UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Jeffrey Tucker, on behalf of himself and all others similarly situated, Plaintiff, vs. Baptist Health System, Inc., the Baptist Health System, Inc. Benefits Committee and John Does 1-20, Defendants.	Civil Action No. 2:15-cv-00382-MHH

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARDS OF ATTORNEYS' FEES AND EXPENSES, AND INCENTIVE FEE TO THE NAMED PLAINTIFF

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Plaintiff respectfully submits this memorandum in support of his motion, pursuant to Federal Rule of Civil Procedure 23(h), for an award of attorneys' fees in the amount of $820,000, reimbursement of litigation expenses in the amount of $18,070.86, and for an Incentive Fee in the amount of $2,000 for Plaintiff Jeffrey Tucker ("Plaintiff") in recognition of his service in this case.

I. INTRODUCTION

The proposed Settlement represents a very favorable result for the Settlement Class.[1] The Settlement provides for contributions to fund the Plan over a 10 year period of eleven million dollars ($11,000,000) for the benefit of the Baptist Health System, Inc. Retirement Plan (the "Plan") and its participants and beneficiaries. This $11 million contribution is in addition to the $88.9 million that the Plan's sponsor, Baptist Health System, Inc. ("Baptist Health") contributed to the Plan shortly after Plaintiff filed the Action. The Settlement also includes equitable provisions concerning future benefits and continuing obligations for Defendants regarding the Plan. Importantly, the Settlement requires Baptist Health to amend the Plan document so that its ongoing obligation to fund the Plan will be based on up-to-date mortality tables and projection scales. Moreover, the

[1] All capitalized, undefined terms shall have the meaning ascribed to them in the Class Action Settlement Agreement (the "Settlement Agreement"), previously filed as Dkt. No. 44-1, and attached herewith as Exhibit 5 to the Joint Declaration of Mark P. Kindall and Edward W. Ciolko in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement and Motion for Awards of Attorneys' Fees, Expenses, and Incentive Fee to the Named Plaintiff (the "Joint Declaration").

Settlement prohibits the Plan from being terminated unless there are sufficient assets to pay outstanding liabilities for 8 years. The Settlement has been preliminarily approved, and a final fairness hearing has been scheduled by the Court for June 5, 2017.

In undertaking this litigation, Class Counsel faced the very real risk that the substantial time and expense they dedicated to the Action would result in no recovery at all. At the time that suit was filed in April of 2015, several courts in other circuits had reached conflicting results with respect to whether an employee benefits plans such as the one at issue qualify for the "church plan" exemption under ERISA, such that the federal statute's numerous and substantial protections for the participants of such plans do not apply. Even the decisions favorable to Plaintiff's position rested upon sometimes conflicting rationales, and the Eleventh Circuit had not addressed the question. And indeed, the legal landscape has continually shifted as the case progressed, with appellate court rulings favorable to Plaintiff's position being issued by the Seventh, Third and Ninth Circuits and then, most recently, with the grant of *certiorari* in all three appellate decisions by the U.S. Supreme Court.[2] The Supreme Court has not yet issued a decision, but the appeals have been fully briefed and argued.

[2] *Advocate Health Care Network v. Stapleton*, 817 F.3d 517 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3039 (U.S. Dec. 2, 2016); *St. Peter's Healthcare System v. Kaplan*, 810 F.3d 175 (3d

In light of the recovery obtained, the time and effort devoted to the Action, the skill and expertise required, and the risks undertaken, Class Counsel respectfully submit that their requested fee is eminently appropriate. As discussed below, the $820,000 fee represents less than 8% of the value of the $11,000,000 recovered for the Settlement Class, and – unlike a true "common fund" case – the payments to the trust fund under the settlement will not be reduced by the amount of the attorneys' fees. The percentage compares very favorably to both amounts that have been approved in other ERISA class actions in this Circuit and other "church plan" litigations across the country. The requested out-of-pocket expenses and Incentive Fee also fit squarely within the range of amounts approved in analogous cases.[3] Importantly, the Class Notice, mailed to Settlement Class Members on April 3, 2017, indicated that Plaintiff would be seeking these amounts from the Court, and to date, no one has objected.

II. FACTUAL AND PROCEDURAL BACKGROUND[4]

A. Description of the Action and Class Counsel's Efforts

On March 3, 2015, Plaintiff filed his Complaint against Baptist Health and the other defendants for violations of ERISA. *See* Dkt. No. 1. Before filing the

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Cir. 2015), *cert. granted*, 85 U.S.L.W. 3052 (U.S. Dec. 2, 2016); *Dignity Health v. Rollins*, 830 F.3d 900 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3080 (U.S. Dec. 2, 2016).

[3] Per the Settlement Agreement, Defendants do not oppose Plaintiff's request for an award of attorneys' fees, reimbursement of expenses, or Incentive Fee for Plaintiff Tucker. *See* Settlement Agreement § 8.1.2.

[4] Plaintiff also incorporates by reference the Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement ("Final Approval Motion"), filed herewith.

Complaint, Izard, Kindall & Raabe, LLP ("IKR")[5] and Ragsdale, LLC ("Liaison Counsel") investigated the claims and pertinent legal issues. Kessler Topaz Meltzer & Check, LLP ("KTMC") later appeared on Plaintiff's behalf (*see* Dkt. Nos. 33 and 34) and, together with IKR are proposed Class Counsel.

The Complaint alleged that Defendants improperly characterized the Plan as a "church plan" to avoid their funding and disclosure obligations under ERISA. *See* Dkt. No. 1 at ¶¶ 1-4. As a result, Plaintiff alleged that the Plan was underfunded by approximately $142 million as of December 31, 2012. On October 19, 2015, Defendants moved to dismiss the Complaint. *See* Dkt. No. 32. Defendants argued that ERISA's text, court opinions, and administrative agency interpretation supported the Plan's classification as an ERISA exempt "church plan." *Id*. Plaintiff filed a memorandum in opposition and the parties thereafter both submitted supplemental briefing. *See* Dkt. Nos. 20, 21, 28, 29 and 30. On February 9, 2016, the Court held oral argument on Defendants' motion to dismiss.

B. The Settlement Negotiations and Preliminary Approval

As noted, before the Court reached a decision on Defendants' motion to dismiss, the parties agreed to mediate the Action, selecting Robert A. Meyer, a highly skilled and experienced mediator who has mediated many complex cases and ERISA class actions including "church plan" actions. As part of the mediation process, Defendants provided Plaintiff with an actuarial report that showed the

[5] The firm was known as Izard Nobel LLP when it filed this case.

Plan's funding status as of January 1, 2016 and the current version of the Plan document that showed Baptist Health's funding obligation. Plaintiff retained his own actuarial expert to review these materials and opine on the Plan's current financial status.

The mediation occurred in Los Angeles on May 31, 2016. Following hard fought negotiations, and lengthy dispute of their respective positions through Mr. Meyer, the parties reached an agreement in principle to settle the Action. Thereafter, the parties worked to memorialize the terms of the agreement into the Settlement Agreement, which they signed on August 25, 2016, and submitted to the Court for preliminary approval. Dkt. Nos. 43, 47. The Court granted preliminary approval by Order dated February 10, 2017. Dkt. No. 51. Among other things, the Order preliminarily certified the Settlement Class, appointed Plaintiff as Class Representative for the Settlement Class, and preliminarily appointed Class Counsel as counsel for the Settlement Class. *Id.*

In accordance with the Preliminary Approval Order, Defendant sent the approved Class Notice to each member of the Settlement Class who could be identified by the Plan's recordkeeper by first class United States mail on or around April 3, 2017. *See* Declaration of Keith Hartsough for Hewitt Associates LLC, attached to the Joint Declaration as Exhibit 1, at ¶ 6. Additionally, the Settlement and other relevant Settlement material, were posted on a dedicated page on the

IKR website (http://ikrlaw.com/file/tucker-v-baptist-health-system-inc/) on February 14, 2017. The Notice to the Settlement Class specifically described the provisions of the Settlement related to this motion:

> Defendants have also agreed to pay a maximum of $870,000 to be used to fund Class Counsel's requested attorneys' fees and for expenses actually incurred and/or an Incentive Fee to the Named Plaintiff. The application for expenses and an Incentive Fee for the Named Plaintiff will not exceed $50,000. The Court has the sole discretion as to whether, and/or in what amounts up to a total of $870,000, to award attorney's fees, expenses, and/or an Incentive Fee.

Class Notice, Dkt. No. 44-1, at 4. Interest in the Settlement has been very high. Counsel for Plaintiff answered approximately 200 telephone calls from Settlement Class Members and provided them with additional information about the case and the Settlement. *See* Joint Declaration, at ¶ 9.

The Preliminary Approval Order set the deadline for filing objections as May 22, 2017. *See* Dkt. No. 51 at ¶ 9. At least as of the date of this filing, no Settlement Class Member has objected to the proposed award of attorneys' fees, expenses, or Incentive Fee for Plaintiff as set forth in the Class Notice.

III. THE ATTORNEYS' FEE REQUEST IS FAIR AND REASONABLE

A. The Fee Request Will Not Reduce Benefits to the Class

Federal Rule of Civil Procedure 23(h) provides that "a court may award reasonable attorneys' fees and nontaxable costs in a class action that are authorized by law or by the parties' agreement." *See, e.g.*, *Camp v. City of Pelham*, No. 10-cv-01270, 2015 WL 12746716, at *2 (N.D. Ala. Dec. 16, 2015) (Haikala, J.) (citing FED. R. CIV. P. 23(h)). As the Supreme Court has repeatedly emphasized,

the determination of fees "should not result in a second major litigation." *Fox v. Vice*, 563 U.S. 826, 838 (2011) (quoting *Hensley v. Eckherhard*, 461 U.S. 424, 437 (1983)). To avoid this result, the parties in class actions are encouraged to reach an agreement on the amount of a fee, as the parties here have done. *See, e.g.*, *Hensley*, 461 U.S. at 437 ("Ideally… litigants will settle the amount of a fee."); *Gisbrecht v. Barnhart*, 535 U.S. 789, 801-02 (2002) (same). However, a court must still asses the reasonableness of the fee award. *See, e.g.*, *Camp*, 2015 WL 12746716, at *2 ("Although the parties do not dispute the amount of the proposed fee award, the Court has an independent duty to evaluate the award.") (citing *Camden I Condominium Assoc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991)). The rationale is that "[e]ven when both parties agree to an award, the court has an independent responsibility to assess its reasonableness, in order to guard against the risk that class counsel might agree to enter into a settlement less favorable to their clients in exchange for inappropriately high fees." *Dunn v. Dunn*, 318 F.R.D. 652, 681 (M.D. Ala. 2016) (citing *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980)).[6]

This concern is reduced, though not eliminated, where (as here) the class action settlement requires that defendant pay the attorneys' fees for the class, rather than have the fees deducted from the class settlement. *See, e.g.*, *Jermyn v. Best*

[6] The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. *See Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Buy Stores, L.P., No. 08-cv-214, 2012 WL 2505644, at *9 (S.D.N.Y. June 27, 2012) (because attorneys' fees were to be paid by defendant rather than from a common fund and the size of the fee award would not affect the recovery to the class, " the danger of conflicts of interest between attorneys and class members is diminished . . . [and] the Court's fiduciary role in overseeing the award is greatly reduced.") (internal citations omitted). As this Court recently reasoned:

> [T]his is not a case in which the attorneys' fees represent a contingency portion of the payments made to the plaintiffs. Rather, the total payments to the plaintiffs are separate and distinct from the settlement agreement to pay their fees and expenses. The payment of the fees and expenses does not reduce the compensation negotiated for and payable to the plaintiff employees themselves.

Briggins v. Elwood TRI, Inc., 3 F. Supp. 3d 1277 (N.D. Ala. 2014).

B. The Eleventh Circuit's Approach to Analyzing Fees

The Eleventh Circuit has noted that "[u]ltimately, the computation of a fee award is necessarily an exercise of judgment, because '[t]here is no precise rule or formula for making these determinations.'" *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1305 (11th Cir. 2001) (quoting *Hensley*, 461 U.S. at 436). This Court has "wide discretion to award attorneys' fees based on its own expertise and judgment." *Waters v. Cook's Pest Control, Inc.*, No. 07-cv-394, 2012 WL 29235424, at *15 (N.D. Ala. July 17, 2012).

There are two primary methods employed in assessing the reasonableness of fees – the "percentage-of-the-common-fund method or lodestar method." *Dikeman v. Progressive Exp. Ins. Co.*, 312 F. App'x 168, 172 (11th Cir. 2008) (citing

Camden I, 946 F.2d at 774). The court generally employs the percentage method in cases where a common fund is created for the benefit of the class and plaintiff's attorney's fees are paid from that fund, while it employs the lodestar method in fee-shifting cases. *Id.* However, in cases where a fee-shifting statute is involved and the Settlement does not involve a finding of noncompliance with the statute, the court may apply either methodology. In *Dikeman*, for example, the Court found that the District Court could award fees based on the percentage method, even though the case involved a fee-shifting statute, since the parties had resolved the suits by a settlement that did not entail an express finding that defendant had not complied with the statute. *Id.*

Plaintiff respectfully submits that the reasonableness of the requested fee is best measured against the value of what the Settlement provides in total. As in *Dikeman*, while the case involves a fee-shifting statute, the parties have resolved the case through a settlement that does not include a finding of non-compliance. Moreover, although the Settlement does not create a common settlement fund that will be distributed among members of the Class in accordance with an approved Plan of Allocation, the Settlement ***does*** provide direct monetary payments by Defendant into an existing trust fund that supports the ongoing pension benefits of Class members.

Courts frequently employ the common fund analysis when assessing the reasonableness of the fee, even where the fee is not being paid from a common fund. As a District Court in this Circuit recently reasoned:

> While I recognize that the fee award requested by Class Counsel will be paid separately by Defendants and is not drawn from a "common fund" in the traditional sense, there is authority directing "district courts to exercise their equitable jurisdiction to review counsel-fee arrangements negotiated in connection with class-action settlements—even where the counsel fees are not taken from a common fund but are instead paid separately by a class-action defendant.

David v. Am. Suzuki Motor Corp., No. 08-cv-22278, 2010 WL 1628362, at *8 n.14 (S.D. Fla. Apr. 15, 2010) (internal citations omitted). Decisions from other Circuits are in accord. *See, e.g.*, *Dewey v. Volkswagen Aktiengesellschaft*, 558 F. App'x 191, 197 (3d Cir. 2014) ("this case does not involve a true common fund because Volkswagen is paying the fee out of its own pocket and not through the reimbursement fund. However, where the reality is that the fund and the fee are paid from the same source—in this case, Volkswagen—the arrangement is, for practical purposes, a constructive common fund, and courts may still apply the percent-of-fund analysis in calculating attorney's fees."); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal.").

C. The *Johnson* Factors Support the Fee Request

In common fund cases, courts in the Eleventh Circuit use a percentage of the fund method in determining the reasonableness of attorneys' fees. *See, e.g.*, *Camp*, 2015 WL 12746716, at *3 (citing *Camden I*, 946 F.2d at 775). "There is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Camden I*, 946 F.2d at 774. The "majority of common fund fee awards fall between 20% to 30% of the fund." *Id.* However, the "benchmark'' range of 20% to 30% "may be adjusted in accordance with the individual circumstances of each case." *Id.* at 775. "The factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary." *Id.*

Even considering ***only*** the monetary value of the settlement, Plaintiff's counsel seek an award that is equal to less than eight percent of the $11 million Settlement.[7] *See* Settlement Agreement § 8.1.2. Moreover, the Settlement Agreement contains significant non-monetary protections for the class as discussed

[7] The percentage is even lower when the other monetary elements of the Settlement are considered. The percentage of fund method usually considers the fee as a percentage of the total amount paid by Defendant, but unlike in a true "common fund" case, here the total amount paid by Defendant includes a separate payment of fees and expenses in addition to the amounts provided for the direct benefit of class members. The fee request represents less than 7% of the total amount that Defendant has here agreed to pay, since the total amount includes $11 million for the trust fund, $820,000 for fees, $18,070.86 for expenses and $2,000 for an Incentive Award. *Cf. Manual for Complex Litig.* § 21.75 (4th ed. 2008) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees ... the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.").

above. In *Wilson v. EverBank*, No. 14-cv-22264, 2016 WL 457011, at *13 (S.D. Fla. Feb. 3, 2016), the court noted that that "class counsel's fee award should also be based on consideration of 'any non-monetary benefits conferred upon the class by the settlement'" (quoting *Poertner v. Gillette Co.*, 618 F. App'x 624, 629 (11th Cir. 2015)). Thus, the requested fee represents an even smaller percentage of the true value of the Settlement.

The Eleventh Circuit has instructed courts to consider the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or 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 length of the professional relationship with the client; and (12) awards in similar cases.

Camden I, 946 F.2d at 775 (citing *Johnson*, 488 F.2d at 717-19). A review of the applicable *Johnson* factors[8] clearly demonstrates that the requested award of $820,000 in attorneys' fees is fair and reasonable.

1. The Time and Labor Required

"The Supreme Court has noted that 'complex civil litigation involving numerous challenges to institutional practices or conditions ... is lengthy and demands many hours of lawyers' services.'" *Camp*, 2015 WL 12746716, at *3

[8] The seventh (time limitations imposed by the client or circumstances) and eleventh (the nature and length of the professional relationship with the client) *Johnson* factors are inapplicable to this Action and are thus omitted from Class Counsel's analysis.

(quoting *Hensley*, 461 U.S. at 436). "Although the hours claimed or spent on a case should not be the sole basis for determining a fee ... they are a necessary ingredient to be considered." *Johnson*, 488 F.2d at 717. Given the significant time and resources expended by Class Counsel in litigating this matter, this factor strongly supports approval of the fee request.

Class Counsel dedicated considerable time and effort to investigating the claims at issue in the Action, drafting the Complaint, analyzing the arguments presented in Defendants' Motion to Dismiss, reviewing numerous documents, retaining and working with an actuarial expert concerning liability and damages, and negotiating the Settlement. While Class Counsel worked efficiently and resolved the case at an early stage, this favorable resolution would not have been possible without the careful work that went into the case at the outset. In total, Class Counsel have devoted over 550 hours to the case through May 4, 2017.

Indeed, it is important to note that even if the Court grants final approval of the Settlement, Class Counsel will continue to expend time and resources overseeing the Settlement administration, assisting Settlement Class Members, and tending to any issues that may arise relating to the Settlement. Class Counsel received approximately 200 telephone calls from Class members in response to the Class Notice and expects to receive more as the Final Fairness hearing approaches. Accordingly, this factor supports the requested attorneys' fees.

2. The Novelty and Difficulty of the Questions Involved

As courts in this Circuit have recognized, "risk is the most important factor in determining the appropriate percentage fee to be awarded under *Camden I*." *Wolff v. Cash 4 Titles*, No. 03-cv-22778, 2012 WL 5290155, at *1 (S.D. Fla. Sept. 26, 2012), *report and recommendation adopted*, 2012 WL 5289628 (S.D. Fla. Oct. 25, 2012). The risks in this Action support the fee request.

The central question involved in the case – whether the Plan qualifies as a "church plan" under ERISA – has been the subject of relatively few cases, which reached different results, and, even when favorable to Plaintiff's position here, relied upon conflicting rationales. *Compare Stapleton v. Advocate Health Care Network*, No. 14-cv-01873, 2014 WL 7525481 (N.D. Ill. Dec. 31, 2014) (finding that the church plan exemption did not apply to plan that was not established by a church in the first instance) *with Medina v. Catholic Health Initiatives*, No. 13-cv-01249, 2014 WL 4244012 (D. Colo. Aug. 26, 2014) (finding that the church plan exception did apply). Moreover, neither the Eleventh Circuit, nor any of the District Courts within the Circuit, has addressed the issue. And, interpretations by the Internal Revenue Service favored Defendant's position. Thus, the legal landscape governing the central issue in this litigation was uncertain at the time that the case was filed. This risk supports the fee request. *See, e.g.*, *Wolff*, 2012 WL 5290155, at *1 ("The Court should consider the risk at the time of filing

suit."). *See also Johnson*, 488 F.2d at 717 (noting "[c]ases of first impression generally require more time and effort on the attorney's part.").

The uncertainty and thus the difficulty of litigating this Action have only been magnified since the case began. Specifically, as noted above, the Supreme Court is currently deciding whether a "church plan" must be established by a church or if it can be established by an organization that is merely affiliated with a church. Its answer could change the prevailing circuit-level law which supports the Complaint's allegations. Given that Defendants' Motion to Dismiss was pending at the time the parties mediated the Action, if this Action were not to settle, the Supreme Court's decision could have a material impact.

This factor is thus satisfied and supports approval of Class Counsel's fee request.

3. The Skill Required to Perform the Legal Services Properly

The *Johnson* factors can be viewed in conjunction with one another. For example, with respect to the second and third *Johnson* factors, "[t]he skill of counsel is commensurate with the novelty and complexity of the issues in this case." *Camp*, 2015 WL 12746716, at *4. The same is true here.

As an initial matter, Class Counsel IKR and KTMC have extensive ERISA class action experience, including "church plan" litigation experience. This Court recognized as much in preliminarily appointing IKR and KTMC as Class Counsel.

See Dkt. No. 51 at ¶ 3. Class Counsel in this case is comprised of attorneys and law firms that are national leaders in class action litigation generally, and ERISA matters in particular. *See* IKR and KTMC Firm Resumes, attached to the Joint Declaration as Exhibits 6 and 7, respectively. Class Counsel both possesses and utilized the necessary skill to ably provide the legal services which led to a favorable settlement.

The quality of Class Counsel's representation is also evident when considering the equally high quality defense attorneys against whom they successfully litigated this case. *See, e.g.*, *Waters*, 2012 WL 2923542, at *16 ("The skill necessary to litigate this case, despite the consistently tough opposition of reputable law firms with significant resources, is high."). From the outset, Class Counsel engaged in hard fought litigation with highly capable attorneys from the Groom Law Group, a recognized leader in ERISA defense litigation, aided by the attorneys at Maynard Cooper & Gale PC, a nationally recognized firm and one of the best in Alabama.

The foregoing speaks to the quality of Class Counsel's representation and supports the requested attorneys' fees.

4. The Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case

This factor requires consideration of whether "once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for

other purposes." *Johnson*, 488 F.2d at 718. As reflected by the sheer number of hours devoted by the attorneys and staff involved in litigating this case, a substantial amount of their time was spent on this case, and this was certainly time that could have been devoted to other cases that the firms are presently investigating or litigating. *See* Kindall Declaration at ¶ 4; Ciolko Declaration at ¶ 4. Thus, this factor supports the requested fee award. *See Johnson*, 488 F.2d at 718 ("Priority work that delays the lawyer's other legal work is entitled to some premium.").

5. The Customary Fee

As noted above, the majority of common fund fee case awards fall between 20% and 30% of the fund. *Camden I*, 946 F.2d at 774. Indeed, attorneys' fee awards in several recent ERISA class actions in the Eleventh Circuit fall squarely in this range. *See, e.g.*, *Alford v. United Community Banks, Inc.*, No. 11-cv-309 (N.D. Ga. Jan. 9, 2014) (awarding 25% of $3.5 million settlement in attorneys' fees in ERISA class action); *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 09-cv-792, 2012 WL 4856704, at *3 (N.D. Ala. Oct. 12, 2012) (awarding 26% of a $2.5 million settlement in attorneys' fees in ERISA class action); *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 07-cv-952 (N.D. Ga. Nov. 15, 2010) (awarding 27.5% attorneys' fees in a $5.5 million in ERISA class action); *Spivey v. Southern Co.*, No. 04-cv-1912 (N.D. Ga. Aug. 14, 2007) (approving 27.5% for attorneys'

fees in ERISA class matter); *In re Mirant Corp. ERISA Litig.*, No. 03-cv-1027 (N.D. Ga. Nov. 16, 2006) (attorney fee request of 27.5% of the common fund was approved by the court in an ERISA class action).[9] Moreover, one third of the recovery is considered standard in a contingency fee agreement. *See* Alba Conte, *Attorneys Fee Awards* § 2.07 at 48 (2d ed. 1995). *See also Wolff*, 2012 WL 5290155, at *4 (noting "the requested fee of 33% is at the market rate").

Here, the requested attorneys' fees represent less than 8% of the value of the $11 million that Defendant must pay in to the Trust Fund under the settlement and – as described above – the percentage would be even lower if all of the payments from Defendant were considered as well as the non-monetary protections provided in the Settlement Agreement. Thus, Class Counsel's requested fees are significantly below the 20% to 30% benchmark commonly awarded by courts in the Eleventh Circuit, including other ERISA class actions.

6. Whether the Fee is Fixed or Contingent

Courts have long recognized that there is some degree of risk that attorneys will receive no fee – or at least a fee that does not reflect their efforts – when representing a class, as this risk is inherent when undertaking any contingency fee action. *See, e.g.*, *Wolff*, 2012 WL 5290155, at *1. Accordingly, courts recognize contingent basis litigation as a factor which can support a fee request. *Id.* ("Class Counsel litigated this case on an "at risk" contingent fee basis. … It was Class

[9] These Orders are attached to the Joint Declaration as Exhibits 9A through 9E, respectively.

Counsel alone that bore the entire risk of this representation—a significant finding in support of the requested fee.").

The legal landscape of the "church plan" exemption is in flux, casting doubt on Class Counsel's ability to recover anything. This contingency basis litigation thus supports the requested attorneys' fee award. *See, e.g.*, *Wolff*, 2012 WL 5290155, at *5 ("Mindful of the need to attract counsel of this high caliber, courts have recognized the importance of providing incentives to experienced counsel who take on complex litigation cases on a contingent fee basis so those cases can be prosecuted both efficiently and effectively.") (collecting cases).

7. The Amount Involved and the Results Obtained

As this Court has recognized, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Camp*, 2015 WL 12746716, at *3. *See also Hensley*, 461 U.S. at 435 (recognizing that "the most critical factor is the degree of success obtained"). It cannot be disputed that the Settlement here is an excellent result, particularly in light of the risks and uncertainty in this case and the difficulties and delays that could arise.

The monetary portion of the Settlement will be funded by contributions to the Plan totaling eleven million dollars ($11,000,000) over a ten-year period. *See* Settlement § 8.1. The $11 million Settlement amount is in addition to the $88.9 million Defendants contributed to the Plan shortly after Plaintiff filed the

Complaint. As a result of this contribution, the Plan became fully funded under ERISA's standards and Plaintiff's "best case" recovery at trial was greatly reduced.

While Plaintiff had arguments for a greater level of minimum funding of up to $20 million based on different actuarial assumptions, even if he won the case, Plaintiff could not force Defendants to contribute more than ERISA requires. The $11 million that the Defendants will contribute to the Plan provides further protection for the Plan, along with the changes to the Plan document that were negotiated that update the actuarial assumptions that the Plan uses. This relief, in combination represents a significant recovery and, practically, the best that could be obtained at the current time. In sum, the Settlement is an excellent result.

8. The Experience, Reputation, and Ability of the Attorneys

The background, experience, and accomplishments of Class Counsel are discussed above in connection with the third *Johnson* factor, *supra*, as well as in the Final Approval Memorandum, and in Class Counsel's firm resumes attached as Exhibits 6 and 7 to the Joint Declaration. This factor supports approval of Class Counsel's fee request.

9. The "Undesirability" of the Case

The issues presented in this case rendered the case inherently risky, if not "undesirable," from the start. As set forth above, the numerous legal and factual risks assumed by Class Counsel in prosecuting this case on a contingent fee basis were substantial. Moreover, the "undesirability" of this Action is supported by the

fact that no other attorneys filed suits challenging Defendants' conduct in connection with the Plan. *See, e.g.*, *Wolff*, 2012 WL 5290155, at *3 (finding "the best objective test of the risk inherent in this litigation is the absence of any other attorneys willing to represent the class on a contingent fee basis.").

The fact that no other firm filed suit challenging the Plan's use of the "church plan" exemption is telling here, because in a number of other "church plan actions that Class Counsel have filed, another set of plaintiffs and their counsel also filed. For example, in *In re Mercy Health ERISA Litig.*, No. 16-cv-441 (S.D. Ohio), IKR and KTMC filed their complaint on March 30, 2016, and a month later, a substantially similar complaint was filed by another set of plaintiffs and counsel, which was then followed two months later by another substantially similar complaint filed by yet another plaintiff and her counsel.

In fact, numerous courts have recognized that "counsel should be rewarded for taking on a case from which other law firms shrunk." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011). This factor thus also supports Class Counsel's fee request. *See, e.g.*, *Waters*, 2012 WL 2923542, at *18 ("The expense and time involved in prosecuting such litigation on a contingent basis, with no guarantee or high likelihood of recovery, would make this case highly undesirable for many attorneys. Therefore, this factor, too, supports the requested amount of attorneys' fees.").

10. Awards in Similar Cases

"The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court's circuit." *Johnson*, 488 F.2d at 719. As noted above, actions involving ERISA "church plan" litigation are mostly novel and the law is still being developed. However, there have been a few settlements of analogous actions, and the attorneys' fee awards in those cases confirm the reasonableness of Class Counsel's request in this action as Class Counsel's request is either in line with or below those awards. *See, e.g.*, *Kemp-DeLisser v. Saint Francis Hospital and Medical Center et al*., No. 15-cv-1113 (D. Conn.) (awarding $800,000 in attorneys' fees); *Overall v. Ascension Health et al.*, No. 2:13-cv-11396 (E.D. Mich.) (awarding $2,000,000 in attorneys' fees); *Griffith et al v. Providence Health & Services et al.*, No. 14-cv-1720 (W.D. Wash.) (awarding $6,425,877 in attorneys' fees). Class Counsel's requested attorneys' fees are eminently reasonable.

IV. CLASS COUNSEL'S EXPENSES SHOULD BE REIMBURSED

As this Court has noted, counsel should be reimbursed for all expenses that are reasonably and necessarily incurred. *See, e.g.*, *Waters*, 2012 WL 2923542, at *19 ("Upon submission of adequate documentation, plaintiffs' attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefited the class.") (citation omitted). *See also* FED. R. CIV. P. 23(h). In prosecuting this Action, Class Counsel

incurred $18,070.86 in litigation-related expenses for which it respectfully seeks reimbursement. All of the expenses were reasonable and necessary to the prosecution of this matter, and represent standard litigation costs and expenses such as court filing fees, mediation and travel expenses, and expert costs.

These expenses are itemized in further detail in the Kindall Declaration and Ciolko Declaration, attached as Exhibits 2 and 3 respectively to the Joint Declaration. They are the types of expenses regularly reimbursed by courts. *See, e.g.*, *Briggins*, 3 F. Supp. 3d at 1297 (finding fees including "filing fees, witness fees, court reporter fees, and other miscellaneous expenses" were "reasonable and necessary, and should be approved."). Class Counsel respectfully submit that their request for reimbursement of expenses is reasonable and should be approved.

V. THE REQUESTED INCENTIVE FEE IS REASONABLE

The excellent result obtained in this Action could not have been achieved without Plaintiff's substantial and continuing efforts. From the time the initial complaint was filed through settlement, Plaintiff was kept abreast of the details of the litigation and offered his insight and opinions. Class Counsel respectfully submit that Plaintiff should be awarded $2,000 as an Incentive Fee in recognition of these efforts.

As this Court recently noted, "there is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful

class action." *Waters*, 2012 WL 29235424, at *14. "In fact, courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Id.* (citation omitted).

Throughout this action, Plaintiff – the sole plaintiff in the Action – has contributed greatly. At the outset of the action, Plaintiff provided documents and information to his counsel that helped inform the allegations in the Complaint. Thereafter, Plaintiff regularly communicated with his counsel, and also was involved in the settlement discussions. These are the types of actions that courts have recognized warrant an incentive award. *See, e.g.*, *Waters*, 2012 WL 2923542, at *14 (noting the plaintiff "bor[e] the burden of acting as the sole class representative" and "kept up with the progress of the case"). Importantly, per the Settlement, any Incentive Award will be paid separate and apart from the monetary portion of the Settlement, which means any award will not deplete the Settlement amount. *See* Settlement § 8.1.2. Moreover, the Incentive Fee is wholly at the Court's discretion and the approval of the Settlement is not contingent on Plaintiff receiving any payment. *See id.* at §§ 8.1.3, 11.4.

This amount is also in line with awards in other "church plan" actions. *See, e.g.*, *Kemp-DeLisser v. Saint Francis Hosp. & Med. Center*, No. 15-cv-1113, 2016 WL 6542707, at *18 (D. Conn. Nov. 3, 2016) (awarding $2,000 incentive award to

sole plaintiff). Additionally, this award is below other case contribution amounts awarded in ERISA class actions within this Circuit. *See, e.g.*, *Alford*, No. 11-cv-309 (N.D. Ga. Jan. 9, 2014) (awarding $5,000 case contribution award to named plaintiff); *In re Colonial Bancgroup, Inc. ERISA Litig.*, 2012 WL 4856704, at *3 (awarded $5,000 to each of the named plaintiffs); *In re Checking Acc't Overdraft Litig.*, 830 F. Supp. 2d at 1358 (awarding $5,000 to each class representative).

The amount sought for Plaintiff Tucker is modest given the dollar amount of the Settlement and the instrumental role Plaintiff played in helping to achieve that amount for the Class. Accordingly, an Incentive Fee of $2,000 for Plaintiff is entirely appropriate.

VI. CONCLUSION

Plaintiff respectfully requests the Court award attorneys' fees in the amount of $820,000, approve the reimbursement of expenses in the amount of $18,070.86, and approve an Incentive Fee in the amount of $2,000 to Plaintiff.

Dated: May 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, a copy of the foregoing was sent via the CM/ECF system to the following counsel of record:

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