-fund approach only when there has been a defined monetary recovery. See *Edelman & Combs v. Law*, 663 So. 2d 957, 961 (Ala. 1995); *Ex parte Brown*, 562 So. 2d 485, 496 (Ala. 1990); *Reynolds v. First Alabama Bank of Montgomery, N.A*, 471 So. 2d 1238, 1245 (Ala. 1985); and *Eagerton v. Williams*, 433 So.2d 436, 450–51 (Ala. 1983)....

The *Edelman* opinion, at 960, adopts the view of *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991), that "strict reliance on 'the time consumed' factor in a common fund case could encourage and reward protracted litigation." *Edelman* agrees that "the 'expended time' factor has limited significance in a common fund case." *Id*. Following 11th Circuit courts, *Edelman* relied on a Harvard Law Review article that asserts that "'hours of time expended' is a nebulous, highly variable standard, of limited significance" in a common-fund case. *Id*.

Many federal cases hold that hours expended is irrelevant in a common-fund, percentage-

fee case. *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 189 (Ala. 2000), explains that "Alabama will look to federal law in interpreting" how to award attorneys' fees in common-fund cases. Federal common-fund cases decided under *Camden I* and *Johnson* are highly persuasive. The Alabama Supreme Court held in *Edelman*, at 960, that the *Peebles* factors were relevant for consideration by the Court in setting the percentage: "This Court has recognized the use of the *Peebles* factors in setting a percentage fee in common fund cases and has allowed percentages even higher than one-third in some cases." *Peebles v. Miley*, 439 So. 2d 137, 140-41 (Ala. 1983) (a collection case based on a contract), which was neither a class action nor a common-fund case, adopted a series of factors for a court to consider in deciding the amount of a reasonable fee. *Peebles* was based upon the opinion of the old Fifth Circuit in *Johnson v Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974).

Like the third *Peebles* factor, "the time consumed," the first enumerated *Johnson* factor is "the time and labor required." "While the *Johnson* factors must be [separately considered and] addressed, 'rarely are all the *Johnson* factors applicable; this is particularly so in a common fund case.'" *Di Giacomo v. Plains All American Pipeline*, 2001 WL 34633373, *9 (S.D. Fla. Dec. 19, 2001) (emphasis added). Indeed, this first *Johnson* factor is arguably relevant only to a lodestar cross-check analysis, and is not even an appropriate factor in determining a fair percentage fee. See *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213-14 (S.D. Fla. 2006).

The district courts in the 11th Circuit, post-*Camden I,* hold that time sheets and hours spent are not relevant to the common-fund fee analysis. As one of many examples, see *Wilson v. EverBank*, No. 14-CIV-22264, 2016 WL 457011, *19 (S.D. Fla. Feb. 3, 2016) (emphasis added):

> The Jabranis argue further that the proposed fee award should have been based on a lodestar-crosscheck method for calculating fees, but in the Eleventh

> Circuit, "the lodestar approach should not be imposed through the back door via a 'cross-check.'" *Checking Account Overdraft Litig.*, 830 F.Supp.2d at 1362 (citing, inter alia, Alba Conte, ATTORNEY FEE AWARDS § 2.7, at 91 n. 41 ("The Eleventh ... Circuit[ ] repudiated the use of the lodestar method in common-fund cases")). In *Camden I*, the court criticized the inefficiencies of lodestar approach, vacating the district court's order utilizing the lodestar and risk enhancement method in calculating the attorneys' fee, and directing the district court to determine a reasonable attorneys' fee based upon a percentage of a common fund. See 946 F.2d at 773–75. Other courts have also called the lodestar-crosscheck method into question because it "creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *In re Quantum Health Resources, Inc.*, 962 F.Supp. 1254, 1256 (C.D. Cal. 1997). "Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, **without discussing lodestar at all**." *Checking Overdraft*, 830 F. Supp.2d at 1363 (*citing David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010)).

In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1361-63 (S.D. Fla. 2011), says (emphasis added):

> Several Objectors complain about Class Counsel's fee request. A few Objectors urge the Court to scrutinize Class Counsel's voluminous time and task records in evaluating the fee request. This the Court will not do. The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the ***exclusive*** method for awarding fees in common fund class actions. *Camden I,* 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F.Supp. 660, 670 (M.D. Ala. 1988). **More importantly, the Court observed first hand the monumental effort exerted by Class Counsel in this case, and does not need to see timesheets to know how much work Class Counsel have put in to reach this point**.
>
> As the Court noted at the Final Approval Hearing, Tr. at 87-89, one of the many problems with Objectors' argument that the Court should consider the lodestar of Class Counsel is that it encourages inefficiency. That is, if counsel knows that they can substantially enhance their fees by dragging out the litigation for years and pouring in billable hours, there is little incentive to obtain an early settlement even where, as here, that settlement is substantial and results in immediate relief for the class, and is thus in the class' best interest.
>
> The lodestar approach should not be imposed through the back door via a "cross-check." Lodestar "creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *In re Quantum Health Resources, Inc.*, 962 F.Supp. 1254, 1256 (C.D. Cal. 1997). In *Camden I*, the Eleventh Circuit criticized lodestar and the inefficiencies that it creates. 946 F.2d at 773-75. In so doing, the court "mandate[d] the exclusive use

> of the percentage approach in common fund cases, reasoning that it more closely aligns the interests of client and attorney, and more faithfully adheres to market practice." *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 50 (2d Cir. 2000); see also Alba Conte, Attorney Fee Awards § 2.7, at 91 fn. 41 ("The Eleventh ... Circuit[ ] repudiated the use of the lodestar method in common-fund cases"). Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all. *See, e.g*., *David v. American Suzuki Motor Corp*., 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010). "[A] common fund is itself the measure of success and represents the benchmark on which a reasonable fee will be awarded.... In this context, monetary results achieved predominate over all other criteria." *Camden I*, 946 F.2d at 774 (citations and alterations omitted). This Court will not deviate from that approach, for all of the reasons set forth above and in the excellent analyses presented in Plaintiffs' expert declarations.

Because the Alabama Supreme Court's common-fund jurisprudence is primarily drawn from *Johnson* and *Camden I*, this Court finds highly persuasive the federal district court cases explaining that time sheets and hours are irrelevant in a common-fund, percentage-fee class action case. No Alabama Supreme Court decision since 1995 has required trial courts to review time sheets or perform a lodestar cross-check analysis in a common-fund, class action case.

Walker's August 5th brief is not persuasive in its demand for discovery of attorney time records. Page 4 of Walker's brief cites this: "See, e.g. *City of Birmingham v. Horn*, 810 So. 2d 667, 682 (Ala. 2001) ('Applicants for an attorney fee bear the burden of proving their entitlement to an award and documenting their appropriately expended hours.')." This citation is completely irrelevant to a common-fund attorneys' fees question because *Horn* was not a common-fund case. The Court used the lodestar method in an equity (benefit conferred) case. In *Horn*, city residents sought attorneys' fees in connection with their action against the city which resulted in a new ordinance regulating solid-waste facilities. *Horn* was a lodestar case, so hours and time were relevant. The Court specifically held that no fund was created so the lodestar method would have to be applied instead of the percentage method. Thus, *Horn* is irrelevant.

At page 12, Walker also cites: "*Madison Cnty. Dept. of Human Res. v. T.S.*, 53 So. 3d 38, 55 (Ala. 2009) ('[I]t is generally recognized that the first yardstick that is used by trial judges is the time consumed' when determining the reasonableness of an attorney fee.')." This opinion is also irrelevant. This is not a class action case. It was a pro ami settlement case. Moreover, this case is not precedent for anything because only four of the nine voting Justices concurred in the rationale (two dissented, and three concurred only in result). And, the plurality opinion ruled on the attorneys' fees award, anyway, without remanding to get time records. Also, note that this case settled in only four months.

Again, since 1995, no Alabama case holds that time and hours bear any relevance to an attorneys' fees award in a common-fund class action. The Alabama attorneys' fees cases discussing the *Peebles* factors and mentioning time or hours are all cases that are utterly different from common-fund class action cases. Many are trust and estates cases. Several involve setting a guardian ad litem fee. Some, like *Peebles*, are collection suits where the contract provides for reasonable attorneys' fees. Some, like *Horn*, are non-monetary equity or injunction cases - where no monetary fund it created. In all of those sorts of cases, the lodestar method is applicable, and time and hours are relevant. But, those cases have nothing whatsoever to do with common-fund class actions where the percentage method is the applicable law.

Walker points out that the last page of *Edelman*, at 961, refers to the fact that time sheets were not provided. The opinion says, cryptically, that "[t]he trial court should consider that factor in determining the appropriate percentage to be awarded in this case." Accordingly, to the extent this third *Peebles* factor is even relevant, the Court finds that it is beyond cavil that this 13-year case has demanded substantial time and labor, including extensive briefing, protracted discovery, and arduous settlement negotiations. As quoted at *Caremark II*, 175 So. 3d at 602,

Judge King's 2012 certification order found that: "These plaintiff attorneys have labored thousands of hours since 2003 seeking to represent and protect this proposed class, and have done so without remuneration for their time and monumental expenses incurred.... This civil action spanning into its tenth year is so complex and replete with filings, depositions and rulings, it is a virtual certainty that no lawyer and/or law firm would now invest the time and incur the expense to represent this class."

Since March 2015, this Court has personally viewed the expenditure of thousands of more lawyer hours in preparing this case to the brink of trial. These were not inefficiently-spent hours. The substantial amount of time and labor spent on this case was necessary, given the breadth and complexity of the allegations. The discovery battles alone were substantial. Beyond discovery, the summary judgment motions and the numerous evidentiary motions demanded extraordinary amounts of time and effort to save this case from defeat. All of these facts easily support a 40% fee award. So, just as the Court in *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330 (S.D. Fla. 2011), said, this "Court observed first hand the monumental effort exerted by Class Counsel in this case, and **does not need to see timesheets** to know how much work Class Counsel have put in to reach this point." (Emphasis added). This Court does not need time sheets in order to find that this factor, "the time consumed," to the extent it is relevant at all, also firmly supports the full 40% fee requested by class counsel.

The Court has reviewed the history of the litigation since it was filed and makes the following observations. The initial complaint itself shows significant time was expended at the very front end. The parties then battled over motions to dismiss, a process that took several months. It is clear from a review of the pleadings alone that the time expended has been significant. Some examples are the first class certification and first appeal. Class discovery and

class certification processes followed that extended for more than a year. In connection with class certification, a review of the record shows that almost 30,000 pages of documents were filed, all of which were reviewed. Merits discovery and motion practice on the merits was extensive, as well. Based on the record itself -- over 3,000 filings that all class counsel had a duty to review -- there was a significant expenditure of time and effort.

It is clear from a review of the record that Class Counsel was battling the biggest corporations and scores of the best lawyers in the country. The number of defense lawyers who entered appearances in this case and the presence of so many defense lawyers is indicative of the complexity of this case and time expended in this case. In a case this hard-fought and complicated, in which the Court has itself witnessed much of the time expended, detailed billing records of class counsel that describe every fifteen-minute task performed would not be helpful. The reason that "time expended" might be a relevant factor at all in a common-fund case is to ensure there is no unwarranted windfall. Here, based on the record, the reality is that, to do the job they did, class counsel clearly spent thousands of hours and forewent other opportunities for other work. Moreover, as Professor Miller points out, lawyers should be rewarded based on the risk they undertook. From its review of the record and the filings in this case this Court concludes that the time expended by Plaintiffs' class counsel was enormous and that the requested fees do not constitute a "windfall."

4. <u>The professional experience and reputation of the attorney</u>

See Judge Clemon's declaration, Exhibit 3, and the discussion in subsection (2), above. At p. 14 of the 2012 certification order, Judge Tom King wrote: "the Court observed on the record during the Class Certification Hearing that the attorneys, both plaintiff and defense, are profoundly respected and professional. They are among the finest attorneys in the nation. The

Court makes this statement because it is true. These lawyers involved in this case are among the best in the country in handling large complex litigation." The undersigned agrees with and reiterates Judge King's assessment. Since March 2015, this Court has spent literally hundreds of hours in open court with lawyers for both sides and many more hours outside of court reviewing the work of these lawyers. The work of the lawyers on both sides has been of the highest possible quality. This Court is very familiar with class counsel and knows that their professional reputations are of the highest order, and knows that they each have extensive and successful experience in class actions and other complex commercial litigations.

5. The weight of [counsel's] responsibilities

"The weight of the responsibilities undertaken by Plaintiffs' counsel was very substantial. There were public documents reflecting the excess coverage for the 1998 case. So, to overcome the Defendants' dispositive motions, Plaintiffs' counsel had to make a showing of plausible and controvertible facts. That task was much easier said than done. Plaintiffs' counsel did just that." Judge Clemon's declaration, Exhibit 3, at ¶ 44.

The risks undertaken by class counsel were extreme in this literally unique case. In the context of analyzing class action fees, the factor often called "undesirable" means that counsel had to commit to enter unchartered legal waters. With Caremark Rx, LLC and AIG as defendants, counsel had no reason to expect a quick settlement. The estimated percentage chance of winning or losing was impossible to judge at the beginning of the case, primarily because there was sparse or zero case law regarding the important "merits" issues. This was by no means "copy-cat" litigation where the landmarks were clearly known in advance. New law had to be made in this case.

Moreover, as observed by Professor Arthur Miller, the responsibilities assumed by class

counsel extended to protecting the integrity of the judicial process. "[T]hrough their diligence and endurance, it is my opinion that Class Counsel have actually served a vital role in preserving the integrity of the judicial process in Alabama. But for the tenacity and perseverance of Class Counsel, the fraud and suppression that is the subject of this lawsuit would never have been discovered let alone remedied. Therefore, even if one does not characterize the role of Class Counsel as private attorneys general as many would, they have nonetheless played a critical role in preserving the sanctity and legitimacy of the judicial process." Declaration of Miller, Exhibit 2, p. 7, ¶ 16.c. Simply put, they saw what they believed to be a wrong and, at considerable risk to themselves, acted to correct this wrong on behalf of the Class for over a decade. Such actions should be compensated and thereby encouraged. Thus, for purposes of choosing a fair attorneys' fee percentage, this case is categorized as highly "risky," weighing on the side of a high fee percentage. Courts often elevate percentage fee awards due to the absence of prior or related litigation that could be of value to class counsel in prosecuting the case. *See City of Detroit v. Grinnell Corp*., 495 F.2d 448, 471 (2d Cir. 1974); *In re Gulf Oil/Cities Serv. Tender Offer Litig*., 142 F.R.D. 588, 597 (S.D. N.Y. 1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals.... They did all the work on their own.").

By any reasonable view, this case was extremely risky. The issues were complex; the legal hurdles many and substantial; the opponents powerful and ably defended; and the time and expense demands daunting. Such circumstances justify a generous fee award. A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case that is "undesirable" due to any number of things, including thorny factual circumstances, or complex, undecided legal questions. See *In re Sunbeam Sec. Litig*., 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001).

This case was "undesirable" in another sense as well -- the factual risks of this case could not be fully ascertainable until extensive discovery had been completed because defendants were in possession of the most relevant information. See *Di Giacomo v. Plains All American Pipeline*, 2001 WL 34633373, *12 (S.D. Fla. Dec. 19, 2001) (holding that an enhanced fee award is appropriate in cases that "carried risks that required investigation and ... discovery to uncover and analyze"). Even if class counsel felt confident about their assessment of fraud liability, they did not -- and could not -- appreciate the full financial ramifications of the tort until mountains of data were analyzed. (Toward the end, the Defendants still had experts ready to opine that the economic loss to the class from the fraud-in-the-settlement was actually zero.) It was well within the realm of possibility that a jury would believe that, even if they found that fraud had been committed, the damages flowing from the fraud were insubstantial or non-existent, leaving class counsel and the class with only a Pyrrhic victory. "Undesirability" and relevant risks are evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, and not retroactively with the benefit of hindsight.

As to the undesirability of the case, courts have observed that: "Cases may be deemed 'undesirable' when 'the defendant is a large corporation with substantial resources, financial and otherwise, for a vigorous defense; and the legal and factual issues presented risks to recovery absent settlement.'" *Burford v. Cargill, Inc*., No. 05-0283, 2012 WL 5471985, *5 (W.D. La Nov. 8, 2012) (quoting *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litig*., 851 F.Supp.2d 1040, 1085 (S.D. Tex. 2012)). "Where class counsel is 'a relatively small group of attorneys with limited resources pitted against ... [a larger entity] with access to enormous legal resources,' the tenth factor weighs in favor of a substantial fee." *Id*. (quoting *In re Bayou Sorrel Class Action*, No. 04-1101, 2006 WL 3230771, *6 (W.D. La. 2006)). See *Columbus*

Drywall & Insulation, Inc. v. Masco Corporation, No. 1:04-cv-3066, 2012 WL 12540344, *6 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.): "This Court has recognized the risk and difficulty inherent in antitrust class actions, as well as the particular obstacles to recovery in this case. There 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 millions of dollars in out-of-pocket expenses. Class counsels' willingness to assume those risks should be reflected in the fee." The willingness of class counsel to assume the risks in this unique case should be rewarded at the highest permissible percentage level.

6. The measure of success achieved

This is the factor which many courts have consistently recognized as a major factor, if not the most important factor, to be considered in making a fee award. *See*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Vizcaino v. Microsoft*, 290 F.3d 1043, 1048 (9th Cir. 2002) ("Exceptional results are a relevant circumstance" in deciding a fee award in common fund cases); and *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F.Supp.2d 732, 796-97 (S.D. Tex. 2008) (the most critical factor). In this regard the success of the litigation is not only determined by the gross amount of the recovery but also by the number of individuals who benefit from the class settlement, the degree to which the settlement provides them with full compensation for their injuries, and the extent to which the settlement benefits the public at large. *In re Vioxx Products Liability Litigation*, 760 F.Supp.2d 640, 657-58 (E.D. La. 2010). As noted above, Professor Miller opined that "Class Counsel have actually served a vital role in preserving the integrity of the judicial process in Alabama." This Court also agrees with Paragraph 2 of Professor Rubenstein's

declaration: "Class Counsel should be rewarded for investing enormous sums of money in this class's exceptionally risky suit as their work here exemplifies the legal system's core aspiration for class action attorneys: that they serve as private attorneys general."

Class counsel have achieved a settlement of $310,000,000 -- a significant achievement in a case as fraught with peril as this one. After extensive investigation and discovery, class counsel were able to assess the strengths and weaknesses of their case, and have recovered by settlement a significant percentage of plaintiffs' best-case scenario of compensatory damages. Instead of facing additional years of costly litigation, class members will now share in a substantial settlement fund. This class has already waited since 2003, when this case was filed - or, even longer, if one uses the 1999 date of the fraud. This settlement will provide immediate and significant cash benefits to the class. A trial would have been lengthy and expensive. A settlement providing an immediate cash benefit, and avoiding the cost and risk of continued litigation, is a positive result for the members of the class. *See Enterprise Energy Corp. v. Columbia Gas Transmission*, 137 F.R.D. 240, 246-247 (S.D. Ohio 1991) (noting that a cash settlement "provides immediate value to the Class and minimizes the costs which plaintiffs must otherwise incur in moving forward and potentially obtaining a successful result").

"The quality of representation is best measured by comparing the possible recovery to the amount actually received." 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 6:24 (12th ed.) (database updated Dec. 2015). *See also Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("We agree with counsel that the quality of representation is best measured by results, and that such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'"). An enhancement of the fee award is appropriate in cases of exceptional success. *Blum v. Stenson*, 465 U.S. 886, 901 (1984). If any

case can ever meet that definition, this case and this $310-million settlement is an "exceptional success."

7. The reasonable expenses incurred by the attorney

Judge Clemon says that $3 million or less in total litigation expenses "seems very reasonable on its face, given 13 years of hard litigation against some of the major defense firms in the country." Exhibit 3, at ¶ 46. The subsection below, entitled, "Expenses," provides greater detail on this subject and factor # 7. Because large expenses were incurred over many years with no guarantee of recovery, this factor also supports a high percentage fee.

8. Whether the fee is fixed or contingent

In this case, class counsel prosecuted this action for over 12 years on an "at-risk" contingent-fee basis, meaning that counsel would be paid only if they achieved a successful result. Contingent risk obviously is an important factor in determining the fee award, and the recognition of that risk -- as well as the proper assessment of it -- is necessary to provide incentives to experienced counsel. In this case, class counsel assumed the risk of an unsuccessful result.

Class counsel have not received a dime of fees or expense reimbursement from any class member for the duration of this entire case. Class counsel undertook this litigation on a fully contingent-fee basis, with everything dependent upon a successful result. In view of the complexity involved in litigating this action, counsel faced a significant risk that they would never be paid for the thousands of hours of time expended or the millions of dollars of out-of-pocket expenses incurred. The risk of non-payment in complex cases such as this is very real. *See Ressler v. Jacobson*, 149 F.R.D. 651, 655 (M.D. Fla. 1992)

In determining the amount of the fee in a common-fund case, courts should focus on the

amount of contingent risk involved and enhance the award accordingly. The district court in *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339-40 (S.D. Fla. 2007), spoke at length on this subject, offering the following observations that are equally applicable here:

> A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high. Cases recognize that attorneys' risk is "'perhaps the foremost' factor" in determining an appropriate fee award. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (citation omitted); accord *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result.")....
>
> Class Counsel have received no compensation during the course of this litigation and have also incurred significant expenses in litigating on behalf of the Class, none of which would have been recovered if the case had not been successfully concluded. From the time Class Counsel filed suit, there existed a real possibility that they would achieve no recovery for the Class and hence no compensation. Class Counsel's investment of time and expenses has always been at risk and wholly contingent on the result they achieved. Although Class Counsel have successfully concluded the litigation, this result was not foreseeable at the outset. The relevant risks must be evaluated from the standpoint of Plaintiffs' counsel as of the time they commenced the suit and not retroactively with the benefit of hindsight. The financial risks borne by Class Counsel fully support the appropriateness of the fee requested.

Accord *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1214-15, 1216-17 (S.D. Fla. 2006) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.... As recognized in *Behrens*, without a contingent fee, '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.'").

Indeed, the fee jurisprudence has historically recognized that there is a cardinal difference between the economic value of services performed on a currently billed fee-for-service basis and compensation that is contingent on success. *Lindy Bros. Builders, Inc. v. Am. Radiator*, 487 F.2d 161, 168 (3d Cir. 1973) ("No one expects a lawyer … whose compensation is

contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting on other grounds) ("[L]awyers charge a premium when their entire fee is contingent on winning .... The premium added for contingency compensates for the risk of nonpayment if the suit does not succeed and for the delay in payment until the end of the litigation-factors not faced by a lawyer paid promptly as litigation progresses"). As the authoritative report by the Third Circuit Task Force on the award of counsel fees stated:

> It does not impugn the service that the plaintiffs' class action bar provides to note that the driving force in most cases is the opportunity to share in the plaintiffs' risk and ultimately in any reward they may receive. Like most prudent individuals, plaintiffs' counsel would not seek involvement in most class action cases ... unless the financial reward justified the risk that counsel undertakes. Because they have abilities that could be put to other uses, plaintiffs' counsel must find something in a class action that signals that it is financially attractive to be class counsel.
>
> It is plaintiffs' counsel who pay the expenses of the lawsuit, and who expect that they will lose much if not all of their out-of-pocket expenses if they are not ultimately successful in having a court certify a class and achieving either a settlement or a litigation victory. It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The quid pro quo for the risk ... is some kind of risk premium if the case is successful.

Third Circuit Task Force Report on Selection of Class Counsel, 208 F.R.D. 340, 342-43 (2002).

Consistent with economic theory, the law uniformly recognizes that "[r]isk ... must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise)." *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 488 (S.D. N.Y. 1998). The risk inherent in the initial contingent fee representation in this case supports the requested 40% fee. See *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 54 (2d

Cir. 2000) (risk is "perhaps the foremost factor" in determining the appropriate fee). "The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award. In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel received little or no fee." *Ressler v. Jacobson,* 149 F.R.D. 651, 656-57 (M.D. Fla. 1992). The risk of no recovery in complex cases of this type is real. There have been numerous class actions in which lead counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise.

This Court agrees that an award of attorneys' fees "should be structured as an incentive for lawyers to risk achieving the highest possible benefits for the greatest number of Class Members." *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1189 (S.D. Fla. 2006). The fees allowed in a case must also serve the function of covering situations where "attorneys have received no fees and litigated at substantial risk to themselves and in the best interest of the Class." *Id*. "This is not a situation where a class action is brought, soon settled, and Class Members receive an insignificant award and the lawyers get millions." *Allapattah*, at 1189. *See Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *5 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.): "As already noted, class counsel prosecuted this case on an entirely contingent fee basis. In doing so, counsel assumed significant risk of investing tens of thousands of hours and millions of dollars in out-of-pocket expenses with no compensation.... [T]his case has always involved a high degree of risk of nonpayment. This substantial contingency risk favors the requested fee."

The Court rejects Walker's argument that this is a "mega-fund" case that will result in a "windfall" unless a "sliding-scale" percentage method is utilized. Page 9 of Walker's August 5th brief cites two so-called "mega-fund" cases: one trial court order from almost 20 years ago, and one involving a recovery of over $7B. The other cases cited by Walker (at p. 10) are all from 1990, 26 years ago. This Court agrees with Professors Rubenstein and Miller that, in today's world of 2016, this is not a "mega-fund" case, and, because of the years of hard litigation involved in this unique case, no counsel will be receiving a "windfall." The Court agrees with Paragraph 46 of Professor Rubenstein's declaration (Exhibit 1):

> The "windfall" "presumption is not applicable in this case, given its protracted nature, extensive litigation through several appeals and up to the eve of trial, the vast amounts of time and money Class Counsel have invested, the extraordinary risks that they took and results they achieved, as discussed below. Thus, as set forth above, higher percentages are not limited to small fund cases: they often characterize cases that proceed to trial and/or through appeals regardless of the fund sizes in such matters, as these are cases in which counsel have invested enormous resources and in which they are therefore unlikely to reap a windfall from a higher percentage award. Moreover, on my Exhibit C list of cases with fees at 40% or higher, the fund sizes range from $250,000 to $377.... It would be more accurate to say that higher percentages characterize two contexts in which they are unlikely to represent a windfall: [1] small fund cases, in which the high percentage amounts to a relatively small fee; and [2] long, protracted cases involving trials and/or appeals, in which the high percentage reflects counsel's significant, long-term investment in the case. In short, while there may be a correlation between the size of the fund and the percentages courts set, the size of the fund is not determinative of the percentage counsel deserve – what determines counsel's entitlement are the facts of the particular case.

The Court also agrees with an adopts Professor Miller's analysis, stated in Paragraphs 44 and 47 of his affidavit (Exhibit 2):

> 44. I am aware of the argument that fee recoveries should decline as the size of the fund increases above a certain point. These are sometimes referred to as "mega fund" settlements. In my view, the Court should not take this approach in this case for the following reasons:
>
> (a) In today's world, recovery of even hundreds of millions of dollars on a claim intensely litigated for over many years at great risk should not automatically be categorized as a "mega fund" for purposes of determining what

is a proper fee award. That is far too simplistic. The only rational basis for reducing percentages at the top ends of very high class action recoveries is the avoidance of a windfall, which might be true because a case had relatively little risk or counsel invested comparatively modest time and effort or despite the size of the fund created by the action the result was not particularly favorable or perhaps because the case was simply a tag-along to prior determinations that "paved the way." Given the lengthy and very contentious litigation currently before the Court, this litigation does not have the potential to create windfall for counsel. I therefore believe that the so-called "mega fund" approach is not appropriate, especially as it relates to the Plaintiff Class.

(b) There is no rule of law requiring that a trial court reduce fee petitions simply because there is a large settlement or award. The cases I have cited all involve substantial amounts of money, but usually result in percentage recoveries similar to or larger than what the Plaintiff Class counsel has sought.

(c) The size of the settlement should, logically and pragmatically, not be an indicator of whether a percentage common benefit fee is appropriate since it is not an index of the risks assumed by the attorneys or the litigation difficulties they faced or the quality of the results achieved by the tenacious and dedicated efforts of counsel for the benefit of the claimants. In numerous cases that do not appear to be as difficult or tenaciously contested as this one, there have been large settlements in which the fees awarded are in the 30% to 36% range. [citations omitted].

(d) There is something of a trend recently away from reducing the fee percentage when there is a very large recovery. Many courts consider reducing the percentage a disincentive to plaintiffs to push harder or litigation longer to obtain the largest recovery they can for their clients. Examples are [citations omitted].

(e) Decreasing percentages as recoveries increase is a disincentive for plaintiffs' counsel to obtain the highest possible recovery and fails to recognize the unique skills (and sometimes the standing) of lawyers who are gifted negotiators or willing to "go the extra mile" in the settlement dynamic. In words applicable to this case, a federal court in the Eleventh Circuit has stated: "By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little." *Allapaltah Servs., Inc*., 454 F. Supp 2d. at 1213. "[I]f courts were to hold that the percentage should decline sharply after, say, the $100 million threshold was passed, then plaintiff's counsel in a case such as this would have had little incentive to hold out for nine long years for the $1.2 billion recovery that it obtained." *Id*. Indeed, it actually makes more sense to increase fee percentages as the recovery increases; certainly in a negotiated situation, common sense indicates it is far easier to recover the first dollar than the last dollar – and that probably also is true of judicial and jury awards as well....

47. In my opinion, the amount of recovery achieved for the Plaintiff Class in this settlement does not yet reach "mega fund" status. The history of this litigation has shown that the Class Counsel have been a major focus of the

> Defendants' discovery efforts. The procedural history of this litigation shows that counsel for the Plaintiff Class have achieved remarkable results by overcoming numerous obstacles, including the relentless discovery and motion practice engaged in by the Defendants. These realities militate in favor of a fee percentage at the very top of the accepted range. Nothing suggests that the Court is faced with a "windfall."

Class counsel's assumption of this particular and unique contingency fee risk, and their continued and extensive litigation in the face of these risks, strongly supports the reasonableness of the 40% fee request.

9. <u>The nature and length of the professional relationship</u>

Regarding this factor, the *Johnson* decision noted that "[a] lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office." 488 F.2d at 719. However, this case was not one where an attorney might tend to discount his or her fees in anticipation of obtaining repeat business with an established client. here does not seem to be any likelihood that the named plaintiffs or class members were in a position to promise future business to these attorneys that would somehow offset the tens of thousands of hours and millions of dollars in expenses that class counsel invested in this case. Thus, class counsels' compensation for these risks must come entirely from the settlement fund, rather than from future business from these clients. Again, this fraud-in-a-class-settlement case is a one-time event, unlikely ever to be repeated. *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1189 (S.D. Fla. 2006) ("[A] higher fee may be warranted in class actions where counsel for the class had no prior relationship with the named plaintiffs ... [and where] the risk of representation was not diminished by a long and beneficial previous relationship.").

10. <u>The fee customarily charged in the locality for similar legal services</u>

A complex individual fraud case in Alabama would normally rate at least a 40% contingency fee. See ¶ 48 of Judge Clemon's affidavit, Exhibit 3:

> In the State of Alabama, over the last ten years, the usual contingency rate has escalated from 33% to 40%. This declaration is based on my personal experience, my law firm's practice, and interactions with plaintiff lawyers throughout the State. While attending the most recent annual convention of the Alabama Bar Association a few weeks ago, I re-affirmed the extant practice by talking with several lawyers from Huntsville to Mobile. As the presiding Judge in *Torbert et al v. Monsanto Corp*. (N.D. Ala. No. 01-cv-1407), I personally know that the lawyers in those cases received 40% of the $600 million global settlement. The case was less than three years old; and the legal services provided in that case pale in comparison to services provided in this case.

Bates v. Stewart, 99 So. 3d 837, 842 (Ala. 2012), notes that "the trial court entered an order denying Avery's motion and finding that a 40% attorney fee in the *Monsanto* litigation was reasonable pursuant to the 12 criteria this Court enumerated in *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 552-53 (Ala. 2004) (quoting *Van Schaack v. AmSouth Bank, N.A.*, 530 So. 2d 740, 749 (Ala.1988)).[1]

As Judge Posner recognized in *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 572 (7th Cir. 1992), courts should look to the marketplace to evaluate the reasonableness of a percentage fee:

> The judicial task might be simplified if the judge and the lawyers spent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of $45 million. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud and won $45 million. What would its lawyers have gotten pursuant to their contingent fee contract?

Accord *In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001) (requiring that "common fund" percentage awards be determined by the market rate for contingency-fee agreements on a prospective basis at the outset of the case).

Other courts have reached similar conclusions about reliance upon the market price for legal services in these types of complex cases. For example, *in Pinto v. Princess Cruise Lines,*

Ltd., 513 F. Supp. 2d 1334, 1341 (S.D. Fla. 2007), the district court adopted Judge Posner's reasoning and concluded that "[i]n private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients.... These percentages are the prevailing market rates throughout the United States for contingent representation." *See also Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (40% contractual award if case went to trial). The evidence in this case establishes that, in Alabama, and in the USA, the market price for services in this type of case for a single client would range between 40% - 50%. *See* Paragraph 44 of Professor Rubenstein's declaration:

> [T]he 40% fee sought here is supported by evidence of the rates charged in the private marketplace for similar services, namely empirical evidence on rates charged by contingent fee trial lawyers in non-class action cases. These data are helpful because, to consider the work counsel undertook here, it is necessary to look beyond the class action context since so few class suits proceed to trial. A better comparative group is trial lawyers in regular contingent fee cases, lawyers who more often take cases to trial. The general assumption about market rates for contingent fee lawyers is that most charge at least 33% and that the rates increase into the 40% range if a case goes to trial or on appeal. Those assumptions are largely borne out by the empirical data on contingent fee lawyers. The leading study on point shows that most contingent fee lawyers charge a flat 33% rate, but about a third of such lawyers charge variable rates ranging from 33%-50%. The key variables that pushed rates higher were the presence of a trial or an appeal; the presence of preparation for a trial and (several) appeals therefore contains not one but several factors supporting a 40% fee. A more recent study focusing on medical negligence cases – which are more likely than routine contingent cases to be contested through trial or appeal – showed that 50% of attorneys charged a flat 40% fee, and only 14% charged a flat 33%, with another 33% charging a variable rate. Another recent study of 42 patent cases showed that 10 had a fixed contingent rate, with the mean of those 10 contracts being 38.6%; the remaining 32 contracts tied rates to the litigation stage and "the average percentage upon filing was 28% and the average through appeal was 40.2%." Hence, the available empirical data on market rates for contingent fee trial lawyers support the conclusion that a 40% fee is warranted in a case involving both trial and an appeal(s).

Class litigation against powerful foes such as CVS and AIG presented enormous risks for class counsel. As the district court in *Allapattah* explained:

> This was an "all or nothing" case for the Plaintiffs. Class Counsel, having

> worked on this case since 1992, faced a potential catastrophic risk in the event the case was lost at trial or, thereafter, at each level of review. Given the length of this case, and the significant risks inherent in the litigation, I conclude that the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal.

Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1203 (S.D. Fla. 2006). This Court agrees with Judge Clemon's assessment that the typical Alabama lawyer agreeing to accept and litigate - on a purely contingent basis - an untested claim like the fraud-in-a-class-action-settlement case would surely have charged a fee percentage of at least 40%. This fact weighs heavily in favor of approving the 40% fee request by Class Counsel.

In setting the percentage, "the most appropriate way is to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." *Allapattah Services, Inc. v. Exxon Corp*., 454 F.Supp.2d 1185, 1203 (S.D. Fla. July 6, 2006), citing *Camden I Condo. Assn., Inc. v. Dunkle*, 946 F.2d 768, 772 n. 5 (11th Cir. 1991), and *In re Synthroid Market'g Litig*., 264 F.3d 712, 718 (7th Cir. 2001). *See also City of Ozark v. Trawick*, 604 So. 2d 360, 364-365 (Ala. 1992) (awarding one-third of the common fund in a taxpayer class action); *State v. Brown*, 577 So. 2d 1256, 1260 (Ala. 1991) (noting an award of one-third "would be appropriate had a common fund been established"). In *Waters v. Cook's Pest Control, Inc*., No. 2:07-CV-00394-LSC, 2012 WL 2923542, *17 (N.D. Ala. July 17, 2012), Judge Coogler said: "The rates charged by Class Counsel are well within the customary fees charged for comparable service. Wiggins Childs Quinn & Pantazis, LLC, customarily enters into contingent fee agreements allowing for recovery of 33% in low risk cases with uncontested or moderately contested liability, and up to 49% in higher risk cases with difficult liability issues." The U. S. Supreme Court has recognized that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in

the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 40% of the recovery.

As quoted above, one of Professor Rubenstein's opinions is that a 40% fee in common-fund class actions is not uncommon: "I maintain a database of over 1,000 class action fee awards. In 55 of the cases in my database (or about 5% of all the cases), courts have awarded counsel a fee of 40% or more of the common fund. Typically, fees of this magnitude are awarded in cases that proceed to trial, with the median award of fees and costs combined in such cases being 45%. Third, there are numerous reported federal and state cases awarding 40% or more to class counsel, many in circumstances far less compelling than those that exist in this case." If this case is one the most complex and time-consuming and risky class actions in history (which this Court finds that it is), and class counsel are therefore entitled to a fee near the highest permissible range, and 40% fees in class actions are not rare, then this case, of all cases, is an appropriate one for the awarding of a 40% fee.

11. <u>The likelihood that a particular employment may preclude other employment</u>

This factor supports a fee award in the highest range. The three small law firms representing the class have devoted a large measure of their practice to this one case for over 12 years. Every hour spent on this case could have spent on hourly work or on other contingency-fee cases that most likely would have successfully terminated in a two-to-four-year range. This suit severely limited their ability over many years to take on other representation. The statement of the *Peebles* Factor 11, "the likelihood that a particular employment may preclude other employment," is a severe understatement in this case. *See Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *4 (N.D. Ga. Oct. 26, 2012)

(Julie E. Carnes, J.) (emphasis added):

> *Johnson* held that a fee award should be higher if the attorney was precluded from accepting other employment because of the case at issue. *Johnson*, 488 F.2d at 718. Further, "[p]riority work that delays the lawyer's other legal work is entitled to some premium." *Id*. This case has required eight years of work, punctuated by extended periods requiring the undivided attention of multiple lawyer and staff members, including the period from late 2011 (when the Court set the July trial date) through mid-September 2012, when the parties executed comprehensive settlement papers. Class counsel have devoted tens of thousands of hours to this case that could have been used in the pursuit of other matters that would have paid a guaranteed return by the hour. This factor tends to favor the requested award.

12. The time limitations imposed by the client or by the circumstances

See subsection 11, just above.

To sum up on the *Peebles* factors, every factor weighs very heavily on the side of class counsel in this case being deserving of the highest possible attorneys' fees award. Everyone who has ever touched this case concedes that it is literally unique. Every legal issue was an issue of first impression. There was never any guarantee of a successful conclusion to this 13-year-old litigation. No one has identified a class action that has lasted longer or been defended harder than this one. If the maximum attorneys' fees award that could ever properly be awarded in a common-fund class action is 50%, then the 40% sought here is actually more than fair to the class, because no class action has ever been riskier or required higher legal skills than this one.

In conclusion as to the 40% fee request, Alabama case law acknowledges that state and federal courts across the country commonly state that common-fund, class action attorneys' fees can range up to as much as 50%. The factors analyzed above demonstrate that the fee in this case should rank toward the high end of the permissible scale. That is, this Court cannot conceive of a piece of class action litigation wherein class counsel could justify a fee at a percentage higher than awarded in this case. If any class action ever justified a 40% fee award,

it is this one. So, an objector to this 40% fee request has to, in effect, take the position that no class action could ever, under any circumstances, justify an award of as much as 40%. That is not the law. A 40% common-fund, class action attorneys' fee award is, viewed in a vacuum, a large-sounding number. However, in the context of this truly "unique" case, 40% is easily justified and well-deserved. The Court grants the request for an attorneys' fee of 40% of the $310-million settlement fund.

ATTORNEYS' FEES FOR INTERVENORS' COUNSEL

In "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs," of July 29, 2016, a total, overall fee in the amount of 40% of the Settlement Fund is requested. For purposes of this fee request, the intervenors' attorney, Mr. Lanny S. Vines, is deemed within the group of "class counsel." Page 7, ¶ 1.12, of the Stipulation of Settlement of 5/27/16, defines "Class Counsel" to mean "Hare, Wynn, Newell & Newton, Francis Law, LLC, as successor to James L. North and Associates, and Somerville, LLC. Solely for purposes of Section IX hereto, Class Counsel shall include Attorney for Former Intervenor." Section IX, pp. 39-40, deals with attorneys' fees, expenses, and service awards.

The "Lead Counsel Agreement of February 25, 2009" (Exhibit 10 to the Evidentiary Submissions) between class counsel and Mr. Vines, as counsel for the intervenors, was filed with this Court and was given approval in Judge Tom King's certification order of August 2012. The Supreme Court then affirmed the certification order in all respects.

Mr. Walker's August 5th brief argues that Mr. Vines cannot receive any portion of the fee because Alabama Rule of Professional Conduct 1.5(e) (relating to a "division of fee between lawyers who are not in the same firm") was violated. The law of this case has already held that RPC 1.5 does not apply to and is not violated by Lead Counsel Agreement. Page 21 of Judge

King's certification order held that, "the agreement does not provide for a fee split," and that order was affirmed on appeal. On its face, the Lead Counsel Agreement is not a "co-counsel" or a "fee split" agreement. Thus, Walker's Rule 1.5 objection has no merit.

Secondly, Mr. Walker objects to the fact that Mr. Vines did not file a separate fee petition. This objection exalts form over substance. This Court sees no substantive, dispositive distinction between a single, joint petition versus separate documents. The substantive point is whether Mr. Vines's service has been worth 7.5% of the total award. Class counsel's written presentations and the oral representations of lead class counsel, Scott A. Powell, at the August 8th hearing state emphatically that Mr. Vines's aid to the prosecution and resolution of this class action was worth 7.5% of the legal effort as a whole.

Class action courts may rely on the opinions of class counsel about the settlement agreements' fairness and adequacy. *See Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977). *See also In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 125 (S.D. N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997) ("great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.") (internal citation and quotations omitted); *Chatelain v. Prudential-Bache Sec., Inc*., 805 F. Supp. 209, 212 (S.D. N.Y. 1992) ("[a] substantial factor in determining the fairness of the settlement is the opinion of counsel involved in the settlement."); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1149 (11th Cir. 1983) ("Courts often accord great weight to the opinions of counsel for the class in approving class action settlements."); *Shuford v. Alabama State Bd. of Educ*., 897 F. Supp. 1535, 1549 (M.D. Ala. 1995) (Thompson, J.) ("The judgment of class counsel is also important in addressing the fairness, adequacy, and reasonableness of a consent decree."); 7B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, A. Benjamin Spencer, and Adam N. Steinman,

Federal Practice & Procedure § 1797.1 (3d ed.) (April 2016 update) ("In deciding whether to approve a settlement or not, the court also may take into account class counsel's recommendation regarding the proposed settlement."); and 32B Am. Jur. 2d Federal Courts § 1872 (database updated July 2016) ("In assessing a settlement of a class action, the courts will consider the opinion of a competent counsel as to the propriety of the settlement.").

The Court has no reason to doubt the representations of class counsel. And, the Court is independently acquainted with the experience with and reputation in class action litigation possessed by Mr. Vines. Therefore, the Court finds that Mr. Vines's contribution to achieving this $310-million settlement is valued at 7.5% of the overall 40% fee, and the Court again gives its judicial approval of the terms of the "Lead Counsel Agreement of February 25, 2009."

EXPENSES

In "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs," of July 29, 2016, the Plaintiff Class's class counsel petition for reimbursement from the Settlement Fund of out-of-pocket litigation expenses of $2,585,932.71. *See* attachments to Exhibit 4, Joint Affidavit of Class Counsel Scott A. Powell, J. Timothy Francis, and John Q. Somerville. For the reasons stated below, this request is granted.

No putative objection has been made to this request for reimbursement of expenses. From the Court's own experience, the Court knows that roughly $2.5 million of expenses is less than what most lawyers and judges would have expected that 13 years of hard-fought litigation like this would have cost. Class counsel have done a good job in keeping litigation expenses well within a range of reasonableness. The Court agrees with ¶ 46 of Judge Clemon's declaration, wherein he opined that the amount of requested expenses "seems very reasonable on its face, given 13 years of hard litigation against some of the major defense firms in the

country."

As a guardian of the rights of the absent class members, the Court has examined the expense ledgers attached to class counsel's affidavit. Each of the expenses on the ledgers and expense reports appear to be the types of expenses that would ordinarily be charged to an hourly, paying client or to an individual contingency-fee client in a non-class, individual case. Therefore, the Court approves of each expense item as being necessary and reasonable to the prosecution of this class action, and the Court approves the request for reimbursement to class counsel from the Settlement Fund of their out-of-pocket litigation expenses in the requested amount of $2,585,932.71.

THREE SERVICE AWARDS

In "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs," of July 29, 2016, the Plaintiffs, the Plaintiff Class, and Class Counsel request the awarding of service awards (also commonly known as incentive awards) to the two current class representatives, Sam Johnson and the City of Birmingham Retirement and Relief System, and to John Lauriello, the original named plaintiff and former class representative. The request is for $50,000 each. See Exhibits 5, 6, and 7: the affidavits of Sam Johnson, James Love for the Relief System, and John Lauriello. For the reasons stated below, these three requests are granted, and in the amounts requested (i.e., $50,000 each).

No putative objection has been made to the requested $50,00 service awards for each of the two current class representatives. The Court's independent judgment is that these two service awards are merited, and in the amounts requested. This case has been in litigation for many years and Mr. Johnson and the Relief System have been steadfast in their support of class counsel and the class. Mr. Johnson and representatives of the Relief System have been deposed

and attended hearings, and were prepared for a multi-week trial. Had this case ended with a defense verdict and judgment, Mr. Johnson and the Relief System might have been liable for the defendants' costs. The specter of this huge potential liability, by itself, is a sufficient basis for service award in the amount of $50,000.

Although he is not presently a class representative, Mr. John Lauriello served the class even longer than Mr. Johnson and the Relief System served. Indeed, without Mr. Lauriello's willingness to serve, this litigation would have never even begun. As a prominent Birmingham businessman, Mr. Lauriello has suffered the antipathy and contempt of many others in the business community upset with the fact that Mr. Lauriello is supporting litigation against what was once one of Birmingham's largest public companies. This is a valid ground for a service award to Mr. Lauriello.

Mr. Walker's only objection to the service award for Mr. Lauriello is the fact that he was made whole for his economic loss out of the 1999 settlement. The Court finds that fact to be completely irrelevant to the question of whether, in this case, Mr. Lauriello provided a valuable service to this class. Depending upon the amount of claims filed by September 30, 2016, Mr. Johnson and the Relief System also might be paid their entire compensatory loss - but Mr. Walker does not object to their requests for service awards. Even if Mr. Walker's objection to Mr. Lauriello's service award had been timely made by a proven class member, the Court would reject the merits of such objection.

For the reasons stated, the Court directs that $150,000 be removed from the Settlement Fund and paid equally ($50,000 each) to Sam Johnson, John Lauriello, and the City of Birmingham Retirement and Relief System as a service award for their efforts in helping to prosecute this class action to a successful conclusion for the class.

CONCLUSION AND ORDER

Each of the requests presented in CLASS COUNSEL'S FEE AND EXPENSE APPLICATION AND APPLICATION FOR SERVICE AWARDS TO PLAINTIFFS is GRANTED.

Specifically, IT IS HEREBY ORDERED, ADJUDGED, and DECREED, as follows:

(1) Class counsel (John W. Haley, Scott A. Powell, Bruce J. McKee, Brian M. Vines, Ralph D. Cook, Tempe D. Smith, of Hare, Wynn, Newell & Newton, LLP; J. Timothy Francis of Francis Law, LLC; and John Q. Somerville of Somerville, LLC) are jointly awarded a common-fund attorneys' fees to be paid from the Settlement Fund in the sum of $124,000,000.00, which represents 40% of the $310-million Settlement Fund.

(2) Attorney for the intervenors, Lanny. S. Vines, is awarded for his services to the class an attorneys' fee equal to 7.5% of the overall fee referenced in paragraph (1), above, to-wit: $9,300,000.00, to be paid out of the $124,000,000 fee award.

(3) In addition to attorneys' fees, class counsel are to be reimbursed from the Settlement Fund the amount of $2,585,932.71 to reimburse them for their out-of-pocket case expenses which they advanced.

(4) A total of $150,000.00 is to be paid from the Settlement Fund as service awards, with $50,000.00 to be paid each to Sam Johnson, the City of Birmingham Retirement and Relief System, and John Lauriello.

DONE and ORDERED this 15th day of August, 2016.

/s/ PAT BALLARD
CIRCUIT JUDGE