UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FIFTH TRANCHE ACTION

Childs, et al. v. Synovus Bank, et al.
N.D. Ga. Case No. 1:10-CV-03027-ODE
S.D. Fla. Case No. 1:10-CV-23938-JLK

ORDER OF FINAL APPROVAL OF CLASS SETTLEMENT, AUTHORIZING SERVICE AWARDS, AND GRANTING APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

On February 5, 2015, Plaintiffs and Class Counsel filed their Motion for Final Approval of Class Settlement, Application for Service Awards, Attorneys' Fees, and Expenses, and Incorporated Memorandum of Law ("Motion"), seeking Final Approval of the Settlement Agreement and Release and the Amendment to Settlement Agreement and Release (collectively, the "Agreement" or the "Settlement") with Defendants Synovus Bank and Synovus Financial Corp. (collectively, "Synovus").[1] (DE # 4067-1). In support, Plaintiffs filed declarations from Settlement Class Counsel, an expert in class action law and attorneys' fees, and others

[1] This Order incorporates the definitions of terms used in the Agreement attached to the Motion (DE # 4067-1).

supplementing the factual record to enable the Court to evaluate the fairness and adequacy of the Settlement. (DE # 4067-2, 4067-3, 4067-4, 4067-5, 4098).

This matter came before the Court on April 2, 2015, for a Final Approval Hearing pursuant to the Court's Preliminary Approval Order dated December 3, 2014. (DE # 4015). The Court reviewed all of the filings related to the Settlement and heard argument on the Motion.

After careful consideration of the presentations of the Parties, the Court concludes that this Settlement provides a fair, reasonable, and adequate recovery for Settlement Class Members based on the creation of a $3,750,000 common fund. The Settlement constitutes a reasonable result for the Settlement Class under the circumstances and challenges presented by the Action. The Court specifically finds that the Settlement is fair, reasonable, and adequate, and a satisfactory compromise of the Settlement Class Members' claims. The Settlement fully complies with Fed. R. Civ. P. 23(e) and, thus, the Court grants Final Approval to the Settlement, certifies the Settlement Class, and awards the fees and costs requested by Class Counsel as well as the requested Service Awards for the representative Plaintiffs.

BACKGROUND

The Court is familiar with the history of this consumer class action brought against Synovus, having presided over MDL 2036 for over five years. During that time, the Court has had ample opportunity to observe Class Counsel and Synovus's counsel in action. These attorneys, several of whom have practiced before this Court for many years, are extremely skilled advocates, and vigorously litigated the Action up to the time of the Settlement. The Settlement is quite obviously the result of arm's-length negotiations, and the Court so finds.

The present evidentiary record is adequate for the Court to consider the fairness, reasonableness, and adequacy of the Settlement. A fundamental question is whether the district

judge has sufficient facts before him to evaluate and intelligently and knowledgeably approve or disapprove the settlement. *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (citing *Detroit v. Grinnell*, 495 F.2d 448, 463-68 (2d Cir. 1974)). In this case, the Court has such facts before it in considering the Motion, including the evidence and opinions of Class Counsel and their experts.

1. Factual and Procedural Background of the Action.

On September 21, 2010, Plaintiffs Natalie Childs and Jeramie Childs initiated this litigation against Synovus, Case No. 1:10-cv-03027-CAP ("*Childs*"), in the United States District Court for the Northern District of Georgia, alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, interest, attorney's fees, restitution, and equitable relief. *See* Joint Declaration of Robert C. Gilbert and E. Adam Webb, ¶ 8 ("Joint Decl.") (DE # 4067-2). On November 25, 2010, *Childs* was transferred to this Court, where it joined other actions coordinated in *In Re: Checking Account Overdraft Litigation*, Case No. 1:09-md-02036-JLK ("MDL 2036"). *Id.* at ¶ 9.

On October 21, 2011, Plaintiffs filed an Amended Class Action Complaint (DE # 2026), alleging unfair assessment and collection of Overdraft Fees and seeking monetary damages, restitution, interest, attorney's fees, and equitable relief from Synovus. Joint Decl. ¶ 10. On November 22, 2011, Synovus filed a motion to dismiss the Amended Class Action Complaint (DE # 2158). On December 22, 2011, Plaintiffs filed their opposition to that motion (DE # 2328), and on January 11, 2012, Synovus filed its reply (DE # 2374). On July 27, 2012, the Court granted in part and denied in part Synovus' motion to dismiss (DE # 2858). On August 15, 2012, Synovus filed an answer to the Amended Class Action Complaint (DE # 2882) in

Childs, denying any and all wrongdoing and liability whatsoever and asserting various affirmative defenses. *Id.* at ¶ 14.

On January 25, 2012, Plaintiff Richard Green filed suit against Synovus in the United States District Court for the Middle District of Georgia, Case No. 4:12-cv-00027-CDL ("*Green*"), alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, interest, attorney's fees, restitution, and equitable relief. Joint Decl. ¶ 12. On August 3, 2012, *Green* was transferred to this Court, where it joined *Childs* and other actions coordinated in MDL 2036. *Id.* at ¶ 13.

On September 5, 2012, *Green* was consolidated into *Childs* through the filing of a Second Amended Complaint (DE # 2941). On September 24, 2012, Synovus answered the Second Amended Complaint (DE # 2969), denying any and all wrongdoing and liability whatsoever and asserting various affirmative defenses. Joint Decl. ¶ 15.

The Parties thereafter conducted pretrial discovery. Synovus produced approximately 135,000 pages of documents, in addition to voluminous electronic data files and spreadsheets. Joint Decl. ¶ 16. Class Counsel took the depositions of four Synovus employees and expert witnesses. Synovus took the depositions of the Plaintiffs, as well as of Plaintiffs' expert witness. *Id.*

On July 24, 2013, Plaintiffs moved for leave to add John Jenkins Sr. as a named Plaintiff (DE # 3542). On August 9, 2013, Synovus filed its opposition (DE # 3596), and on August 19, 2013, Plaintiffs filed their reply (DE # 3604). On August 23, 2013, the Court granted Plaintiffs' motion to add Mr. Jenkins as a Plaintiff (DE # 3622).

On July 26, 2013, Plaintiffs moved for class certification. (DE # 3547). On March 18, 2014, Synovus filed its opposition to class certification (DE # 3810), and on April 17, 2014, Plaintiffs filed their reply (DE # 3830).

On March 18, 2014, Synovus filed its contingent motion to compel arbitration. (DE # 3809). On April 4, 2014, Plaintiffs filed their opposition to the contingent motion (DE # 3823), and on April 14, 2014, Synovus filed its reply (DE # 3829).

On March 18, 2014, Synovus filed its motion to strike portions of Plaintiffs' class certification expert's declaration in support of class certification. (DE # 3808). On March 28, 2014, Plaintiffs filed their opposition to the motion (DE # 3814), and on April 7, 2014, Synovus filed its reply (DE # 3825).

B. Settlement Negotiations.

The Parties initiated preliminary settlement discussions in mid-2013, but those discussions reached an impasse in late 2013. Joint Decl. ¶ 21.

On February 3, 2014, Synovus entered into a settlement of a related action styled *Thomas Griner and Fern Cohn v. Synovus Bank, d/b/a Bank of North Georgia, et al.*, Case No. 10-C-11235-3 ("*Griner*"), that received final approval from the Georgia state court on or about May 20, 2014. Joint Decl. ¶ 22. The *Griner* settlement approved in Georgia state court resolved all claims that were being pursued on behalf of Synovus' Georgia customers in *Childs*. *Id.* at ¶ 23. Since Georgia customers made up approximately seventy percent (70%) of the putative class in *Childs*, the *Griner* settlement significantly reduced the size of the class in *Childs*. *Id.*

In mid-2014, the Parties resumed settlement discussions following approval of the *Griner* settlement. Joint Decl. ¶ 24. On August 23, 2014, the Parties executed a Summary Agreement memorializing the material terms of the Settlement. *Id.* On August 25, 2014, Settlement Class Counsel and Synovus filed a Joint Notice of Settlement, and requested a suspension of all pretrial

deadlines pending the drafting and execution of a final settlement agreement (DE # 3936). The Court granted that request on August 27, 2014 (DE # 3937). Following further negotiations and discussions, the Parties resolved all remaining issues, culminating in the Agreement. Joint Decl. ¶ 24. The Court entered the Preliminary Approval Order on December 3, 2014 (DE # 4015).

3. Summary of the Settlement Terms.

The Settlement's terms are set forth in the Agreement. (DE # 4067-1). The Court now provides a summary of the material terms.

A. The Settlement Class.

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

> All holders of a Synovus Account in the United States, excluding any Account(s) opened and/or maintained in a branch/office of Synovus located within the State of Georgia, who, during the Class Period applicable to the state in which the account was opened, incurred one or more Overdraft Fees as a result of Synovus' High-to-Low Posting. Excluded from the Class are all current Synovus employees, officers, and directors, and the judge presiding over this Action.

Agreement ¶ 56.[2]

B. Monetary Relief for the Benefit of the Class.

Pursuant to the Settlement, Synovus timely deposited $3,750,000 into an Escrow Account following Preliminary Approval. Joint Decl. ¶ 25. That deposit created the Settlement Fund. In addition, Synovus timely deposited the additional sum of $150,000 to cover Settlement Expenses. *Id.* The Settlement Fund will be used to pay: (i) all distributions of money to the Settlement Class; (ii) all Court-approved attorneys' fees, costs, and expenses of Class Counsel;

[2] The applicable Class Periods covered by the Settlement are: (a) for Settlement Class Members who opened accounts in Alabama and Tennessee, the period from August 14, 2004 through August 13, 2010; (b) for Settlement Class Members who opened accounts in Florida, the period from August 14, 2005 through August 13, 2010; and (c) for Settlement Class Members who opened accounts in South Carolina, the period from August 14, 2007 through August 13, 2010.

(iii) the Service Award to Plaintiffs; (iv) any residual distributions; (v) any Taxes; (vi) any costs of Settlement Administration other than those to be paid by Synovus; and (vii) additional fees, costs, and expenses not specifically enumerated in the Agreement, subject to approval of Settlement Class Counsel and counsel for Synovus. Agreement ¶ 81.

All Settlement Class Members who experienced a Positive Differential Overdraft Fee will receive a *pro rata* distribution from the Net Settlement Fund. Agreement ¶ 86. The Positive Differential Overdraft Fee analysis determines, among other things, which Synovus Account holders were assessed additional Overdraft Fees that would not have been assessed if the Bank had used a posting sequence or method for Debit Card Transactions other than High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involves a complex multi-step process described in detail in the Agreement. Agreement ¶ 84.

The Net Settlement Fund – which will be distributed *pro rata* among eligible Settlement Class Members who did not opt-out of the Settlement – is equal to the Settlement Fund plus any accrued interest and less: (a) the amount of the Court-awarded attorneys' fees, costs, and expenses to Class Counsel; (b) the amount of the Court-awarded Service Awards to the Plaintiffs; (c) a reservation of a reasonable amount for prospective costs of Settlement administration that are not Synovus' responsibility; and (d) all other costs and/or expenses incurred in connection with the Settlement that are expressly provided for in the Agreement or are approved by Settlement Class Counsel and Synovus. Agreement ¶ 87.

Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. As soon as practicable (but no later than 90 days) from the Effective Date, Synovus and the Settlement Administrator will distribute the Net Settlement Fund to all eligible Settlement Class Members who do not opt out of the Settlement.

Agreement ¶¶ 86-94. Payments to Settlement Class Members who are Current Account Holders will be made by the Bank crediting such Settlement Class Members' Accounts, and notifying them of the credit. Agreement ¶ 91. Settlement Class Members who are Past Account Holders will receive payments from the Settlement Fund by checks mailed by the Settlement Administrator. Agreement ¶ 93.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first Settlement Fund Payments are mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Class Member Payments. Agreement ¶ 94.

Any residual funds remaining in the Settlement Fund one year after the first distribution check is mailed will be distributed as follows: First, to Synovus to reimburse it for the $150,000 paid to cover Settlement Expenses; Second, any remaining funds shall be distributed on a *pro rata* basis to participating Settlement Class Members who received Settlement Fund Payments pursuant to Section XII of the Agreement, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair; and Third, if the costs of preparing, transmitting, and administering subsequent payments to participating Settlement Class Members are not feasible and practical to make individual distributions economically viable, or other specific reasons exist that make such further distributions impossible or unfair, Settlement Class Counsel will propose a plan for distribution of the residual funds consistent with the American Law Institute, *Principles of Aggregate Litigation* § 3.07(c), and will present the plan to the Court for its consideration. The Court will have the discretion to approve, deny, amend, or modify, in whole

or in part, the proposed plan for distribution of the residual funds in a manner consistent with the American Law Institute, *Principles of Aggregate Litigation* § 3.07(c). The residual funds shall not be used for any litigation purpose or to disparage any Party. The Parties agree that the Court's approval, denial, amendment, or modification, in whole or in part, of the proposed plan for distribution of the residual funds shall not constitute grounds for termination of the Settlement pursuant to Section XVI of the Agreement. Agreement ¶ 95.

C. Class Release

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who did not timely opt out will be deemed to have released Synovus from claims relating to the subject matter of the Action as detailed in Section XIV of the Agreement.

DISCUSSION

Federal courts have long recognized a strong policy and presumption in favor of class action settlements. The Rule 23(e) analysis should be "informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. Unit B 1982); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). In evaluating a proposed class action settlement, the Court "will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D. Mich. June 27, 2006) (quoting *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

As explained below, the Settlement here is more than sufficient under Rule 23(e). It consists of Synovus's agreement to pay $3,750,000 in cash for the benefit of the Settlement Class Members. Joint Decl. ¶ 2. Additionally, Synovus agreed to pay $150,000 towards the fees and costs associated with providing Class Notice to the Settlement Class and Settlement Administration. *Id.* Under the Settlement, Settlement Class Members will automatically receive distributions from the Net Settlement Fund in proportion to the actual harm that each of them sustained. *Id.*

1. The Court's Exercise of Jurisdiction Is Proper.

In addition to having personal jurisdiction over the Plaintiffs, who are parties to the Action, the Court also has personal jurisdiction over all members of the Settlement Class because they received the requisite notice and due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998). The Court has subject matter jurisdiction over the Action pursuant to 28 U.S.C. §§ 1332(d)(2) and (6).

a. The Best Notice Practicable Was Provided to the Settlement Class.

Notice of the Settlement in the forms approved by the Court was mailed to approximately 44,200 members of the Settlement Class. *See* Declaration of Cameron R. Azari ¶¶ 13-20 ("Azari Decl."). (DE # 4067-4). Internet Banner Notices regarding the Settlement generated approximately 15 million adult impressions in the four states covered by the Settlement between December 30, 2014 and January 13, 2015. *Id.* at ¶¶ 21-22. Clicking on the banner linked the reader to the Settlement Website where they could obtain information about the Settlement. *Id.* at ¶ 22. In addition, a special Settlement Website and toll-free telephone number were

established to enable Settlement Class Members to obtain detailed information about the Action and the Settlement. *Id.* at ¶¶ 24-26.

b. The Notice Was Reasonably Calculated to Inform Settlement Class Members of Their Rights.

The Court-approved Notice[3] satisfied due process requirements because it described "the substantive claims . . . [and] contained information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor*, 552 F.2d at 1104-05. The Notice, among other things, defined the Settlement Class; described the release provided to Synovus under the Settlement as well as the amount, manner of allocating, and proposed distribution of the Settlement proceeds; and informed Settlement Class Members of their right to opt-out or object, the procedures for doing so, and the time and place of the Final Approval Hearing. Further, the Notice stated that Class Counsel intended to seek attorneys' fees of up to thirty percent (30%) of the $3,750,000 Settlement Fund. In addition to disclosing these material terms, the Notice informed Settlement Class Members that a class judgment would bind them unless they opted out, and told them where they could get more information – for example, at the Settlement Website that posts a copy of the fully executed Agreement, as well as other important court documents such as the Motion.

The Motion and attachments thereto contained Settlement Class Counsel's and their expert's considered opinion that the $3,750,000 Settlement Fund represents approximately thirty-six percent (36%) of the most probable damages Plaintiffs and the Settlement Class could recover at trial. Joint Decl. ¶¶ 58-59. The disclosure of this percentage was sufficient to put Settlement Class Members on notice of their potential recovery based on their personal history

[3] *See* Preliminary Approval Order at ¶¶ 12-27. (DE # 4015).

with Synovus and to allow them to make an informed decision about whether to accept the Settlement, object to it, or opt out of it.

The Court finds that the Settlement Class Members were provided with the best practicable notice; the notice was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). This Settlement with Synovus was well publicized, and any Settlement Class Member who wished to express comments or objections had ample opportunity to do so. Azari Decl. ¶¶ 7-9, 28-37.

2. The Settlement Is Fair, Adequate, and Reasonable, and Therefore Is Finally Approved Under Rule 23.

In determining whether to approve the Settlement, the Court considers whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. SouthTrust Bank of Al., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). A settlement is fair, reasonable, and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litig.* (Third) § 30.42 (1995)). The Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted).

The Eleventh Circuit has identified six factors to be considered in analyzing the fairness, reasonableness, and adequacy of a class action settlement under Rule 23(e):

(1) the existence of fraud or collusion behind the settlement;

(2) the complexity, expense, and likely duration of the litigation;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the probability of the plaintiffs' success on the merits;

(5) the range of possible recovery; and

(6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

Leverso, 18 F.3d at 1530 n.6; *see also Bennett,* 737 F.2d at 986.

a. There Was No Fraud or Collusion.

The Court has readily concluded there was no fraud or collusion behind this Settlement. *See, e.g., In re Sunbeam Sec. Litig.,* 176 F. Supp. 2d 1323, 1329 n.3 (S.D. Fla. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (court had "no doubt that this case has been adversarial, featuring a high level of contention between the parties"); *In re Motorsports Merchandise Antitrust Litig.,* 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) ("This was not a quick settlement, and there is no suggestion of collusion."); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record showed no evidence of collusion, but to the contrary showed "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd,* 893 F.2d 347 (11th Cir. 1989).

b. The Settlement Will Avert Years of Highly Complex and Expensive Litigation.

This case involves approximately 44,200 Settlement Class Members and alleged wrongful Overdraft Fees of approximately $10,541,213. Azari Decl. ¶ 17; Joint Decl. ¶ 58; Declaration of Arthur Olsen ¶ 32 ("Olsen Decl.") (DE # 4067-5). The claims and defenses are complex. Joint Decl. ¶¶ 78-81. Litigating them has been difficult and time consuming. *Id.* Although this litigation has been pending for over four years, recovery by any means other than

settlement would require additional years of litigation in this Court and others, including appellate courts. *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 at 317, 325-26 & n.32 (N.D. Ga. 1993) ("adjudication of the claims of two million claimants could last half a millennium").

The Settlement provides immediate benefits to approximately 44,200 current and former Synovus customers. Azari Decl. ¶ 17; *see also In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993) ("The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.") (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Particularly because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no reasonable doubt as to the adequacy of this Settlement.

Prosecuting the Action was risky from the outset. Joint Decl. ¶¶ 83-87; Declaration of Brian T. Fitzpatrick ¶¶ 10-14 ("Fitzpatrick Decl.") (DE # 4067-3). The $3,750,000 Settlement Fund represents approximately thirty-six percent (36%) of the most probable aggregate damages that Settlement Class Counsel believe could have been recovered on behalf of the Settlement

Class if the Action were successful in all respects. Joint Decl. ¶ 51; Olsen Decl. ¶ 32. This percentage recovery of the most probable sum that Settlement Class Counsel anticipated recovering at trial constitutes a fair value in light of the current posture and substantial future risks presented by the litigation. Fitzpatrick Decl. ¶ 10.

Class Counsel believe that Plaintiffs had a solid case against Synovus. Joint Decl. ¶¶ 56-57. Notwithstanding their opinion, Class Counsel understood that Synovus advanced significant defenses they would have been required to overcome in the absence of the Settlement. *Id.* This Action involved several major litigation risks. *Id.* As this Court recognized in granting final approval to the settlement with Bank of America: "The combined risks here were real and potentially catastrophic . . . . [B]ut for the Settlement, Plaintiffs and the class faced a multitude of potentially serious, substantive defenses, any one of which could have precluded or drastically reduced the prospects of recovery." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1347-48 (S.D. Fla. 2011).

Given the myriad risks attending these claims, as well as the certainty of substantial delay and expense from ongoing litigation, the Settlement cannot be seen as anything except a fair compromise. *See, e.g.*, *Bennett v. Behring Corp.*, 96 F.R.D. 343, 349-50 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) (plaintiffs faced a "myriad of factual and legal problems" creating "great uncertainty as to the fact and amount of damage," making it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

c. The Factual Record Is Sufficiently Developed to Enable Class Counsel to Make a Reasoned Judgment Concerning the Settlement.

The Court considers "the degree of case development that class counsel have accomplished prior to settlement" to ensure that "counsel had an adequate appreciation of the merits of the case before negotiating." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods.*

Liab. Litig., 55 F.3d 768, 813 (3d Cir. 1995). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Settlement Class Counsel negotiated the Settlement with the benefit of adequate discovery. Synovus produced approximately 135,000 pages of documents, in addition to electronic data files and spreadsheets. Class Counsel took the depositions of four Synovus employees and expert witnesses, and Synovus took the depositions of Plaintiffs, as well as of Plaintiffs' expert witness. Joint Decl. ¶¶ 16, 55. Review of those documents, data and testimony positioned Settlement Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' and the Settlement Class' claims and Synovus' defenses. *Id.* Even in the absence of such discovery, Settlement Class Counsel are familiar with the practices and likely defenses of other banks on these issues throughout MDL No. 2036, and "[i]nformation obtained from other cases may be used to assist in evaluating the merits of a proposed settlement of a different case." *Lipuma*, 406 F. Supp. 2d at 1325; *see also Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988). The stage of this Action, coupled with the benefit of decisions by this Court in other MDL 2036 cases, also supports granting Final Approval. Fitzpatrick Decl. ¶16.

d. Plaintiffs Would Have Faced Significant Obstacles to Obtaining Relief.

The Court also considers "the likelihood and extent of any recovery from the defendants absent . . . settlement." *In re Domestic Air Transp.*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise"). Plaintiffs faced many obstacles in this matter, including arbitration. In the words of Professor Fitzpatrick: "[t]he arbitration clause alone – but certainly

when combined with the other uncertainties outlined below with regard to the merits – paints a challenging picture for the class had this lawsuit gone forward." *See* Fitzpatrick Decl. ¶ 11.

Plaintiffs and Class Counsel faced several significant risks in this litigation in addition to arbitration. Fitzpatrick Decl. ¶¶ 11-13. Absent this Settlement, this litigation likely would have continued for two or three more years. Joint Decl. ¶ 54. Given the myriad risks attending these claims, the Settlement is a fair compromise. *See, e.g., Bennett*, 96 F.R.D. at 349-50 (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984).

e. The Benefits Provided by the Settlement Are Fair, Adequate, and Reasonable When Compared to the Range of Possible Recovery.

In determining whether a settlement is fair in light of the potential range of recovery, the Court is guided by the "important maxim[]" that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens*, 118 F.R.D. at 542. This is because a settlement must be evaluated "in light of the attendant risks with litigation." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see Bennett*, 737 F.2d at 986 ("compromise is the essence of settlement."); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("the very essence of a settlement is . . . a yielding of absolutes and an abandoning of highest hopes.") (internal quotation omitted). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren,* 693 F. Supp. at 1059; *see, e.g., Great Neck Capital Appreciation Inv. P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.,* 212 F.R.D. 400, 409-10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

The Settlement provides fair and reasonable benefits to the Settlement Class. Joint Decl. ¶ 59. Under the Settlement, Plaintiffs and the Settlement Class have recovered $3,750,000 in cash, which represents approximately thirty-six (36%) of the most probable aggregate damages that Settlement Class Counsel and their expert believe Plaintiffs and the Settlement Class could have recovered at trial. *Id.* Synovus' agreement to pay $150,000 towards the fees, costs and expenses of the Notice Administrator and Settlement Administrator further enhances the Settlement. As Professor Fitzpatrick said: "In light of the risks and expense of class action litigation, this level of recovery can be considered quite successful." *See* Fitzpatrick Decl. at ¶ 10.

f. The Opinions of Class Counsel, Class Representative, and Absent Settlement Class Members Strongly Favor Approval of the Settlement.

The Court gives "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren,* 693 F. Supp. at 1060; *see also Mashburn*, 684 F. Supp. at 669 ("If plaintiffs' counsel did not believe these factors all pointed substantially in favor of this settlement as presently structured, this Court is certain that they would not have signed their names to the settlement agreement."); *In re Domestic Air Transp.*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

Class Counsel believe that this Settlement is deserving of Final Approval, and the Court agrees. Joint Decl. ¶64. Furthermore, the Court also finds it telling that, of approximately 44,200 Settlement Class Members, only two (2) timely requests for exclusion from the

Settlement were received, and no objections to the Settlement were timely submitted. *See* Supplemental Affidavit of Cameron R. Azari, Esq., ¶ 4 (DE # 4098-1); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) (finding that a low percentage of objections "points to the reasonableness of a proposed settlement and supports its approval").

3. The Settlement Class.

This Court previously found the requirements of Rule 23(a) and 23(b)(3) satisfied in this Action in a settlement posture (DE # 4015). In similar actions in MDL 2036, the Court found the requirements of Rule 23(a) and 23(b)(3) satisfied on contested motions for class certification (*see, e.g.*, DE # 1763 (Union Bank); DE # 2615 (TD Bank) and in the context of settlement (*see, e.g.*, DE # 1520, 2150 (Bank of America); DE # 2712, 3134 (JPMorgan Chase Bank)). The Court hereby reiterates its findings that: (a) the Settlement Class Members are so numerous that joinder of them is impracticable; (b) there are questions of law and fact common to the Settlement Class that predominate over any individual questions; (c) the claims of the representative Plaintiffs are typical of the claims of the Settlement Class; (d) the representative Plaintiffs and Class Counsel fairly and adequately represent and protect the interests of the Settlement Class Members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

The two (2) individuals listed in Exhibit A to the Final Judgment being entered contemporaneously herewith timely elected to opt out of the Settlement. The Court therefore finds and decrees that they are not part of the Settlement Class, are not bound by the Settlement or release contained therein, and will not receive any distributions from the Settlement Fund.

4. The Application for Service Awards to the Class Representatives Are Approved.

Service awards "compensate named plaintiffs for the services they provided and the risks

they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Ingram*, 200 F.R.D. at 694 (awarding class representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award."); *Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff). The factors for determining a service award include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *E.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The named Plaintiffs provided invaluable assistance to Class Counsel in this litigation by, among other things, engaging in significant interviews and conferences and by locating, producing responsive documents and information, and sitting for depositions. Joint Decl. ¶ 68. The Service Awards represents only 0.008% of the Settlement Fund, and the amount of the Service Awards are fair and reasonable in view of the efforts of the named Plaintiffs that greatly benefited the Settlement Class. *Id.* at ¶ 69.

The Court finds that the Class Representatives expended substantial time and effort in representing the Settlement Class, and deserve to be compensated for such time and effort on behalf of the Settlement Class. Joint Decl. ¶ 69. Therefore, the Court approves the requested

Service Awards of $10,000 for each named Plaintiff or $10,000 for each couple serving as named Plaintiffs, to be paid from the Settlement Fund.

5. Class Counsel's Application for Attorneys' Fees Is Granted.

Class Counsel request a fee equal to thirty percent (30%) of the $3,750,000 Settlement Fund created through their efforts in litigating the Action and reaching the Settlement. The Court analyzes this fee request under *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). As set forth below, after considering the *Camden I* factors, the Court concludes that Class Counsel's application for fees in the amount of $1,125,000, equal to thirty percent (30%) of the $3,750,000 Settlement Fund, will be granted.

a. The Law Awards Class Counsel Fees from the Common Fund Created Through Their Efforts.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole."

Sunbeam, 176 F. Supp. 2d at 1333 (citing *Van Gemert*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund").

In the Eleventh Circuit, class counsel are awarded a percentage of the fund generated through a class settlement. As the Eleventh Circuit held, "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, 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.

This Court has substantial discretion in determining the appropriate fee percentage awarded to counsel. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *In re Sunbeam,* 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). However, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund," although "an upper limit of 50 percent of the fund may be stated as a general rule." *Id.* (quoting *Camden I,* 946 F.2d at 774-75); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (approving fee award where the district court determined that the benchmark should be 30% and then adjusted the fee award higher based on the circumstances of the case).

Based on the findings below, this Court finds that Class Counsel are entitled to an award of thirty percent (30%) of the $3,750,000 Settlement Fund secured through their efforts. Class Counsel achieved an excellent result and overcame procedural and substantive hurdles to obtain this Settlement benefiting the Settlement Class. Fitzpatrick Decl. ¶ 23. Class Counsel undertook a risky and undesirable case and, through diligence, perseverance, and skill, obtained an

outstanding result. They are to be commended and should be compensated in accord with their request, which is both warranted and reasonable given similar fee awards. The Court firmly believes this kind of initiative and skill must be adequately compensated to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future. *See Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

b. As Applied Here, the *Camden I* Factors Demonstrate the Requested Fee Is Reasonable and Justified.

The Eleventh Circuit's factors for evaluating the reasonable percentage to award class-action counsel are:

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the client; and

(12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These twelve factors are guidelines; they are not exclusive. "Other 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." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). In addition, the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775.

i. The Claims Against Synovus Required Substantial Time and Labor.

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. Joint Decl. ¶ 72; Fitzpatrick Decl. ¶ 25. Throughout the pendency of the Action, the organization of Class Counsel ensured they were engaged in coordinated, productive work to maximize efficiency and minimize duplication of effort. Joint Decl. ¶ 72. Class Counsel devoted substantial time to investigating the claims of potential plaintiffs against Synovus. *Id.* at ¶ 73. Class Counsel interviewed numerous Synovus customers and potential plaintiffs to gather information about Synovus' conduct, both at the time the lawsuit was filed and in the past, to determine the effect that its conduct had on consumers. *Id.* This information was essential to Class Counsel's ability to understand the nature of Synovus' conduct, the language of the Account agreements at issue, and potential remedies. *Id.* Class Counsel also expended resources researching and developing the legal claims at issue. *Id.*

Class Counsel expended significant resources researching and developing the legal theories and arguments presented in the pleadings and motions, and in opposition to Synovus' motions, before this Court. Joint Decl. ¶ 74. Substantial time and resources were also dedicated to conducting discovery. *Id.* at ¶ 75. Class Counsel took the depositions of Synovus employees,

and two of its expert witnesses. *Id.* Synovus took the depositions of Plaintiffs, as well as of Plaintiffs' data expert. *Id.* Class Counsel also served and responded to interrogatories, requests for production, and requests for admission. *Id.*

Settlement negotiations consumed additional time and resources. Joint Decl. ¶ 76. As noted previously, preliminary settlement discussions began in early 2013. *Id.* Ultimately, on August 23, 2014, Settlement Class Counsel and Synovus reached an agreement in principle and executed a Summary Agreement memorializing the material terms of the Settlement, and filed a joint notice of settlement, requesting a suspension of all deadlines pending the drafting and execution of the Agreement. *Id.* at ¶ 23. Detailed discussions and negotiations ensued, ultimately resulting in the drafting and execution of the Agreement. *Id.*

All told, Class Counsel's coordinated work paid dividends for the Settlement Class. Each of the above-described efforts was essential to achieving the Settlement before the Court. Joint Decl. ¶ 77. The time and resources Class Counsel devoted to prosecuting and settling this Action readily justify the fee they now request. "For all these reasons, I believe the fee award requested here is within the range of reason." *See* Fitzpatrick Decl. ¶ 26.

The Eleventh Circuit made clear in *Camden I* that the percentage of the fund is the *exclusive* method for awarding fees in common fund class actions.[4] *Camden I*, 946 F.2d at 774. Even before *Camden I*, courts in this Circuit recognized that "a percentage of the gross recovery

[4] Eleventh Circuit attorneys' fee law governs this request. *See Allapattah*, 454 F. Supp. 2d at 1200 ("The district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law."); *see also Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 522 n.5 (1st Cir. 1991) (recognizing that district court presiding over diversity-based class action has equitable power to apply federal common law in determining fee award, irrespective of state law); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (*Erie* doctrine does not deprive federal court in diversity case of power to employ equitable remedies not available under state law).

is the only sensible method of awarding fees in common fund cases." *Mashburn*, 684 F. Supp. at 690. More importantly, the Court observed firsthand the effort exerted by Class Counsel in this Action and the other cases made part of MDL 2036, and, given the results achieved here, does not find it necessary or useful to review Class Counsel's lodestar records.

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 Res., 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 Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (emphasis added); *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. Am. Suzuki Motor Corp.*, 2010 WL 1628362, at *7-8 (S.D. Fla. Apr. 15, 2010).[5] "[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 sound approach.

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[5] *See also Stahl v. MasTec, Inc.*, 2008 WL 2267469, at *1-2 (M.D. Fla. May 20, 2008); *Sands Point Partners, L.P. v. Pediatrix Med. Group, Inc.*, 2002 WL 34343944, at *7 (S.D. Fla. May 3, 2002); *Fabricant v. Sears Roebuck & Co.*, 2002 WL 34477904, at *4-5 (S.D. Fla. Sept. 18, 2002).

ii. The Issues Involved Were Novel and Difficult and Required the Exceptional Skill of a Highly Talented Group of Attorneys.

The attorneys on both sides of this case displayed a very high level of skill. Joint Decl. ¶¶ 78-80; *see Walco*, 975 F. Supp. at 1472 (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3 (in assessing the quality of representation by class counsel, Court also should consider the quality of their opposing counsel.); *Johnson,* 488 F.2d at 718; *Ressler*, 149 F.R.D. at 654. Class Counsel's work is emblematic of the effort and outcomes witnessed by this Court on a regular basis in MDL 2036. Nor can there be any legitimate dispute that, based on the novel and complex issues confronted by Class Counsel in this Action, detailed here and elsewhere, that an extraordinary group of lawyers was required to prosecute this case. Fitzpatrick Decl. ¶ 24. The Court knows many of these lawyers from years of presiding over cases in this District, and has come to expect this level of performance from them. That is not to say, however, that such performance should be taken for granted. Instead, the fact that this level of legal talent was available to the Settlement Class is another compelling reason in support of the fee requested. As with most things, you get what you pay for, and the Settlement Class received an impressive amount and quality of legal services. In the private marketplace, counsel of exceptional skill commands a significant premium. So too should it here.

iii. The Claims Against Synovus Entailed Considerable Risk.

The risks facing Plaintiffs in this Action have been discussed above, in the Motion, and elsewhere. Joint Decl. ¶¶ 83-84. There were myriad ways in which Plaintiffs could have lost this case – yet they managed to achieve a successful Settlement. A large amount of the credit for this must be given to Class Counsel's strategic choices, effort, and legal acumen. Fitzpatrick

Decl. ¶¶ 23-24.

"A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *In re Sunbeam*, 176 F. Supp. 2d at 1336. In addition, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. Gen. Motor Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

The most undesirable aspect of this case was the long odds on success. Any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if (i) Plaintiffs succeeded in obtaining class certification; (ii) Plaintiffs succeeded in defeating the Bank's contingent motion to compel arbitration as to certain absent class members (DE # 3809); (iii) Plaintiffs and any certified class defeated summary judgment; (iv) Plaintiffs and any certified class established liability and recovered damages at trial; and (v) the final judgment was affirmed on appeal. Joint Decl. at ¶ 62.

The Court expresses no opinion on the merits of these arguments. The critical point for present purposes is that, heading into this case, Class Counsel confronted these issues without any assurances as to how the Court would rule. Class Counsel nonetheless accepted the case and the risks that accompanied it. Given the positive societal benefits to be gained from attorneys'

willingness to undertake this kind of difficult and risky, yet important, work, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a thirty percent (30%) fee based on the $3,750,000 Settlement Fund.

iv. Class Counsel Assumed Substantial Risk to Pursue the Action on a Pure Contingency Basis, and Were Precluded From Other Employment as a Result.

Class Counsel prosecuted the Action entirely on a contingent fee basis. Joint Decl. ¶ 85. In undertaking to prosecute this Action on that basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Fitzpatrick Decl. ¶ 24.

Numerous cases recognize such a risk as an important factor in determining a fee award. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548, *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656; *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir. 1986); *York v. Ala. State Bd. of Educ.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986).

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee here. As this Court has observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, 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.

Behrens, 118 F.R.D. at 548.

The risks taken by Class Counsel have already been discussed. It is uncontroverted that the attorney time spent on the Action was time that could not be spent on other matters. Joint Decl. ¶ 86. Consequently, this factor supports the requested fee.

v. Class Counsel Achieved an Excellent Result.

The Court finds that this Settlement is fair, adequate, and reasonable. Fitzpatrick Decl. ¶ 18. The common fund created by this Settlement is $3,750,000. Rather than facing more years of costly and uncertain litigation, approximately 44,200 Settlement Class Members will promptly receive a cash benefit from the Settlement Fund representing a percentage of their most probable damages, *assuming* a class-wide verdict against Synovus. The Settlement Fund is unlikely to be diminished by the fees and expenses associated with the Notice Program and Settlement administration as Synovus has paid $150,000 towards all such fees and expenses. Moreover, payments to the Settlement Class will be forthcoming *automatically*, through direct deposit (for Current Account Holders) or checks (for Past Account Holders or Current Account Holders for whom automatic deposits are not reasonably feasible). Class Counsel's efforts in pursuing and settling these consumer claims were notable. *Id.* at ¶¶ 24-25.

vi. The Requested Fee Comports with Fees Awarded in Similar Cases.

In MDL 2036, this Court awarded thirty percent (30%) in attorneys' fees to class counsel in prior settlements involving Bank of America (*In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011)), Bank of Oklahoma (DE # 2949), Union Bank (DE # 2986), Bank of the West (DE # 3128), JPMorgan Chase Bank (DE # 3134), Citizens Financial (DE # 3331), TD Bank (DE # 3339), and others. Similarly, numerous recent decisions within

this Circuit have awarded attorneys' fees up to and in excess of thirty percent. *See e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding fees of 31 1/3 % of $1.06 billion); *In re: Terazosin Hydrochloride Antitrust Litig.*, 99-1317-MDL-Seitz (S.D. Fla. April 19, 2005) (awarding fees of 33 1/3 % of settlement of over $30 million); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-Civ-Gold (S.D. Fla. May 30, 2003) (awarding fees of 33 1/3 % of settlement of $77.5 million); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million).

The Court finds that a fee of thirty percent (30%) of the $3,750,000 Settlement Fund, plus expenses, is appropriate here and comports with customary fee awards in similar cases. Fitzpatrick Decl. ¶ 23. Professor Fitzpatrick distilled several major empirical studies of attorneys' fees, including his own, awarded in connection with class action settlements. *Id.* at ¶¶ 19-23. He concluded that the empirical data from those studies supports the reasonableness of a thirty percent (30%) fee award in this case. *Id.*

vii. The Remaining *Camden I* Factors Also Favor Approving Class Counsel's Fee Request.

The Court finds that the remaining *Camden I* factors further support Class Counsel's fee request, and so holds. Fitzpatrick Decl. ¶ 24. The burdens of this litigation and the relatively small size of most of the firms representing Plaintiffs and the Settlement Class lend support to the fee awarded. This fee is firmly rooted in "the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F. Supp. 2d at 1333. The Court is convinced by its many years of presiding over significant cases like this one that proper incentives must be maintained to insure that attorneys of this caliber are available to take on cases of significant public importance like

this one. The factual record in this case, and the Court's own observations, all of which are incorporated herein, support the award here. Fitzpatrick Decl. ¶¶ 22-26.

6. Class Counsel's Application for Reimbursement of Litigation Costs and Expenses Is Approved.

Finally, the Court finds that Class Counsel's request for reimbursement of $85,311.83, representing certain out-of-pocket costs and expenses that Class Counsel incurred during the prosecution and settlement of the Action against Synovus, is reasonable and justified. These costs and expenses consist of: (1) $67,898.29 in fees and expenses for experts; and (2) $17,413.54 in court reporter fees and transcripts. Joint Decl. ¶ 90. The Court hereby approves Class Counsel's request for reimbursement of these costs and expenses. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). These costs and expenses, advanced by Class Counsel for the benefit of the Settlement Class, were necessarily incurred in furtherance of the litigation of the Action and the Settlement. Joint Decl. ¶ 90. Accordingly, reimbursement of costs and expenses in the amount of $85,311.83 shall be made from the Settlement Fund following disbursement of attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court: (1) grants Final Approval to the Settlement, including the Amendment; (2) appoints as Class Representatives the Plaintiffs listed in paragraphs 25 and 42; (3) appoints as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 23 and 51 of the Agreement, respectively; (4) approves the requested Service Awards for the Plaintiffs; (5) awards Class Counsel attorneys' fees in the amount of $1,125,000, equal to thirty percent (30%) of the $3,750,000 Settlement Fund, plus reimbursement of costs in the amount of $85,311.83; (6) directs Settlement Class Counsel, Plaintiffs, and Synovus to implement and consummate the Settlement pursuant to its terms and

conditions; (7) retains continuing jurisdiction over Plaintiffs, the Settlement Class, and Synovus to implement, administer, consummate, and enforce the Settlement and this Final Approval Order; and (8) will separately enter Final Judgment dismissing the Action with prejudice.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 2nd day of April, 2015.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record