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

PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, APPLICATION FOR SERVICE AWARDS, ATTORNEYS' FEES, AND EXPENSES, AND INCORPORATED MEMORANDUM OF LAW

After more than three years of litigation, Settlement Class Counsel negotiated the Settlement Agreement and Release attached as Exhibit A ("Agreement" or "Settlement") with Synovus Bank and Synovus Financial Corp. (collectively, "Synovus").[1] The Settlement – which consists of the Bank's payment of $3,750,000 in cash, plus Synovus' payment of an additional $150,000 to pay the fees and costs associated with the Notice Program and administration of the Settlement – will provide immediate benefits to the Settlement Class without further risks, delays, and costs. *See* Joint Declaration of Robert C. Gilbert and E. Adam Webb ¶¶ 4, 53 ("Joint Decl.") (attached as Exhibit B). In the opinion of one nationally recognized expert, the Settlement is fair, adequate, and reasonable, and the relevant factors "clearly counsel in favor of

[1] All capitalized defined terms used herein have the same meanings ascribed in the Agreement.

approving this settlement." *See* Declaration of Professor Brian T. Fitzpatrick ¶¶ 9, 18 ("Fitzpatrick Decl.") (attached as Exhibit C).

Plaintiffs and Class Counsel now seek Final Approval of the Settlement. Based on the controlling legal standards and supporting facts, Final Approval is clearly warranted. In addition, Class Counsel respectfully request that the Court award Service Awards to the Class Representative Plaintiffs, whose willingness to represent the Settlement Class and participation in the Action helped make possible the Settlement. Finally, Class Counsel respectfully request that the Court award attorneys' fees equal to thirty percent (30%) of the Settlement Fund to compensate us for our work in achieving the Settlement, and approve reimbursement of certain expenses incurred in prosecuting the Action and in connection with the Settlement.

I. INTRODUCTION

The Action involved sharply opposing positions on several fundamental legal questions, including whether Synovus breached its duty of good faith and fair dealing to its customers when it engaged in High-to-Low Posting. Plaintiffs sued on behalf of themselves and all others similarly situated who incurred Overdraft Fees as a result of Synovus' High-to-Low Posting of Debit Card Transactions. Synovus argued that the relevant Account agreements expressly authorized it to engage in High-to-Low Posting, that Plaintiffs' state law claims for relief were preempted, and that the claims brought against it by some of the class members were subject to arbitration agreements requiring individual arbitration.

Preliminary settlement discussions began in mid-2013, but reached an impasse in late 2013. In mid-2014, the Parties resumed settlement discussions. On August 23, 2014, the Parties executed a Summary Agreement memorializing the material terms of the Settlement. Further discussions followed to address, *inter alia*, various issues relating to approval and

implementation of the Settlement. The Court entered the Preliminary Approval Order on December 3, 2014, and Notice was subsequently disseminated to the Settlement Class.

Under the Settlement, all eligible Settlement Class Members who do not opt-out will automatically receive their *pro rata* share of the Settlement Fund. Settlement Class Members do not have to prove that they were damaged as a result of the Bank's High-to-Low Posting. Synovus' expert and Settlement Class Counsel's expert used available Synovus data to determine which Synovus Account holders were harmed by High-to-Low Posting, and will apply a formula detailed in paragraph 84 of the Agreement to calculate each Settlement Class Member's *pro rata* share of the Settlement Fund.

A testament to the fairness and reasonableness of the Settlement is the size of the Settlement Fund. Settlement Class Counsel negotiated a $3,750,000 cash payment, which represents approximately thirty-six percent (36%) of the most likely recovery Settlement Class Members could have achieved at trial. In addition to the $3,750,000 Settlement Fund, Synovus agreed to pay $150,000 towards the fees and costs that will be incurred in connection with the Notice Program and administration of the Settlement.

Plaintiffs and Class Counsel respectfully request that the Court: (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) appoint as Class Representatives the Plaintiffs listed in paragraph 42 of the Agreement; (4) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 23 and 51 of the Agreement, respectively; (5) approve Service Awards to the Plaintiffs; (6) award Class Counsel attorneys' fees and reimbursement of certain expenses pursuant to Rule 23(h) of the Federal Rules of Civil Procedure; and (7) enter Final Judgment dismissing the Action with prejudice.

II. MOTION FOR FINAL APPROVAL

A. Procedural History.

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. Joint Decl. ¶ 8. 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). *Id*. at ¶ 11. On August 15, 2012, Synovus filed an answer to the Amended Class Action Complaint (DE # 2882) filed 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 a case 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. 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. Joint Decl. ¶ 16.

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). Joint Decl. ¶ 17.

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). Joint Decl. ¶ 18.

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). Joint Decl. ¶ 19.

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). Joint Decl. ¶ 20.

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*"), which 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*. 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*. at ¶ 23.

In mid-2014, the Parties resumed settlement discussions following approval of the *Griner* settlement. On August 23, 2014, the Parties executed a Summary Agreement memorializing the material terms of the Settlement. On August 25, 2014, Settlement Class Counsel and Synovus filed a Joint Notice of Settlement (DE # 3936), and requested a suspension of all pretrial deadlines pending the drafting and execution of a final settlement agreement. 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 (DE # 4015) on December 3, 2014.

C. Summary of the Settlement Terms.

The Settlement's terms are detailed in the Agreement. The following is a summary of the material terms of the Settlement.

1. 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]

2. 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. Agreement ¶ 78. That deposit created the Settlement Fund. In addition, Synovus timely deposited the additional sum of $150,000 to cover Settlement Expenses. *Id.*

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 sooner 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

[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.

will receive payments from the Settlement Fund by checks mailed by the Settlement Administrator. Agreement ¶ 93.

Thus, 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 do 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.

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 still remaining

after that period will be distributed in accord with paragraph 95 of the Agreement. Agreement ¶ 95.

3. Class Release.

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

4. Settlement Notice.

The Notice Program (Agreement, Section VIII) was designed to provide the best notice practicable, and was tailored to take advantage of the information Synovus has available about Settlement Class Members. Agreement ¶¶ 65-75. Synovus agreed to pay $150,000 towards the fees and costs of the Notice Program and the administration of the Settlement. *Id.* at ¶ 59. The Notice Program was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the Settlement, Class Counsel's Fee Application and request for Service Awards for Plaintiffs, and their rights to opt-out of the Settlement Class or object to the Settlement. *See* Declaration of Cameron Azari ¶¶ 4-8, 28-37 ("Azari Decl.") (attached as Exhibit D); Joint Decl. ¶ 33. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice, and satisfied all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process. *Id.*

5. Settlement Termination.

Except at provided in paragraph 95(c) of the Agreement, either Party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or an appellate court. Agreement ¶ 104. Synovus also has the right to terminate the Settlement if the number of Settlement Class Members who timely opt out of the Settlement Class equals or exceeds the

number or percentage specified in the separate letter executed concurrently with the Agreement by Synovus' counsel and Settlement Class Counsel. Agreement ¶ 105. The number or percentage will be confidential except to the Court who, upon request, will be provided a copy of the letter for *in camera* review. *Id.*

6. Class Representative Service Awards.

Class Counsel will seek, and Synovus will not oppose, Service Awards of $10,000 per Class Representative, or $10,000 for married couples in which both spouses are Class Representatives. Agreement ¶ 102. If the Court approves them, the Service Awards will be paid from the Settlement Fund, and is in addition to the relief the Class Representatives will be entitled to under the terms of the Settlement. *Id.* These awards will compensate the Class Representatives for their time and efforts in the Action, including preparing for and appearing at depositions, and for the risks they assumed in prosecuting the Action against Synovus. Joint Decl. ¶ 42.

7. Attorneys' Fees and Costs.

Class Counsel are entitled to request, and Synovus will not oppose, attorneys' fees of up to thirty percent (30%) of the Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement ¶ 99. The Parties negotiated and reached this agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. Agreement ¶ 103; Joint Decl. ¶ 43.

D. Argument.

Court approval is required for settlement of a class action. Fed. R. Civ. P. 23(e). The federal courts have long recognized a strong policy and presumption in favor of class 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). In evaluating a proposed class 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 28, 2006) (quoting *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). Indeed, "[s]ettlement 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). Class settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. Therefore, "federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

The Settlement here is more than sufficient under Rule 23(e) and Final Approval is clearly warranted.

1. The Court Has Personal Jurisdiction Over the Settlement Class Because Settlement Class Members Received Adequate Notice and an Opportunity to Be Heard.

In addition to having personal jurisdiction over the Plaintiffs, who are parties to this 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), *cert. denied*, 525 U.S. 1114 (1999).

a. The Best Notice Practicable Was Furnished.

The Notice Program was comprised of three parts: (1) direct mail postcard notice ("Mailed Notice") to all identifiable Settlement Class Members; (2) publication notice ("Published Notice") designed to reach those Settlement Class Members for whom direct mail notice was not possible; and (3) a "Long Form" notice with more detail than the direct mail or publication notices, that has been available on the Settlement Website and via mail upon request. Agreement, Section VIII; Azari Decl. ¶¶ 13-26; Joint Decl. ¶¶ 34-36.

Each facet of the Notice Program was timely and properly accomplished. Azari Decl. ¶¶ 13-26. The Notice Administrator received data files from Synovus that identified the names and last known addresses of 46,663 identifiable Settlement Class Members, ran the addresses through the National Change of Address Database, and mailed postcards to 44,244 Settlement Class Members. Azari Decl. ¶ 17. The Notice Administrator performed follow up research and attempted to re-mail postcards to Settlement Class Members whose initial postcard notices were returned by the postal service. *Id*. at ¶ 18. Settlement Class Members could also download a copy of the Long Form Notice at the Settlement Website or request that one be mailed to them by calling the toll-free number. *Id*. at ¶ 19.

The Notice Administrator also performed and timely completed the Published Notice Program through the Internet Banner Ads described in amended paragraph 73 of the Agreement. Azari Decl. ¶¶ 21-23.

The Notice Administrator also established the Settlement Website, including the "Long Form" notice, to enable Settlement Class Members to obtain detailed information about the Action and the Settlement. Azari Decl. ¶ 24. As of January 31, 2015, the Settlement Website had over 15,882 visitors. *Id*. at ¶ 25. In addition, a toll free number was established and has

been operational since December 30, 2014. *Id*. at ¶ 26. By calling this number, Settlement Class Members can listen to answers to frequently asked questions and request a copy of the "Long Form" notice. *Id*. As of January 31, 2015, the toll free number had handled 667 calls. *Id*.

b. The Notice and Notice Program Were Reasonably Calculated to Inform Settlement Class Members of Their Rights.

The Court-approved Notice and Notice Program satisfied due process requirements because they described "the substantive claims . . . [and] contain[ed] information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig*., 552 F.2d 1088, 1104-05 (5th Cir. 1977). The Notice, among other things, defined the Settlement Class, described the release provided to Synovus under the Settlement, as well as the amount 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. It also notified 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 Agreement, as well as other important documents. Further, the Notice described Class Counsel's intention to seek attorneys' fees of up to thirty percent (30%) of the $3,750,000 Settlement Fund, plus expenses, and Service Awards for the Class Representative Plaintiffs. Hence, the Settlement Class Members were provided with the best practicable notice that 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); *see* Azari Decl. ¶¶ 28-37.

As of January 31, 2015, the Notice Administrator had received only one (1) request for exclusion (opt-out). Azari Decl. ¶ 27. As of that date, no objections to the Settlement had been received. *Id.*; Joint Decl. ¶ 63.

2. The Settlement Should Be Approved as Fair, Adequate, and Reasonable.

In deciding whether to approve the Settlement, the Court will analyze whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. Southtrust Bank*, 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.*, MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litig. (Third)* § 30.42 (1995)). Importantly, 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 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. The analysis of these factors set forth below shows this Settlement to be eminently fair, adequate, and reasonable.

a. There Was No Fraud or Collusion.

This Court well knows the vigor with which the Parties litigated until they reached the Settlement. The sharply contested nature of the proceedings in this Action demonstrates the absence of fraud or collusion behind the 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 disclosed 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).

Settlement Class Counsel negotiated the Settlement with similar vigor. Plaintiffs and the Settlement Class were represented by experienced counsel throughout the negotiations. All negotiations were arm's-length and extensive. Joint Decl. ¶¶ 21-24, 44-47; *see also Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 703 (M.D. Fla. 2005) (concluding that class settlement was not collusive in part because it was overseen by "capable attorneys with experience in litigation of this nature").

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

The claims and defenses are complex; litigating them is both difficult and time-consuming. Joint Decl. ¶¶ 48-53; Fitzpatrick Decl. ¶ 15. Although this Action was litigated for over three years before the Parties resolved it, recovery by any means other than settlement would require additional years of litigation. *Id.*; *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, 317, 325-26 & n.32 (N.D. Ga. 1993) ("adjudication of the claims of two million claimants could last half a millennium").

In contrast, the Settlement provides immediate and substantial benefits to approximately 42,000 Settlement Class Members who are all current or former Synovus customers. Joint Decl. ¶ 54. As stated in *In re Shell Oil Refinery*, 155 F.R.D. 552 (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. In this respect, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Id. at 560 (alterations in original) (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 doubt about the adequacy of the present Settlement, which provides reasonable benefits to the Settlement Class.

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

Courts also consider "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 General 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 significant litigation before this Court involving Synovus (and other banks in MDL 2036). Joint Decl. ¶¶ 55, 58. Settlement Class Counsel's analysis and understanding of the various legal obstacles positioned them to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and defenses through the conclusion of the litigation, as well as the range and amount of damages that were potentially recoverable if the Action successfully proceeded to judgment on a class-wide basis. Joint Decl. ¶¶ 55-60; Fitzpatrick Decl. ¶¶ 10-16. "Information 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.

d. Plaintiffs Faced Significant Obstacles to Prevailing.

The "likelihood and extent of any recovery from the defendants absent . . . settlement" is another important factor in assessing the reasonableness of a settlement. *Domestic Air*, 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."). According to Professor Fitzpatrick, "it was not at all clear that the plaintiffs would have won their cases on the merits." Fitzpatrick Decl. ¶ 12. Synovus' preemption defense and its class arbitration motion presented serious legal issues that made success far from certain. *Id*. at ¶¶ 11-12.

Class Counsel believe that Plaintiffs had a solid case against Synovus. Joint Decl. ¶ 56. Even so, they are mindful that Synovus advanced significant defenses that would have been required to overcome in the absence of the Settlement. *Id*. at ¶¶ 56-57; Fitzpatrick Decl. ¶¶ 11-12. This Action involved several major litigation risks. Joint Decl. ¶¶ 56-57; Fitzpatrick Decl. ¶¶ 11-14. As this Court recognized in granting final approval to the settlement with Bank of America: "The combined risks here were real and potentially catastrophic . . . . but 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).

Apart from the risks, continued litigation would have involved substantial delay and expense, which further counsels in favor of Final Approval. Joint Decl. ¶ 57; Fitzpatrick Decl. ¶ 15. The uncertainties and delays from this process would have been significant. *Id.*

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").

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

In determining whether a settlement is fair given the potential range of recovery, the Court should be guided by "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 v. Wometco Enters., Inc*., 118 F.R.D. 534, 542 (S.D. Fla. 1988) (King, J.), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Id*. 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 also Bennett*, 737 F.2d at 986 ("compromise is the essence of settlement."). 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.").

Class Counsel were well-positioned to evaluate the strengths and weaknesses of Plaintiffs' claims, as well as the appropriate basis upon which to settle them, as a result of their litigation and settlement of similar claims reached within and outside of MDL 2036. Joint Decl. ¶ 46. Class Counsel also gained further insight into the practical and legal issues they would have continued to face litigating these claims against Synovus based, in part, on similar claims challenging Wells Fargo's high-to-low posting practices prosecuted in *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010). Joint Decl. ¶ 47. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment rendered in favor of the certified class of California customers in that case, vacated the $203 million

restitution award, and remanded the case for further proceedings. *Gutierrez v Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012).

Class Counsel's damage expert's analysis of Synovus' transactional data showed that the most probable sum Plaintiffs and the Settlement Class could reasonably have anticipated recovering at trial was $10,541,213 under the litigation class periods for the states (other than Georgia) where Synovus operated branches during that timeframe. *See* Declaration of Arthur Olsen ¶ 32 ("Olsen Decl.") (attached as Exhibit E); Joint Decl. ¶ 58. Through this Settlement, Plaintiffs and the Settlement Class Members have achieved a recovery of approximately thirty-six percent (36%) of those damages, without any further risks or delays. Joint Decl. ¶ 58; Fitzpatrick Decl. ¶¶ 13-14. This Settlement provides an extremely fair and reasonable recovery to the Settlement Class in light of Synovus' defenses, as well as the challenging, unpredictable path of litigation that Plaintiffs would otherwise have continued to face in the trial and appellate courts. Joint Decl. ¶ 59; Fitzpatrick Decl. ¶¶ 13-14. The Automatic Distribution process further supports Final Approval; eligible Settlement Class Members will receive their cash benefits automatically, without needing to fill out any claim forms – or indeed taking any affirmative steps whatsoever. Joint Decl. ¶ 60; Fitzpatrick Decl. ¶ 17.

The $3,750,000 cash recovery is fair and reasonable given the obstacles confronted and the complexity of the Action, and the significant barriers that stood between the pre-settlement status of the Action and final judgment, including expert discovery, pretrial motions, motions for summary judgment, trial, and post-trial appeals. Joint Decl. ¶¶ 62-64; Fitzpatrick Decl. ¶¶ 10-16. Taking these risks into account, the Settlement is clearly fair, adequate and reasonable. Fitzpatrick Decl. ¶ 18. Synovus' agreement to pay an additional $150,000 towards the fees and costs of the Notice Administrator and Settlement Administrator further enhances the recovery.

Joint Decl. ¶ 52. Given the obstacles that Plaintiffs faced in the litigation, this recovery is a successful achievement by any objective measure.

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

Settlement Class Counsel fully endorse the Settlement with Synovus. Joint Decl. ¶¶ 61-64. The Court should give "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 Domestic Air*, 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).

To date, there has been virtually no opposition to the Settlement. As of January 31, 2015, only one (1) Settlement Class Member had requested to be excluded from the Settlement Class. Azari Decl. ¶ 27; Joint Decl. ¶ 63. Moreover, as of that date, no Settlement Class Members had objected to the Settlement. *Id.* This is another indication that the Settlement Class is satisfied with the Settlement. It is settled that "[a] small number of objectors from a plaintiff class of many thousands is strong evidence of a settlement's fairness and reasonableness." *Association for Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002); *also Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) ("In evaluating the fairness of a class action settlement, such overwhelming support by class members is strong circumstantial evidence supporting the fairness of the Settlement."); *Austin v. Pennsylvania Dept. of Corrections*, 876 F. Supp. 1437, 1458 (E.D. Pa. 1995) ("Because class members are presumed to know what is in their best interest, the reaction of the class to the Settlement Agreement is an important factor for the court to consider.").

3. The Court Should Certify 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), and in similar actions in MDL 2036 on contested motions for class certification [*see, e.g.*, DE # 1763 (Union Bank); DE # 2615 (TD Bank); DE # 2673 (BancorpSouth); DE # 2697 (PNC Bank); DE # 2847 (Capital One); and DE # 3559 (U.S. Bank)] and in the context of settlement [*see, e.g.*, DE # 1520, 2150 (Bank of America); DE # 2712, 3134 (JPMorgan Chase Bank); DE # 2959, 3331 (Citizens Financial)]. The Court should make the same class certification findings in granting Final Approval.

Based on the foregoing, the Settlement is fair, adequate, and reasonable, and merits Final Approval.

III. APPLICATION FOR SERVICE AWARDS

Pursuant to the Settlement, Class Counsel request, and Synovus does not oppose, Service Awards for the Class Representatives identified in paragraphs 25 and 42 of the Agreement. The amount of the Service Awards is $10,000 per Class Representative, or $10,000 for married couples in which both spouses are Class Representatives. Agreement ¶ 102; Joint Decl. ¶ 65. 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. American 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 v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (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. Chicago Bd. Options Exchange, 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 relevant factors 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. *See, e.g.*, *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The above factors, as applied to this Action, demonstrate the reasonableness of the requested Service Awards to the Class Representatives. Joint Decl. ¶ 68; *see, e.g., Checking Account Overdraft*, 830 F. Supp. 2d at 1357-58 ("The Court notes that the class representatives expended time and effort in meeting their fiduciary obligations to the Class, and deserve to be compensated for it."). The Class Representatives provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including (1) submitting to interviews with Class Counsel, (2) locating and forwarding responsive documents and information (i.e., monthly account statements and account agreements), and (3) being deposed by Synovus' counsel. In so doing, the Class Representatives were integral to forming the theory of the case. Joint Decl. ¶ 68.

The Class Representatives not only devoted time and effort to the litigation, but the end result of their efforts, coupled with those of Class Counsel, provided a substantial benefit to the Settlement Class. Joint Decl. ¶ 68. If the Court approves them, the total Service Awards will be $30,000. This amount is less than 0.008% of the Settlement Fund, a ratio that falls well below the range of what has been deemed to be reasonable. *Id.* at ¶ 69; s*ee, e.g., Enterprise Energy*

Corp. v. Columbia Gas Transmission, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving service awards totaling $300,000, or 0.56% of a $56.6 million settlement). The Service Awards requested here are reasonable and should be approved.

IV. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

As indicated in the Agreement and the Notice, and consistent with standard class action practice and procedure, Class Counsel respectfully request attorneys' fees equal to thirty percent (30%) of the $3,750,000 Settlement Fund created through our efforts.[3] Agreement ¶ 99; Joint Decl. ¶ 70. Class Counsel also request reimbursement of limited out-of-pocket costs and expenses totaling $85,311.83 incurred in connection with the prosecution of the Action and in connection with the Settlement. Joint Decl. ¶ 70. Settlement Class Counsel and Synovus negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. Agreement ¶ 103; Joint Decl. ¶ 70. The thirty percent (30%) fee request is within the guidelines set forth by the Eleventh Circuit in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and adheres to this Court's prior decisions in MDL 2036 regarding attorneys' fees. Fitzpatrick Decl. ¶¶ 21-25. For the reasons detailed herein, Class Counsel submit that the requested fee is appropriate, fair, and reasonable and should be approved.

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

[3] In addition to the firms identified as Class Counsel in paragraph 23 of the Agreement, this fee request also includes Alters Law Firm, P.A.

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, but the amount is subject to court approval."). Courts have also recognized that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons, and deter future misconduct of a similar nature. *See, e.g.*, *Mashburn*, 684 F. Supp. at 687; *see also Deposit Guar. Nat'l Bank v. Rope*, 445 U.S. 326, 338-39 (1980). Adequate compensation promotes the availability of counsel for aggrieved persons:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

In the Eleventh Circuit, class counsel receives a percentage of the funds obtained through a settlement. In *Camden I* – the controlling authority regarding attorneys' fees in common-fund class actions – the Eleventh Circuit held that "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 applied the percentage of the fund approach in MDL 2036, holding:

> 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.

Checking Account Overdraft, 830 F. Supp. 2d at 1362.

The Court has substantial discretion in determining the appropriate fee percentage. "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." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774). Nonetheless, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund" – though "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), *cert. denied*, 530 U.S. 1289 (2000) (approving fee award where the district court determined that the benchmark should be 30 percent and then adjusted the fee award higher in view of the circumstances of the case).

Class Counsel's fee request falls within this accepted range and is in accord with the Court's prior fee awards in MDL 2036. Fitzpatrick Decl. ¶¶ 22-23. There is no reason for the Court to deviate from its prior fee rulings here.

B. Application of the *Camden I* Factors Supports the Requested Fee.

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions:

(1) the time and labor required;

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

(3) the skill required to properly carry out the legal services;

(4) the preclusion of other employment by the attorney as a result of his acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

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

(8) the results obtained, including the amount recovered for the clients;

(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 clients; and

(12) fee awards in similar cases.

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

These twelve factors are guidelines and 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. As applied here, the *Camden I* factors demonstrate that the Court should approve the requested fee. Fitzpatrick Decl. ¶¶ 21-25.

1. 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 that we 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 significant 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 our 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 that we now request. "For all these reasons, I believe the fee award requested here is within the range of reason." Fitzpatrick Decl. ¶ 26.

2. The Issues Involved Were Novel and Difficult, and Required the Skill of Highly Talented Attorneys.

The Court regularly witnessed and commented upon the high quality of our legal work, which conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. Joint Decl. ¶ 78. Our work required the acquisition and analysis of a substantial amount of factual and legal information. *Id.* The management of this very large MDL, including the Action against Synovus, also presented challenges most law firms are simply not able to meet. *Id.*

In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Litigation of this Action required counsel highly trained in class action law and procedure as well as the specialized issues presented here. Class Counsel possess these attributes, and their participation added value to the representation of this large Settlement Class. Joint Decl. ¶ 79. The record demonstrates that the Action involved a broad range of complex and novel challenges, which Class Counsel met at every juncture. *Id.* at ¶ 80; Fitzpatrick Decl. ¶ 24.

In evaluating the quality of representation by Class Counsel, the Court should also consider the quality of opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149 F.R.D. at 654. Throughout the litigation, Synovus was represented by extremely capable counsel. They were worthy, highly competent adversaries. Joint Decl. ¶ 81; *see also Checking Account Overdraft*, 830 F. Supp. 2d at 1348 (finding "Class Counsel confronted not merely a single large bank, but the combined forces of a substantial portion of the entire American banking industry, and with them a large contingent of some of the largest and most sophisticated law firms in the country.") (internal quotation marks and citation omitted); *Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating 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").

3. Class Counsel Achieved a Successful Result.

Given the significant litigation risks faced here, the Settlement represents a successful result. Fitzpatrick Decl. ¶ 24. Rather than facing more years of costly and uncertain litigation, the overwhelming majority of Settlement Class Members will receive an immediate cash benefit. Joint Decl. ¶ 82. The Settlement Fund will not be reduced by the substantial fees and costs of

Notice or Settlement administration as Synovus agreed to pay $150,000 towards such fees and expenses. *Id.* Moreover, payments to eligible Settlement Class Members will be forthcoming automatically, through direct deposit for current Account Holders or checks for former Account Holders. *Id.*

4. The Claims Presented Serious Risk.

The Settlement here is particularly noteworthy given the combined litigation risks. Joint Decl. ¶¶ 83-84; Fitzpatrick Decl. ¶¶ 11, 12, 24. Synovus raised substantial defenses. Success under these circumstances represents a genuine milestone. *Id.* at 24.

Consideration of the "litigation risks" factor under *Camden I* "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.'" *Sunbeam*, 176 F. Supp. 2d at 1336.

Further, "[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. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988). "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. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

Prosecuting the Action was risky from the outset. Joint Decl. ¶ 85; Fitzpatrick Decl. ¶ 24. 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. Given these risks, the $3,750,000 cash recovery obtained through the Settlement is outstanding, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. These risks could easily have impeded, if not altogether derailed, Plaintiffs' and the Settlement Class' successful prosecution of these claims at trial and in an eventual appeal.

The Settlement is a fair and reasonable recovery for the Settlement Class in light of Synovus' merits defenses, and the challenging and unpredictable path of litigation Plaintiffs would have faced absent the Settlement. Joint Decl. ¶¶ 56-57; Fitzpatrick Decl. ¶¶ 11-12.

5. Class Counsel Assumed Considerable Risk to Pursue This Action on a Pure Contingency Basis.

In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Joint Decl. ¶ 85; Fitzpatrick Decl. ¶ 24. That risk warrants an appropriate fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548); *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-fee basis, plaintiffs' counsel must be adequately compensated for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

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. Joint Decl. ¶ 86. In the Court's words:

> 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 progress of the Action shows the inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel. Fitzpatrick Decl. ¶ 24.

6. The Requested Fee Comports With Fees Awarded in Similar Cases.

The fee sought here matches the fee typically awarded in similar cases. Joint Decl. ¶ 88; Fitzpatrick Decl. ¶ 23. Legions of decisions have found that a thirty percent fee is well within the range of a customary fee. *See, e.g.*, *Sunbeam*, 176 F. Supp. 2d at 1333-34. Indeed, several recent decisions within this Circuit have awarded attorneys' fees up to (or in excess of) thirty percent, confirming the fairness and reasonableness of the thirty percent fee requested here. Fitzpatrick Decl. ¶ 23.

As another member of this Court observed: "[F]ederal district courts across the country have, in the class action settlement context, *routinely* awarded class counsel fees in excess of the 25 percent 'benchmark,' even in so-called 'mega-fund' cases."[4] *Allapattah Servs., Inc. v. Exxon*

[4] *See also* 1 *Court Awarded Attorney Fees*, ¶ 2.06[3], at 2-88 (Matthew Bender 2010) (noting that, "when appropriate circumstances have been identified, a court may award a percentage significantly higher" than 25 percent); 4 *Newberg on Class Actions*, § 14:6, at 551 (4th ed. 2002)

Corp., 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (emphasis added) (awarding fees equaling 31⅓ percent of settlement fund); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1 percent)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33 percent is the norm, and awarding 38 percent of settlement fund); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (36 percent); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8 percent); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (45 percent); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.*, 480 F. Supp. 1195, 1199 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980) (approximately 53 percent); *Zinman v. Avemco Corp.*, 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (Higginbotham, J.) (50 percent).

Class Counsel's fee request falls within the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. *See Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring); *see also Kirchoff v. Flynn*, 786 F.2d 320, 323, 325 n.5 (7th Cir. 1986) (noting "40 percent is the customary fee in tort litigation"); *In re Public Serv. Co. of N.M.*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.").

("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

The record here leaves no doubt that Class Counsel's fee request is appropriate and comports with attorneys' fees awarded in similar cases. Professor Fitzpatrick distilled several major empirical studies of attorneys' fees, including his own, awarded in connection with class action settlements. Fitzpatrick Decl. ¶ 23. He concluded that the empirical data from those studies supports the reasonableness of a thirty percent (30%) fee award in this case. *Id.*

Class Counsel's fee request also falls within the range of awards in numerous recent cases in this Circuit and District. Fitzpatrick Decl. ¶ 23; *see, e.g.*, *Waters*, 190 F.3d at 1297-98 (affirming fee award of 33⅓ percent on settlement of $40 million even though most of the fund ultimately reverted to the defendant); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-CIV-Gold (S.D. Fla. May 30, 2003) (33⅓ percent of $77.5 million settlement); *Sands Point Partners, LP v. Pediatrix Med. Group, Inc.*, 2002 U.S. Dist. LEXIS 25721 (S.D. Fla. 2002) (30 percent of $12 million settlement); *In re CHS Elecs., Inc. Sec. Litig.*, 99-8186-CIV-Gold (S.D. Fla. 2002) (30 percent on settlement of over $11 million); *Ehrenreich v. Sensormatic Elecs. Corp.*, 95-6637-CIV-Zloch (S.D. Fla. 1998) (30 percent on settlement of over $44 million); *Tapken v. Brown*, 90-0691-CIV-Marcus (S.D. Fla. 1995) (33 percent of $10 million settlement).[5]

[5] *See also In re Friedman's, Inc. Sec. Litig.*, 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30 percent); *Francisco v. Numismatic Guar. Corp. of Am.*, 2008 WL 649124 (S.D. Fla. 2008) (30 percent); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30 percent); *In re BellSouth Corp. Sec. Litig.*, Civil Action No. 1:02-cv-2142-WSD (N.D. Ga. Apr. 9, 2007) (30 percent); *In re Cryolife, Inc. Sec. Litig.*, Civil Action No. 1:02-cv-1868-BBM (N.D. Ga. Nov. 9, 2005) (30 percent); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, Civil Action No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (33⅓ percent plus interest and expenses); *In re Clarus Corp. Sec. Litig.*, Civil Action No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (33⅓ percent); *In re Pediatric Servs. of Am., Inc. Sec. Litig.*, Civil Action No. 1:99-CV-0670-RLV (N.D. Ga. Mar. 15, 2002) (33⅓ percent); *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (30 percent).

7. The Remaining *Camden I* Factors also Favor Approving the Requested Fee.

The remaining *Camden I* factors likewise support granting Class Counsel's fee request. "[C]lass counsel count among their number some of the most experienced and highly regarded lawyers in the United States. Without doubt, they had the skill needed to perform the services required in this complex class action . . . This talented team of lawyers accomplished outstanding results for the settlement class in the face of substantial risks. Had they not had the requisite skill to perform the necessary services, it is highly doubtful the class could have achieved the results obtained in this case. In short, these are not mere "benchmark" lawyers."" *See* Fitzpatrick Decl. ¶ 25. Moreover, without adequate compensation and financial reward, cases such as this simply could not be pursued. The Court previously held that, "given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized. The Court believes, and holds, that the proper incentive here is a 30% fee." *Checking Account Overdraft*, 830 F. Supp. 2d at 1364. The record before the Court warrants the same outcome in this parallel MDL 2036 Action. Fitzpatrick Decl. ¶¶ 22-26.

8. The Expense Request Is Appropriate.

Class Counsel also request reimbursement for a total of $85,311.83 in certain litigation costs and expenses. Joint Decl. ¶ 90; *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). This sum corresponds to certain actual out-of-pocket costs and expenses that Class Counsel necessarily incurred and paid in connection with the prosecution of the Action and the Settlement. Joint Decl. ¶ 90. Specifically, these costs and expenses consist of: (1) $67,898.29 in fees and expenses incurred for experts, principally Arthur Olsen, whose services were critical in determining the damages for the Settlement Class, in identifying Settlement Class Members, and

in allocating the Settlement Fund, and (2) $17,413.54 in court reporter fees and transcripts associated with depositions and hearings in the Action.[6] *Id.* These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action. *Id.*

VI. CONCLUSION

The Settlement with Synovus securing $3,750,000 in cash compensation for the benefit of the Settlement Class represents an excellent result given the obstacles confronted in this Action. The Settlement more than satisfies the fairness and reasonableness standard of Rule 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Further, Class Counsel's application for fees and expenses is reasonable under all the circumstances. The request satisfies the guidelines of *Camden I* given the results achieved, the notable litigation risks, the extremely complicated nature of the factual and legal issues, and the time, effort, and skill required to litigate claims of this nature to a satisfactory conclusion.

Accordingly, Plaintiffs and Class Counsel respectfully request that this Court (1) grant Final Approval to the Settlement; (2) certify for settlement purposes the Settlement Class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(e); (3) appoint as Class Representatives the Plaintiffs listed in paragraphs 25 and 42; (4) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 23 and 51 of the Agreement, respectively; (5) approve the requested Service Awards for the Plaintiffs; (6) award Class Counsel attorneys' fees and expenses; and (7) enter Final Judgment dismissing the Action with prejudice.

[6] Class Counsel have limited the categories of expenses for which reimbursement is being sought to those enumerated above, and are not seeking reimbursement for thousands of dollars in other expenses that are routinely sought and recovered in common fund class actions. Joint Decl. ¶ 91.

Dated: February 5, 2015.

Respectfully submitted,

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Plaintiffs' Executive Committee

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

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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