UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DUDENHOEFFER, *et al.*,

Plaintiffs,

vs.

FIFTH THIRD BANCORP, *et al.*,

Defendants.

Civil Action No. 1:08-CV-538-SSB

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

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S.D. OHIO RULE 7.2(a)(3) TABLE OF CONTENTS AND SUMMARY

On March 26, 2016, this Court preliminarily approved the proposed Settlement in this Action for $6,000,000. In connection with Plaintiffs' request for final approval of the Settlement, Plaintiffs seek approval of the request for award of attorneys' fees, reimbursement of expenses, and Case Contribution Awards for the two Plaintiffs, John Dudenhoefer and Alireza Partovipanah.

Plaintiff John Dudenhoefer, a former employee of Fifth Third and participant in the Plan, filed his initial class action complaint on August 12, 2008 pursuant to §§ 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, against Fifth Third and certain other named and de facto fiduciaries of the Plan, who allegedly are and were responsible for the investment of the Plan's assets. Thereafter, a similar case was filed by Alireza Partovipanah in this Court on September 11, 2008. Following consolidation of the two actions, on September 21, 2009, Plaintiffs filed an amended Consolidated Class Action Complaint (Dkt. No. 54), the operative complaint in this Action.

On October 5, 2009, Defendants filed a motion to dismiss the Complaint with prejudice pursuant to FED. R. CIV. P. 12(b)(6) (Dkt. No 56). Plaintiffs filed an opposition to Defendants' motion to dismiss on November 5, 2009 (Dkt. No. 59) fully addressing each of Defendants' points. Thereafter, Defendants filed a reply in support of their motion to dismiss on December 7, 2009 (Dkt. No. 60). On November 24, 2010, the Court issued its Order granting Defendants' motion to dismiss with prejudice and denied Plaintiffs' request to amend the Complaint (Dkt. No. 81).

Following an unsuccessful telephonic mediation conference on February 2, 2011 before the Office of the Circuit Mediators for the Sixth Circuit, the Parties briefed the Action to the Sixth Circuit Court of Appeals. The Sixth Circuit held oral argument on June 7, 2012. On September 5, 2012, the Sixth Circuit issued a decision reversing and remanding the District Court's opinion regarding Defendants' motion to dismiss.

On December 14, 2012, Defendants filed a petition for a *writ of certiorari* to the Supreme Court regarding the Sixth Circuit's September 5, 2012 decision. However, the Parties continued to litigate this Action while Defendants' petition for *writ of certiorari* was pending.

As noted above, on December 14, 2012, Defendants petitioned for a *writ of certiorari* to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision. Plaintiffs filed an opposition to the petition for certiorari on February 22, 2013. The petition was granted by the Supreme Court on December 16, 2013. *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, 134 S. Ct. 822 (2013). Thereafter the Parties briefed the issue and oral argument was held on April 2, 2014. On June 25, 2014, the Supreme Court issued a unanimous opinion vacating and remanding the Sixth Circuit's decision. *Fifth Third Bancorp et al. v. Dudenhoeffer et al.*, 134 S. Ct. 2459 (2014). The case was thus remanded back to the Sixth Circuit Court of Appeals.

Once remanded to the Sixth Circuit, the Parties agreed to again engage in mediation under the auspices of the Sixth Circuit Mediation Office with one of the office's mediators, Robert Kaiser, presiding over the negotiations. The negotiations in this matter were arms'-length, intense, and complex with both sides strenuously arguing their respective positions. Following the mediation and subsequent discussions, the Parties eventually reached an agreement in principle to settle the Action on August 6, 2015.

The Settlement provides that the Defendants will pay $6,000,000 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation and also provides for structural changes to the Plan. The Settlement Agreement also sets forth the proposed Notice Plan to Settlement Class Members and provides for the payment of attorneys' fees and Plaintiffs' Case Contribution Awards, both of which are subject to Court approval.

Class Counsel respectfully requests that the Court approve the request for attorneys' fees and reimbursement of expenses. Class Counsel seeks $2,000,000 in attorneys' fees, which is one third of the Settlement amount. This amount would compensate for total billable hours of 6,604.6. Based on current billing rates, Class Counsel and Liaison Counsel's combined lodestar is $3,096,813.75. The fee sought here would thus result in a fractional multiplier of 0.65. Class Counsel also seeks reimbursement of expenses in the amount of $207,283.17.

It is axiomatic that counsel who obtain a benefit for a class are entitled to an award of attorneys' fees as compensation for their efforts. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (S.D. Ohio 2006). In assessing the reasonableness, courts in the Sixth Circuit "must consider and discuss the relevant factors that determine reasonableness" articulated by the Court in *Moulton v. United States Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). While in the Sixth Circuit, it is within the discretion of the District Court to determine which method to use in a

given case, as the court noted in the analogous *In re Broadwing, Inc. ERISA Litigation*, in the Southern District of Ohio, the preferred method is to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2006).

While different factors may be more crucial to a specific case, the first factor is widely considered as the more important. *See In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008) ("The primary factor in determining a reasonable fee is the result achieved on behalf of the class."). In the current case, the value of the benefit to the Settlement Class is substantial.

"In evaluating the reasonableness of a fee request, the court also must consider society's stake in rewarding attorneys who produce a common benefit for class members in order to maintain an incentive to others." *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. at 503. This is especially true in this context, as public policy militates in favor of encouraging skilled attorneys to bring ERISA suits such as this one. *See, e.g.*, *Rankin v. Rots*, No. 02-cv-71045, 2006 WL 1791377, at *2 (E.D. Mich. June 27, 2006) ("Protecting retirement funds of workers is of genuine public interest and, thus, supports a fully compensatory fee award."). This factor also strongly supports the reasonableness of the Fee Request.

The third factor assesses the risk Class Counsel took in a possible non-recovery after substantial efforts were made toward the case. It is well recognized that an attorney is entitled to an enhanced fee when the compensation is contingent than when it is fixed on a time or contractual basis. *See, e.g.*, *Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 382 (S.D. Ohio 2006) ("contingency serves to justify the high fees."). Class Counsel pursued this class action purely on a contingent fee basis for more than eight years, and advanced all costs incurred in the litigation during that time.

As noted above, in the Southern District of Ohio, the preferred method is to award attorneys' fees representing a reasonable percentage of the fund. However, one of the *Moulton* factors is the value of the services on an hourly basis. *See Moulton*, 581 F.3d at 352. This factor is essentially a lodestar "cross-check" of the reasonableness of the fee request. In assessing the lodestar crosscheck, a court must calculate the value of the attorneys' hours with the hourly rate charged for the respective attorneys. *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d at 767. Here, both calculations confirm the reasonableness of the Fee Award.

As noted above, this was a vigorously prosecuted case spanning over eight years which involved significant time, *inter alia*, researching and briefing issues before the Court, Sixth Circuit, and the Supreme Court, and consulting with experts, including Supreme Court specialists. The total number of hours billed by Class Counsel is more than 6,600 hours. Plaintiffs submit that the amount of time Class Counsel has expended is appropriate and reasonable in the light of scope and complexity of this case and the extensive litigation efforts required by this Action as discussed herein.

The second step in the lodestar cross-check analysis is to evaluate the reasonableness of the current billing rates charged by counsel. Here, Plaintiffs' Counsel charged a total of 6,604.60 hours at rates ranging from $150 to $825 an hour. *See* Joint Dec. ¶ 58 and Exhibits 5-7 of the Joint Dec. The total hours result in a lodestar of $3,096,813.75. The hourly rates charged by Class and Plaintiffs' Counsel in this case have been approved in many judicial settlement hearings in recent ERISA class action cases, including those approved in this Circuit.

Courts have recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross-check" for a percentage of recovery analysis, counsel may be entitled to a "multiplier" of their lodestar rate to compensate them for the risk assumed by them, the quality of their work, and the result achieved for the class. Because a 33% fee award of $2,000,000 is significantly less than Plaintiffs' Counsels' lodestar (in fact, it yields a "fractional multiplier" of 0.65, meaning that the requested fee represents a fraction of the actual time expenses by Class Counsel in this Action), the crosscheck confirms that Class Counsel's Fee Request of a 33% fee is more than reasonable under the circumstances of this particular case.

The next *Moulton* factor, the "complexity of the litigation" also supports the Fee Award. As discussed in greater detail in the Final Approval Memo, ERISA litigation in general and as this Action, in particular are both exceedingly complex. Numerous courts have recognized the complex nature of ERISA litigation. That this area of law is complex and in a rapid state of development is perhaps best confirmed by this case's litigation history. The magnitude and complexity of this action is borne out by the time and effort Class Counsel put into litigating the case for eight years. The complexity of the litigation in this Action further confirms the appropriateness of the Fee Award.

This factor, which "considers the professional skill and standing of counsel" strongly supports the Fee Award. *See In re Delphi Corp. Sec., Der., & "ERISA" Litig.*, 248 F.R.D. at 504. As described above and in the Final Approval Memo, as well as the Joint Declaration, Class

Based on the foregoing, Plaintiffs respectfully request the Court approve Class Counsel's request for an award of attorneys' fees in the amount of $2,000,000, approve the reimbursement of expenses in the amount of $207,283.17, and approve Case Contribution Awards in the amount of $10,000 each to the two Plaintiffs.

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Named Plaintiffs John Dudenhoefer and Alireza Partovipanah ("Plaintiffs"), participants in the Fifth Third Bancorp 401(k) Savings Plan,[1] respectfully submit this memorandum of law in support of Plaintiffs' motion for an award of attorneys' fees in the amount of $2,000,000, representing one-third of the cash portion of the Settlement Amount (the "Fee Request"), reimbursement of expenses in the amount of $207,283.17 and Case Contribution Awards to the Named Plaintiffs in the amount of $10,000 for each Named Plaintiff.

I. INTRODUCTION

On March 26, 2016, this Court preliminarily approved the proposed Settlement in this Action which involves the payment of $6,000,000 cash, plus structural relief to the Plan.[2] In connection with Plaintiffs' request for final approval of the Settlement, Plaintiffs seek approval of the request for attorneys' fees, reimbursement of expenses, and Case Contribution Awards for the two Plaintiffs, John Dudenhoefer and Alireza Partovipanah.[3]

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[1] The Plan was formerly known as the Fifth Third Bancorp Master Profit Savings Plan. All capitalized, undefined terms have the meanings ascribed to them in the Stipulation of Settlement (the "Settlement" or "Agreement"), which is attached as Exhibit 1 to the Joint Declaration of Mark K. Gyandoh and Thomas J. McKenna in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of Plan of Allocation and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for the Plaintiffs ("Joint Decl." or "Joint Declaration").

[2] *See* Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying Class for Settlement Purposes, Approving Form and Manner of Class Notice, Preliminarily Approving Plan of Allocation and Scheduling a Date for a Final Approval Hearing (the "Preliminary Approval Order") (Dkt. No. 132).

[3] Plaintiffs are concurrently filing their Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of Plan of Allocation ("Final Approval Memo."), incorporated pursuant to FED. R. CIV. P. 10(c), which demonstrates why the Settlement is an excellent result for the Class and should be granted final approval.

Class Counsel, experienced in ERISA-based[4] class actions, understood and accepted the risks inherent in this type of litigation, and obtained a meaningful recovery for the Settlement Class after more than eight years of hard-fought litigation. Despite formidable opposition advanced by Defendants, including briefing and argument all the way to the Supreme Court of the United States, Class Counsel was able to sufficiently develop and prosecute the Action, which enabled them to engage in a productive and well-informed settlement process under the auspices of the Sixth Circuit Court of Appeals Office of the Mediator, Robert Kaiser.

This case was fraught with risk especially given the Supreme Court's decision in *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). Although Plaintiffs and Class Counsel successfully argued for the Supreme Court to reject the *Moench*[5]/*Kuper*[6] "presumption of prudence" that had favored defendants for close to twenty years, *id.* at 2467, *Fifth Third* established new "considerations" for courts to analyze in "company stock" cases that have proved to be difficult for plaintiffs to overcome. *Id.* at 2472-73. Following *Fifth Third*, in recent months, several "company stock" cases, including two in the Sixth Circuit, have been dismissed for failure to meet *Fifth Third*'s "considerations."[7] Given the long history of this case and the uncertainty of outcome in light of the Supreme Court's pronouncements in *Fifth Third* and certain courts interpretations thereof, this case epitomizes the risk of ERISA litigation and underscores how this Settlement is an excellent result for the Settlement Class.

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[4] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[5] *Moench v. Robertson*, 62 F.3d 553, 571 (1995).

[6] *Kuper v. Iovenk*o, 66 F.3d 1447, 1457 (6th Cir. 1995).

[7] *See, e.g., Morrison et al., v. Citizens Republic Bancorp, Inc., et al.*, No. 2:11-cv-11709 (E.D. Mich) (May 29, 2016 Order dismissing action); *Saumer v. Cliffs Natural Resources, Inc., et al.*, No. 1:15-cv-954 (N.D. OH) (Apr. 15, 2016 Order dismissing action); *see also Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016) (Mar. 18, 2016 Order dismissing action).

In all, Class Counsel has spent more than 6,600 hours litigating this Action.[8] This time included the extensive review of 2,000,000 plus pages of documents produced in discovery, significant briefing at the District Court, Sixth Circuit, and Supreme Court, and preparation for oral argument at the Supreme Court, including consultations with appellate experts and participation in a moot court hearing at the Supreme Court Institute at Georgetown School of Law. As compensation for these substantial efforts, Class Counsel respectfully make a Fee Request in the amount of $2 million, representing one-third of the Settlement Amount, and reimbursement of Class Counsel's out-of-pocket expenses incurred in connection with the litigation of this Action in the amount of $207,283.17. Class Counsel submits that these requests are fully justified by the facts of this case and by the applicable law. *See, e.g.*, *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *16 (E.D. Mich. Dec. 20, 1996) (noting that fee awards are "typically . . . 20 to 50 percent of the fund"); *see also In re National City Corp. Sec., Derivative & ERISA Litig.*, No. 09-nc-70002 (N.D. Ohio Apr. 26, 2010) (Order and Final Judgment) (awarding attorneys" fees of 33% of the settlement fund).

Additionally, Named Plaintiffs themselves greatly contributed to the Settlement as well. From the outset, Named Plaintiffs actively participated in this litigation, expending significant amounts of their own time and insight to benefit the Settlement Class. They supplied relevant documentation; reviewed and approved pleadings; assisted with Class Counsel's investigation into the facts relating to the Action; and were involved in settlement discussions. Without them, there would be no recovery for the Plan and the Plan participants. In light of the willingness of the Named Plaintiffs to pursue this Action on behalf of the Settlement Class and assist with the

[8] It should also be noted as described in greater detail herein that the fee requested does not reflect the significant, ongoing role Class Counsel will undertake in the administration of the Settlement.

litigation, Class Counsel asks that the Court approve Case Contribution Awards in the amount of $10,000 to each of the two Named Plaintiffs.

As discussed in greater detail below, the Fee Request is also appropriate in light of the fact that the lodestar "cross-check" yields a "fractional" multiplier of 0.65. In other words, the requested fee represents a fraction of the actual amount of time expended by Class Counsel in this Action over its 8 years. Following widespread dissemination of the Settlement terms to Settlement Class Members by both direct mail (the Class Notice) and internet and newspaper publication (the Publication Notice), no objections to the Fee Request have been received to date.[9] *See* Joint Decl. ¶ 42.

For all of these reasons, and as demonstrated below, the requests for fees, expenses and case contribution awards should be approved.

II. SUMMARY OF LITIGATION EFFORTS

A. Investigation of Claims and Filing of Operative Complaint

Plaintiff John Dudenhoefer, a former employee of Fifth Third and participant in the Plan, filed his initial class action complaint on August 12, 2008 pursuant to §§ 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, against Fifth Third and certain other named and *de facto* fiduciaries of the Plan, who allegedly are and were responsible for the investment of the Plan's assets. Thereafter, a separate case was filed by Alireza Partovipanah in this Court on September 11, 2008, also seeking various relief under ERISA.

[9] As set forth in the Class Notice, the deadline for Settlement Class members to file objections is June 20, 2016. If any objections to the Fee Request are received after the date of this submission, Class Counsel will address them in a supplemental brief to be filed with the Court on or before July 1, 2016 as required by the Preliminary Approval Order.

By Order dated October 9, 2008, the Court consolidated the two ERISA cases. Dkt. No. 20. Thereafter there was motion practice over whether this case should be consolidated with the *Eshe* securities case and eventually on March 16, 2009 it was consolidated for discovery purposes only. Dkt. No. 36. On May 15, 2009, Plaintiffs filed a Consolidated Class Action Complaint for Violations of ERISA that alleged, *inter alia*, that Defendants and other Plan fiduciaries violated their statutory duties of prudence, care, and loyalty under Section 404(a) of ERISA, 29 U.S.C. § 1104(a), through their management, oversight and administration of the Plan's investment in Fifth Third Stock during the Class Period. Plaintiffs asserted causes of action for the losses suffered by the Plan as the result of the alleged breaches of fiduciary duty by Defendants. Dkt. Nos. 41 to 41-7. The Outside Director Defendants[10] filed a motion to dismiss on July 29, 2009. Dkt. Nos. 50 to 50-2. The Fifth Third Defendants[11] also filed their own motion to dismiss on July 29, 2009. Dkt. Nos. 52 to 52-15.

The Outside Director Defendants argued in their motion to dismiss that they were not ERISA fiduciaries for the Plan for purposes of the claims asserted in the lawsuit. In order to avoid lengthy and costly litigation on the question of ERISA fiduciary status of the Outside Director Defendants, Plaintiffs agreed to dismiss the claims against the Outside Director Defendants without prejudice in exchange for entering into an agreement with the Outside Director Defendants that tolled the running of any statute of limitations against the Outside Director Defendants. Thus, the Parties were able to preserve their respective rights and defenses pending further discovery that

[10] The Outside Directors are Darryl F. Allen, John F. Barrett, Ulysses L. Bridgeman, Allen M. Hill, James P. Hackett, Gary R. Heminger, Robert L. Koch, Mitchel D. Livingston, Ph.D., Hendrick G. Meijer, James E. Rogers, John J. Schiff, Jr., Dudley S. Taft, and Thomas W. Traylor.

[11] The Fifth Third Defendants are are Fifth Third Bancorp, Kevin T. Kabat, and the members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee, including Paul L. Reynolds, Nancy Phillips, Greg Carmichael, Robert Sullivan, Mary Tuuk, and other John Doe Defendants.

would likely shed light on whether or not the Outside Directors were fiduciaries of the Plan. The tolling agreement went into effect on September 21, 2009 and was first set to expire on September 21, 2011. The expiration date was extended several times per agreement of the Parties in accordance with the tolling agreement and now expires on September 21, 2016. Dkt. No. 122. Following the agreement to dismiss the Outside Director Defendants, on September 21, 2009, Plaintiffs filed an amended Consolidated Class Action Complaint (Dkt. No. 54) (the "Complaint") which did not name the Outside Directors as defendants, but otherwise pled similar allegations as the prior consolidated complaint. As discussed below, the Fifth Third Defendants re-filed their motion to dismiss the Complaint.

Before filing the initial complaints in this matter, Class Counsel consulted with a forensic accounting expert, reviewed Plan documents, analyzed pertinent cases, researched legal claims and reviewed voluminous public records, government filings, and financial information regarding the Company. The same scope of research was performed in filing Plaintiffs' 81 page, 287 paragraph Complaint. It is clear that Class Counsel conducted a thorough investigation into Plaintiffs' claims and allegations set forth in the Complaint. These efforts included, but were not limited to: (i) review of documents produced by Defendants, including Plan-related documents in response to Plaintiffs' request for such documents pursuant to ERISA § 104(b); (ii) review of publicly-available materials relating to the Company and the Plan; (iii) analysis of specific corporate transactions; and (iv) interviews of Plan participants.

The Complaint in this matter alleges four counts. Count I alleges that the Company, Defendant Kabat, Fifth Third's Chief Executive Officer ("CEO") and President during the Class Period, and members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee ("Plan Committee"), each of whom acted as a fiduciary with respect to the Plan, breached their

fiduciary duties under ERISA by failing to prudently and 1oyally manage the Plan's investment in Fifth Third stock. Count I primarily concerns the offering of imprudent Fifth Third Stock as one of the investment choices offered under the Plan. Count II alleges that the Company and Defendant Kabat -- who were responsible for the selection, appointment and monitoring of Plan Committee members -- breached their fiduciary duties by failing to properly monitor the performance of their fiduciary appointees. Count III alleges that all Defendants failed to avoid or ameliorate inherent conflicts of interest. Count IV alleges that all Defendants are liable for the breaches of their co-fiduciaries.

The gravamen of Plaintiffs' claims is that Defendants breached their fiduciary duties under ERISA by continuing to invest Plan assets in Fifth Third Stock, and maintaining the Plan's significant investments in Fifth Third Stock during the Class Period when it was imprudent to do so. In particular, in July 2007 and thereafter, Defendants failed to take any action to protect the Plan's assets from suffering the adverse effects resulting from Fifth Third's radical shift away from its historically conservative lending practices which impaired its loan portfolio.

B. Motion To Dismiss Briefing

This complex litigation was hotly contested by Defendants from the outset. On October 5, 2009, Defendants filed a motion to dismiss the Complaint with prejudice pursuant to FED. R. CIV. P. 12(b)(6) (Dkt. No. 56). Defendants asserted, inter alia, that the Complaint should be dismissed because: (1) Plaintiffs failed to state a claim that Defendants breached their duty to prudently and loyally manage the Plan's investment in Company stock; (2) Plaintiffs failed to state a claim that Defendants had breached their fiduciary duties by not providing complete and accurate information to the Plan participants; (3) Plaintiffs failed to state a claim that Defendants had a conflict of interest; and (4) Plaintiffs' duty to monitor and co-fiduciary liability claims failed as a matter of law.

Plaintiffs filed an opposition to Defendants' motion to dismiss on November 5, 2009 (Dkt. No. 59) fully addressing each of Defendants' points. Thereafter, Defendants filed a reply in support of their motion to dismiss on December 7, 2009 (Dkt. No. 60). The consolidated matter was transferred to the docket of Magistrate Judge J. Gregory Wehrman on May 24, 2010 (Dkt. No. 70).

After briefing on Defendants' motion to dismiss was complete, the Parties continued to submit notices of supplemental authority to the Court advising it of recently decided decisions that were relevant to Defendants' motion to dismiss. See Dkt. Nos. 61-72, 75-76, 80. On November 24, 2010, the Court issued its Order granting Defendants' motion to dismiss with prejudice and denied Plaintiffs' request to amend the Complaint (Dkt. No. 81). This Court's decision granting Defendants' motion to dismiss was based on application of the now-abrogated Moench/Kuper "presumption of prudence." Judgment was entered on November 24, 2010 (Dkt. No. 82), and Plaintiffs timely filed their Notice of Appeal to the Sixth Circuit Court of Appeals on December 22, 2010 (Dkt. No. 83).

C. Proceedings in the Sixth Circuit

The Parties attended a telephonic mediation conference on February 2, 2011 before the Office of the Circuit Mediators for the Sixth Circuit, but it was to no avail. The Parties were simply too far apart in their positions. On July 7, 2011, Plaintiffs filed their opening brief. On September 21, 2011, Defendants filed their opposition brief. Then, on October 11, 2011, Plaintiffs filed their reply brief. While the matter was pending before the Sixth Circuit, the Parties continued to submit applicable supplemental authority. The Sixth Circuit held oral argument on June 7, 2012. On September 5, 2012, the Sixth Circuit issued a decision reversing and remanding this Court's opinion. *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012). Specifically, the Sixth Circuit held as follows:

> We hold that Count I of the Amended Complaint — including the allegations that Defendants breached their fiduciary duties (1) by continuing to offer Fifth Third Stock as a Plan investment option and failing to divest the Plan of the Stock and (2) by providing false and misleading information and failing to provide complete and accurate information about the Stock to Plan participants — states a claim upon which relief may be granted. The allegations of Count I easily satisfy the requirements that there be a plausible allegation that a fiduciary breached its duty to the plan and a causal connection between that breach and the harm suffered by the plan.

Id. at 423. Further, because the Sixth Circuit found that Plaintiffs' remaining claims in Counts II through IV depended upon the fiduciary breach allegations of Count I that were plausibly alleged, the Sixth Circuit returned those counts to this Court for further consideration in accordance with the opinion. *Id.* at 424. On September 19, 2012, Defendants petitioned the Sixth Circuit for a rehearing and rehearing *en banc*, which was denied October 12, 2012. A mandate issued on October 23, 2012. Thereafter, on December 14, 2012, Defendants petitioned for a *writ of certiorari* to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision.

D. District Court Proceedings Post-Sixth Circuit Remand

The Parties continued to litigate this Action while Defendants' petition for *writ of certiorari* was pending. In December 2012, Plaintiffs retained a damages expert to calculate damages caused to the Plan from the start of the Class Period to date, to aid in the litigation as well as any potential settlement discussions. A few months later, Plaintiffs served discovery requests and interrogatories on Defendants on March 19, 2013. Defendants responded by filing a motion for protective order on April 18, 2013 and seeking a stay of the Action pending resolution of Defendants' petition for *writ of certiorari*. Dkt. No. 115. On April 23, 2013, this Court held a status conference regarding whether to stay this Action in light of the pending *writ of certiorari*. At the conclusion of the status conference, this Court stayed the Action for thirty

(30) days and set a status conference for June 4, 2013 to determine whether the stay would continue or be dissolved. Dkt. No. 116.

Following the June 4th status conference, this Court lifted the stay for the limited purpose of granting Plaintiffs' request that Defendants produce to Plaintiffs the hard drive/archive of documents produced in the *Eshe* companion securities action in lieu of responding to Plaintiffs' discovery requests. Dkt. No. 119. Fifth Third had produced almost 2,000,000 pages of documents in the securities action. Per the Court's order, Fifth Third then produced these documents to Plaintiffs. Over the ensuing months, a dedicated small team of attorneys reviewed and analyzed these documents due to their potential impact on the appeal and on the merits. Plaintiffs also had to be prepared to recommence active litigation if the Defendants' petition for certiorari was denied by the Supreme Court and the Action was returned to the District Court.

E. Proceedings Before the Supreme Court

As noted above, on December 14, 2012, Defendants petitioned for a *writ of certiorari* to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision. Plaintiffs consulted with appellate experts experienced in Supreme Court practice and engaged one to help with the drafting and filing of an opposition to the petition for certiorari. The opposition was filed on February 22, 2013.

On March 25, 2013, the Supreme Court invited the Solicitor General to file a brief in order to express the views of the United States as to whether certiorari should be granted. Class Counsel consequently met with John Bash at the Solicitor General office in Washington D.C. as well as representatives from the Department of Labor for a conference concerning the merits of this case on May 15, 2013. Before the meeting in DC, counsel spent many hours preparing for, and corresponding with, the Office of the Solicitor General. After the meeting, Class Counsel

sent several follow up correspondence clarifying questions the government had proposed so they could formulate their response brief on the pending petition for a *writ of certiorari*. Class Counsel continued to correspond with the Department of Labor and took part in several conference calls with them, as they followed this case.

The petition was granted by the Supreme Court on December 16, 2013. *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, 134 S. Ct. 822 (2013).

Defending Plaintiffs' case in front of the Supreme Court was a formidable challenge. Defendants filed their opening brief on the merits on January 27, 2014, which was followed by the filing of several *amicus curiae* brief in support of Defendants' position. Plaintiffs consulted with experts in preparing their response to Defendants' opening brief and retained another appellate expert with experience in drafting merits briefs and arguing before the Court, Professor Ronald Mann of Columbia Law School. Professor Mann, like Class Counsel, agreed to accept the assignment on a contingent fee basis.[12] The Plaintiffs' opening merits brief rebutted what Defendants had argued and also addressed points raised in several of the *amicus curiae* briefs that had been filed on behalf of Defendants. Plaintiffs filed their opposition brief on February 26, 2014.

After numerous telephone and written consultations and an in-person meeting in Washington, D.C., Plaintiffs also secured the assistance of the Department of Labor which, through the Solicitor General of the United States, submitted an *amicus curiae* brief generally supporting Plaintiffs' position. In addition, Plaintiffs also were able to interest a group of law professors, the AFL-CIO and AARP in the issues being presented to the Court. These groups

[12] Professor Mann incurred approximately 200 billable hours which is not being submitted as part of Plaintiffs' total lodestar amount.

each prepared and filed their own *amicus curiae* briefs raising different points in favor of Plaintiffs' cause.

Additionally, on March 28, 2014, Class Counsel spent significant time preparing for and participating in a moot court hearing at the Supreme Court Institute at Georgetown School of Law in connection with preparing for the pending Supreme Court oral argument. Hours of time were spent to prepare, confer and present the arguments to the panel, and multiple resources were used for this meaningful task on behalf of respondents in connection with the pending Supreme Court argument. Class Counsel believes this was a necessary piece of achieving the successful outcome before the Supreme Court.

The Supreme Court held oral argument on April 2, 2014. On June 25, 2014, the Supreme Court issued a unanimous opinion repudiating the "presumption of prudence" and vacating and remanding the Sixth Circuit's decision. *Fifth Third Bancorp et al. v. Dudenhoeffer et al.*, 134 S. Ct. 2459 (2014). As noted above, Plaintiffs achieved a key victory: the Supreme Court held that defendant-fiduciaries in ERISA breach of fiduciary duty actions such as the instant matter are not entitled to a "presumption of prudence" but rather that "ESOP[13] fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are." 134 S. Ct. at 2467. *See also id.* at 2468 (rejecting claim that "the content of ERISA's duty of prudence varies" depending on the type of ERISA plan); *id.* at 2471 ("the law does not create a special presumption of prudence for ESOP fiduciaries"). The Supreme Court's rejection of the fiduciary-friendly "presumption of prudence" abrogated twenty (20) years of defense-friendly ERISA jurisprudence. *See Dudenhoeffer v. Fifth Third Bancorp*, 757 F. Supp. 2d 753, 759-63 (S.D. Ohio 2010). Some

[13] Employee Stock Ownership Plan.

would argue this victory is not complete as the Supreme Court raised new considerations for plaintiffs to handle in cases such as this, as discussed further below in *infra* Section III.A.

F. Mediation

Once remanded to the Sixth Circuit, the Parties engaged again in mediation under the auspices of the Sixth Circuit Mediation Office with one of the office's mediators, Robert Kaiser, presiding over the negotiations. The mediation before Mr. Kaiser was vigorously contested, extensive, repeated, and involved the exchange of information and data. The Parties each drafted mediation briefs setting forth their position on the law, facts, and settlement possibilities. An in-person mediation session was held before Mr. Kaiser on February 3, 2015. At the end of the in-person session, some progress had been made towards achieving a settlement, but no settlement was reached. Thereafter, the Parties participated in multiple continued telephonic negotiations under the guidance of Mr. Kaiser until an agreement in principle was finally reached on August 6, 2015. The Parties then drafted a Memorandum of Understanding ("MOU") that set forth the cash and Non-Monetary Relief, and executed it on November 16, 2015. Thereafter, the Parties negotiated the actual Settlement Agreement and all its necessary Exhibits, and executed the same on January 15, 2016.

In short, the negotiations in this matter were arms'-length, intense, and complex with both sides strenuously arguing their respective positions.

G. The Proposed Settlement

The Settlement provides that Defendants will pay $6,000,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation. Additionally, the Parties agreed to the Non-Monetary Relief, which are a series of structural changes to the Plan,

which will provide significant benefits to the Plan participants. Specifically, the Non-Monetary Relief includes:

- The freezing of the Fifth Third Stock Fund, including prohibiting new Plan Participants from investing in the Fifth Third Stock Fund;
- Continuing the current practice of matching contributions in cash, rather than in Fifth Third Stock, for a period of at least eight (8) years;
- The dissemination of an annual notice to Plan Participants who currently have more than 20% of their account(s) invested in Fifth Third regarding the benefits of asset allocation and diversification; and
- Improved fiduciary training.

See Agreement (Docket No. 131-3), at § 7.4. Plaintiffs have retained an expert, Krishna Ramaswamy, a Professor of Finance at The Wharton School of The University of Pennsylvania, who will provide a valuation of the structural relief obtained as part of the Settlement. Professor Ramaswamy's report will be submitted to the Court on July 1, 2016 in connection with Plaintiffs' supplemental brief in support of the Settlement. *See* Preliminary Approval Order at ¶ 11. In exchange for the benefits obtained, Plaintiffs and the Plan will dismiss all claims in the Complaint as set forth more fully in the Agreement.

III. THE REQUESTED ATTORNEYS' FEE AWARD IS REASONABLE

Class Counsel respectfully requests that the Court approve the request for attorneys' fees and reimbursement for expenses. Class Counsel seeks $2 million in attorneys' fees, which is one-third of the Settlement Amount. This amount would compensate for total billable hours of 6,604.60. *See* Joint Decl. ¶ 58.[14] Based on current billing rates, Class Counsel's combined

[14] These hours do not include any of the time Class Counsel have spent preparing this fee application or finalizing the motion for final approval of the Settlement, and will necessarily not include the time spent preparing for the July 11, 2016 Final Approval Hearing, or any of the post-approval work with the Claims Administrator and class members that will be required to ensure that the Settlement is fully effectuated

lodestar is $3,096,813.75. *Id.* The fee sought here would thus result in a fractional multiplier of 0.65 Class Counsel also seek reimbursement of litigation-related expenses of $207,283.17 These expenses were primarily incurred in retaining various experts utilized in this Action, e-discovery, mediation expenses, computerized legal research, copy charges, and travel costs incurred for out-of-town travel, and postal charges, messenger and overnight delivery services, and in connection with the District Court, appellate and Supreme Court litigation of this Action. *See* Joint Decl. ¶ 65.

A. Legal Standard Governing Award of Attorneys' Fees

It is axiomatic that counsel who obtain a benefit for a class are entitled to an award of attorneys' fees as compensation for their efforts. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (S.D. Ohio 2006) ("The Court must ensure that class counsel are fairly compensated for the amount of work done and the results achieved.") (citing *Rawlings v. Prudential–Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). "In the Sixth Circuit, district courts have the discretion 'to determine the appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and the particular circumstances of the actual cases pending before the Court' using either the percentage or lodestar approach." *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) (citing *Bowling v. Pfizer, Inc*., 102 F.3d 777, 779 (6th Cir. 1996)). *See also Ranney v. Am. Airlines*, No. 08-cv-137, 2016 WL 471220, at *1 (S.D. Ohio Feb. 8, 2016) (same).

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pursuant to the terms of the Settlement Agreement and the Court-approved Plan of Allocation. Class Counsel estimates that these additional efforts will require at least dozens of hours of additional attorney and paralegal time. Additionally, as noted previously, the reported hours and lodestar do not include approximately 200 billable hours attributable to Professor Ronald Mann, who agreed to serve on a contingent fee basis as counsel of record for Plaintiffs before the Supreme Court.

Specifically, the Sixth Circuit "permits calculation of attorneys' fees under either the lodestar method (multiplying the number of hours spent on the litigation by certain attorneys by their hourly rate) or the percentage of the fund method (counsel receive a set percentage of the total settlement fund)." *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2013 WL 6511860, at *8 (E.D. Mich. Dec. 12, 2013). *See also Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 788-89 (N.D. Ohio 2010) (noting under the "percentage of the fund" method, the court simply allocates a specific percentage of the overall settlement, while under the lodestar approach, the court "multiplies the proven number of hours reasonably expended on the litigation by a reasonable hourly rate" and subsequently adjusts this figure based on case-specific factors).

District courts have broad discretion in determining the "appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before [it]." *Rawlings*, 9 F.3d at 516. Under either approach, the "core inquiry is whether an award is reasonable under the circumstances." *Id.* at 517. *See also Griffin*, 2013 WL 6511860, at *7. "An award of attorneys' fees in common fund cases need only be 'reasonable under the circumstances.'" (quoting *Rawlings*, 9 F.3d at 516).

In assessing the reasonableness, courts in the Sixth Circuit "must consider and discuss the relevant factors that determine reasonableness, which include: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). Each of these factors should be assessed under the case's specific circumstances. "There is no formula for weighing these

factors. Rather, the Court should be mindful that each case presents a unique set of circumstances and arrives at a unique settlement, and thus different factors could predominate depending on the case." *Ranney*, 2016 WL 471220, at *2 (citing *Rawlings*, 9 F.3d at 516).

While in the Sixth Circuit, it is within the discretion of the District Court to determine which method to use in a given case, as the court noted in the analogous *In re Broadwing, Inc. ERISA Litigation*, in the Southern District of Ohio, the preferred method is to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2006). *See also Lonardo*, 706 F. Supp. 2d at 789 ("[i]n general, however, percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share (*i.e.,* a 'common fund')."") (quoting *Rawlings*, 9 F.3d at 516); *In re Delphi Corp Sec., Derivative and "ERISA" Litig.*., 248 F.R.D. at 497 (E. D. Mich. 2008) (noting "the Sixth Circuit has observed a trend towards adoption of a percentage of the fund method in [common fund] cases.") (citing *Rawlings*, 9 F.3d at 515). The Manual for Complex Litigation also endorses the use of the percentage of the fund method in awarding attorneys' fees in common fund cases. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) ("*Manual*") 14.21 at 187 (2004) (commenting that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common fund cases"). Practically every Court of Appeals that has addressed the issue has approved the percentage-of-the-fund method.[15]

[15] *See In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 47-49 (2d Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d at 515-16; *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993).

That the percentage method should be utilized in this Action is further confirmed by the nature of this ERISA case. The *Broadwing* court specifically noted that the percentage of the fund is the "preferred method in this ERISA case, as it most closely approximates how lawyers are paid in the private market and incentivizes lawyers to maximize the Class recovery, but in an efficient manner." *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 381. Accordingly, Class Counsel respectfully submit that the Court should award attorneys' fees based on a percentage of the common fund obtained for the Settlement Class. As the analysis below demonstrates, the Fee Request is reasonable and appropriate and should be approved by the Court in full.

B. The *Moulton* Factors Confirm the Reasonableness of the Fee Request

1. The Value of the Benefit Rendered to the Settlement Class

While different factors may be more crucial to a specific case, the first factor is widely considered as the more important. *See In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008) ("The primary factor in determining a reasonable fee is the result achieved on behalf of the class."). In the current case, the value of the benefit to the Settlement Class is substantial.

Plaintiffs have entered into this Settlement with a full and comprehensive understanding of the strengths and weaknesses of their claims, which are based on Class Counsel's extensive investigation during the prosecution of this Action as well as their unique experience with these types of claims. Before filing the Complaint, and afterward, Class Counsel analyzed the potential damages and consulted with, among other experts, damages experts. Plaintiffs calculated potential damages to range anywhere from mid-seven figures to eight figures. But proving damages presents a challenge in these types of cases.

ERISA requires the breaching fiduciaries to make good to the plan the difference between what the plan earned and what it would have earned but for the breaches of fiduciary duty. *See, e.g.*, *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) ("the measure of damages is the amount that affected accounts would have earned if prudently invested") (citing *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985)); *see also Horn v. McQueen*, 215 F. Supp. 2d 867, 878 n.11 (W.D. Ky. 2002) ("*Donovan v. Bierwirth* holds that the measure of loss under ERISA section 409 requires a comparison of what the Plan actually earned on the ... investment with what the Plan would have earned had the funds been available for other Plan purposes.") (citation omitted). In general, the calculation of "ERISA" damages is "complex, time-consuming and expensive." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004). A final, actual calculation of damages would have to wait until the full discovery process and trial was concluded, where the judge, as fact-finder, would determine the relevant time period when the Company Stock Fund was "imprudent" for this Plan, a factually intensive question in and of itself. A factual finding that the Stock was imprudent for a short amount of time would lead to a short "damages period" which in turn would result in less recoverable damages for Plaintiffs. And, for purposes of trial, an expert must create a reliable and legally admissible damages model, which he or she must then test and be able to effectively present to the court. This intricate and complex process creates the possibility of a model being ruled inadmissible. Defendants would also present their own experts to counter Plaintiffs' experts. Thus, proving damages is fraught with risks.

The two aspects of the Settlement are the monetary portion, which is $6,000,000, and the Non-Monetary Relief, which are a series of structural changes to the Plan. First, the $6 million Settlement provides valuable, certain, and immediate relief to all applicable Plan participants. Once approved, the Settlement Fund will be allocated to each Class Member's account without

the need for any further action to be taken by the Class Members to avail themselves of the relief. Additionally, the Non-Monetary Relief negotiated by Class Counsel will provide significant additional value for the Settlement Class. *See* Section II.G, *supra*; *see also* Settlement Agreement at § 7.4 (providing for, among other changes, the freezing of the Fifth Third Stock Fund and prohibiting new Plan Participants from investing in the Fifth Third Stock Fund; continuing the current practice of matching contributions in cash, rather than in Fifth Third Stock, for a period of at least eight (8) years; and the dissemination of an annual notice to Plan Participants who currently have more than 20% of their account(s) invested in Fifth Third regarding the benefits of asset allocation and diversification). As noted *supra*, Plaintiffs' retained expert, Prof. Krishna Ramaswamy is currently analyzing the value of the structural changes. Plaintiffs will be in position to discuss his results in their Supplemental filing in support of the Settlement that will be filed on July 1, 2016.

The value provided to the Settlement Class in this Action cannot be understated, especially in this complex area of jurisprudence. As the *Griffin* court reasoned in that analogous action, "[t]he $3 million settlement appears to be an excellent result given the uncertainties of the Plaintiffs' chances of ultimately prevailing on the issue of liability in this very uncertain area of ERISA and also given the challenges they face in establishing the operative date of imprudence." *Griffin*, 2013 WL 6511860, at *8. In light of the significant monetary and structural benefits that the Settlement provides to the Settlement Class, Class Counsel respectfully submits that this factor is satisfied.

2. Society's Interest in Rewarding Attorneys

"In evaluating the reasonableness of a fee request, the court also must consider society's stake in rewarding attorneys who produce a common benefit for class members in order to

maintain an incentive to others." *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. at 503. As courts have reasoned, "[e]ncouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this benefits society." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003). *See also In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1042-43 (S.D. Ohio 2001) ("Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.").

This is especially true in this context, as public policy militates in favor of encouraging specifically skilled attorneys to bring unique and complex ERISA suits such as this one. *See, e.g.*, *Rankin v. Rots*, No. 02-cv-71045, 2006 WL 1791377, at *2 (E.D. Mich. June 27, 2006) ("Protecting retirement funds of workers is of genuine public interest and, thus, supports a fully compensatory fee award."). *See also id.* ("[T]here is a public interest in ensuring that attorneys willing to represent employees in ERISA litigation are adequately paid so that they and others like them will continue to take on such cases."). Private enforcement of ERISA is specifically encouraged in the statute itself. *See, e.g.*, 29 U.S.C. § 1132(a) (specifically empowering participants and beneficiaries to bring civil actions to redress violations and/or enforce provisions of ERISA). By providing incentive for adroit counsel to file and litigate these actions, the common fund doctrine has the desirable effect of promoting compliance with ERISA, which, in turn, protects employees and plan participants and encourages individual retirement saving, a valuable public goal. As the court in *Rankin*, reasoned, "[a]bsent adequate compensation, counsel will not be willing to undertake the risk of common fund class action litigation." *Rankin*, 2006 WL 1791377, at *2. Accordingly, the court concluded "[c]ounsel who create a common fund for the benefit of a class are entitled to a payment of fees and expenses from the

fund relative to the benefit achieved." *Id.* This factor also strongly supports the reasonableness of the Fee Request.

3. Services Provided on a Contingent Fee Basis

The third factor assesses the risk Class Counsel took in a possible non-recovery after substantial efforts were made toward the case. It is well recognized that an attorney is entitled to an enhanced fee when the compensation is contingent than when it is fixed on a time or contractual basis. *See, e.g.*, *Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 382 (S.D. Ohio 2006) ("contingency serves to justify the high fees."); *Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 262 F. Supp. 2d 804, 814 (W.D. Mich. 2003) ("contingency serves to justify the high fees").

Class Counsel pursued this class action purely on a contingent fee basis for more than eight years, and advanced all costs incurred in the litigation during that time. Throughout the Action, Plaintiffs and Class Counsel faced the considerable risk of losing. As discussed above, while the Court granted Defendants' motion to dismiss the complaint, and while Plaintiffs were successful in their appeal to the Sixth Circuit Court of Appeals, Defendants then petitioned to the Supreme Court. At every step of the litigation there was a chance of dismissal, yet Class Counsel undertook the litigation on a wholly contingent fee basis. The contingent nature of the case thus supports the Fee Request. *See, e.g.*, *Griffin*, 2013 WL 6511860, at *8 ("The case was taken on a contingent fee basis, a significant risk for counsel who would be standing with nothing to show for their efforts had this Court's dismissal been upheld on appeal."); *In re Delphi Corp. Sec., Der. & "ERISA" Litig.*, 248 F.R.D. at 503 (reasoning fact that counsel "have prosecuted this action entirely on a contingent basis, knowing that it possibly could last for four or five years, require the expenditure of thousands of attorney hours and millions of dollars in

expenses and ultimately result in a loss at summary judgment or at trial" supported attorneys' fee award).

4. Value of Services on Hourly Basis

As noted above, in the Southern District of Ohio, the preferred method is to award attorneys' fees representing a reasonable percentage of the fund. However, one of the *Moulton* factors is the value of the services on an hourly basis. *See Moulton*, 581 F.3d at 352. This factor is essentially a lodestar "cross-check" of the reasonableness of the fee request. As the *In re Broadwing* court noted, "[i]n this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award." *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 381 (citing *Bowling v. Pfizer*, 102 F.3d at 777, 780 (6th Cir. 1996)). In assessing the lodestar crosscheck, a court must calculate the value of the attorneys' hours with the hourly rate charged for the respective attorneys. *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d at 767. Here, both calculations confirm the reasonableness of the Fee Award.

a. The number of hours is reasonable

As noted above, this was a vigorously prosecuted case spanning over eight years which involved significant time, *inter alia*, researching and briefing issues before the Court, Sixth Circuit, and the Supreme Court, and consulting with experts, including Supreme Court specialists. In addition, Class Counsel conducted formal and informal discovery, including reviewing a significant amount of the 2,000,000 pages of documents produced in discovery, as well as Plan-specific documents produced by Defendants during the mediation. As set forth above, the total number of hours billed by Class Counsel is more than 6,600 hours.

When engaging in the lodestar analysis, "[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec.*

Litig., 396 F.3d 294, 306-07 (3d Cir. 2005);[16] *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 at 342 (3rd Cir. 1998) (affirming district court's decision not to ask for detailed time summaries). Here, Plaintiffs submit that the amount of time Class Counsel have expended is appropriate and reasonable in the light of scope and complexity of this case and the extensive litigation efforts required by this Action as discussed herein.

b. Class and Plaintiffs' Counsel's billing rates are reasonable

The second step in the lodestar cross-check analysis is to evaluate the reasonableness of the current billing rates charged by counsel. Here, Class and Plaintiffs' Counsel charged a total of 6,604.60 hours at rates ranging from $150 to $825 per hour. *See* Joint Dec. ¶ 58 and Exhibits 5-7 to the Joint Decl. The lower end represents rates charged by support staff such as paralegals, while the higher end represents rates charged by the senior and managing partners. *Id*. The total hours result in a lodestar of $3,096,813.75.

The hourly rates charged by Class and Plaintiffs' Counsel in this case have been approved in many judicial settlement hearings in analogous ERISA class action cases, including those approved in this Circuit. *See*, *e.g.*, *In re Delphi Corp. Securities, Derivative & ERISA Litig.*, No. 05-cv-1725 (E.D. Mich., May 12, 2010) (Dkt. No. 493 at 2); *In re National City Corp. ERISA Litig.*, No. 08-cv-70000 (N.D. Ohio Nov. 30, 2010) (Dkt. No. 137 at 2); *In re Lear ERISA Litig.*, No. 06-cv-11735 (E.D. Mich., June 24, 2009) (Dkt. No. 103 at 1-2); *In re CMS Energy ERISA Litig.*, No. 02-cv-72834 (E.D. Mich., June 27, 2006). The rates charged by counsel who specialize in large-scale, complex ERISA cases are relevant "because ERISA cases involve a national standard, and . . . ERISA cases are often considered to be complex, ERISA plaintiff

[16] Nevertheless, Class Counsel has of course kept contemporaneous billing records throughout this litigation.

cases are often undesirable, and Plaintiff's attorneys possess extensive experience in ERISA law." *Mogck v. Unum Life Ins Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003). Furthermore, the rates charged by Class and Plaintiffs' Counsel comport with the rates charged by law firms in the cities of Philadelphia, New York, and Cincinnati – the cities in which Plaintiffs' Counsel are based.

A breakdown of each firm's fees is contained in Exhibits 5-7 attached to the Joint Declaration submitted concurrently herewith. On a firm-by-firm basis, the hours expended and fees incurred are as follows:

Firm	***Hours***	***Lodestar***
Kessler Topaz Meltzer & Check, LLP	5,074.10	$2,067,342.50
Gainey McKenna & Egleston	1,423	$992,700.00
Strauss Troy	107.5	$36,771.25
TOTAL	**6,604.60**	**$3,096,813.75**

c. The "fractional" multiplier also confirms the reasonableness of the Fee Request

Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross-check" for a percentage of recovery analysis, counsel may be entitled to a "multiplier" of their lodestar rate to compensate them for the risk assumed by them, the quality of their work, and the result achieved for the class. *See, e.g.*, *Griffin*, 2013 WL 6511860, at *8 ("The requested percentage of the fund award thus represents a more than reasonable multiplier of the lodestar (0.864), actually resulting in a discount of Counsel's normal fees. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (recognizing numerous ERISA cases awarded fees yielding multipliers well above 1%).").

Because a 33% fee award of $2,000,000 is significantly less than Plaintiffs' Counsels' lodestar (in fact, it yields a "fractional multiplier" of 0.65, meaning that the requested fee represents a fraction of the actual time expenses by Class Counsel in this Action), the crosscheck confirms that Class Counsel's Fee Request of a 33% fee is more than reasonable under the circumstances of this particular case.[17]

This same situation was recognized as supporting the requested fee in the analogous *Griffin* action. There, the court reasoned, "[c]ross checking this [requested fee] amount using the lodestar method in this case also demonstrates that the fee request falls within the range of reasonableness. Counsel spent nearly 1,500 hours prosecuting this case and their combined lodestar is approximately $1,042,188.90. The requested percentage of the fund award thus represents a more than reasonable multiplier of the lodestar (0.864), actually resulting in a discount of Counsel's normal fees." *See, e.g.*, *Griffin*, 2013 WL 6511860, at *8. Multipliers well above that the fractional multiplier Plaintiffs' Counsel request here are routinely granted. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 381 (noting the multiplier of between approximately 2.0 and 5.0 that existed in the fee awards in other cases in the district "further confirm[ed] the reasonableness" of the fees requested). Indeed the *Griffin* case noted that numerous ERISA cases "award fees yielding multipliers well above 1%." *Griffin*, 2013 WL 6511860, at *8 (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (collecting cases)). The lodestar cross-check thus further underscores the reasonableness of the Fee Request.

[17] Apologizing for the repetition, Plaintiffs again note that the hours submitted as part of their lodestar do not include the time which will be spent administering and monitoring the Settlement going forward, nor do they include the significant hours spent by Professor Mann as noted above. Inclusion of these hours would further decrease the multiplier.

5. The Complexity of the Litigation

The next *Moulton* factor, the "complexity of the litigation" also supports the Fee Award. As discussed in greater detail in the Final Approval Memo, ERISA litigation in general and as this Action, in particular are both exceedingly complex. Numerous courts have recognized the inherently complex nature of ERISA litigation. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 382 ("An ERISA case involves highly-specialized and complex areas of law. The type of claims brought here, breaches of duty by the Plan's fiduciaries, are based on rapidly evolving legal theories."); *Griffin*, 2013 WL 6511860, at *8 ("The complexity of this ERISA litigation cannot be questioned"). *See also Smith v. Krispy Kreme Doughnut Corp.*, No. 05-cv-00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("ERISA law is highly complex and quickly-evolving area of the law."); *In re Sprint Crop. ERISA Litig.*, 443 F. Supp. 2d 1249, 1270 (D. Kan. 2006) ("The applicable law is complex, unsettled, and in a rapid state of development"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456, 459 n.13 (S.D.N.Y. 2004) (noting ERISA jurisprudence is "a rapidly developing, and somewhat esoteric, area of law.").

That this area of law is complex and in a rapid state of development is perhaps best confirmed by this case's own litigation history. Class Counsel dedicated significant efforts to this case since its inception in 2008. The duration of the case speaks to the time and labor required of counsel, as approximately 8 years have passed from the filing of the initial complaint to the scheduled Fairness Hearing on July 11, 2016. The litigation, including through the appeal to the Sixth Circuit and the Supreme Court, has been complex and contested. This journey included interactions with the Department of Labor and the Solicitor General, mock argument, numerous experts, and lengthy mediation at the Sixth Circuit following remand. By virtue of the

appeal to the Supreme Court and the resulting decision, the entire landscape of ERISA breach of fiduciary duty jurisprudence changed. Specifically, the Supreme Court's decision essentially rewrote the law that had existed for the last twenty years while leaving it to the lower courts to chart new waters in interpreting and applying the decision. 134 S. Ct. at 2473.

Accordingly, even for counsel experienced in these matters, such as Class Counsel, ERISA litigation presents a labyrinth of issues and this Action is perhaps the paradigm of that truism. This Action hinged on numerous complex, legal, and factual issues under ERISA which require comprehensive evidentiary support and testimony. *See also* Final Approval Memo Section II. The magnitude and complexity of this action is borne out by the time and effort Class Counsel put into litigating the case for eight years. The complexity of the litigation in this Action further confirms the appropriateness of the Fee Award.

6. Professional Standing of Counsel

This factor, which "considers the professional skill and standing of counsel" strongly supports the Fee Award. *See In re Delphi Corp. Sec., Der., & "ERISA" Litig.*, 248 F.R.D. at 504. As described above and in the Final Approval Memo, as well as the Joint Decl., Class Counsel are nationally known leaders in the fields of ERISA, class action and complex litigation and their law firms have a notable record in national and class litigation. *See* Final Approval Memo IV.A.4.

This case presented difficult factual, procedural, and legal issues. It involved large amounts of money, scores of potential witnesses, and millions of pages of documents. Successfully marshalling the evidence and applying the law required a high degree of expertise in complex ERISA and class action matters. As national leaders in pursuing this type of litigation, Class Counsel provided the high quality of services this case required, employing the

expertise they have garnered from many years of spearheading company stock and other ERISA and class action cases. Class Counsel are leaders in class action ERISA cases with national practices, and attorneys who practice in virtually all federal courts in the country.[18] This factor thus supports the reasonableness of the Fee Request.

"The quality of opposing counsel also is important to evaluate." *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. at 504. In this Action, Defendants were represented by Keating Muething & Klekamp ("KMK"), a Cincinnati-based firm that has a national reputation for zealous advocacy. In fact, in 2016, KMK earned three National Rankings in the 2016 "Best Law Firms" report published by *U.S. News & World Report* and *Best Lawyers*, including for commercial litigation. *See* http://www.kmklaw.com/news-listings-307.html. KMK also earned a Metropolitan-Cincinnati Tier 1 Ranking in the U.S. News-Best Lawyers 2016 "Best Law Firms" Report in Employee Benefits (ERISA) law. *Id.* Accordingly, the professional skill and standing of both Class Counsel and opposing counsel weigh in favor of the Fee Award.

C. Awards In Similar Cases

The reasonableness of Class Counsel's fee request is also supported by awards in similar cases. In particular, the Fee Request is directly in line with fee requests in analogous ERISA class actions in the Sixth Circuit and around the country. *See, e.g.*, *In re National City Corp. Sec., Derivative & ERISA* Litig., No. 09-nc-70002 (N.D. Ohio Apr. 26, 2010) (33% of the Settlement Fund); *Gee v. UnumProvident Corp., et al*, No. 03-cv-147 (E.D. Tenn. Jan. 25, 2008) (awarding 32% of the Settlement Fund); *see also In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432, 2012 U.S. Dist. LEXIS 75213 (D.N.J. May 31, 2012) (awarding one-third of common fund); *Morrison v. Moneygram Int'l, Inc.*, No. 08-cv-1121 (D. Minn. May 20,

[18] *See* firm résumés of Class Counsel, attached as Exhibits 3 and 4 to the Joint Declaration.

2011) (33.3%); *Coppess v. Healthways, Inc.*, No. 10-cv-109 (M.D. Tenn. Apr. 25, 2011) (33.3%); *In re Radioshack Corp. "ERISA" Litig.*, No. 08-cv-1875 (N.D. Tex. Feb. 8, 2011) (33.3%); *Moore v. Comcast Corp.*, No. 08-cv-773 (E.D. Pa. Jan. 24, 2011) (awarding 33% fee); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (approving one-third request, finding "[i]t is fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere"); *In re Merck & Co. Vytorin ERISA Litig.*, No. 08-cv-285, 2010 U.S. Dist. LEXIS 12344, at **34-42 (D.N.J. Feb. 9, 2010) (awarding 33.3% fee); *Graden v. Conexant Sys., Inc.*, No. 05-cv-695 (D.N.J. Sept. 11, 2009) (33% fee); *Milliron v. T-Mobile USA, Inc.*, No. 08-cv-4149, 2009 WL 3345762, at *14 (D.N.J. Sept. 10, 2009), *aff'd*, 423 F. App'x 131 (3d Cir. 2011) (awarding 33.3% fee); *In re Syncor ERISA Litig.*, No. 03-cv-2446 (C.D. Cal. Mar. 30, 2009) (33.3%); *In re MBNA Corp. ERISA Litig.*, No. 05-cv-429 (D. Del. Mar. 27, 2009) (33%); *In re Elec. Data Sys. Corp. ERISA Litig.*, No. 03-cv-126 (E.D. Tex. Aug. 6, 2008) (33.3%); *Eslava v. Gulf Tel. Co.*, No. 04-cv-297 (D. Ala. Nov. 16, 2007) (35%); *In re Aquila ERISA Litig.*, No. 04-cv-865 (W.D. Mo. Nov. 29, 2007) (33%).

Nationwide, an award of one-third of a common fund created for the benefit of an aggrieved class in a large, complex class action is recognized as an appropriate benchmark. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value of one-third). Class Counsel respectfully submit that its request of $2 million in attorneys' fees representing one-third of the cash component created by the Settlement of this Action is in line with both awards in complex class actions generally, *see above*, and those approved as part of

settlements of analogous breach of fiduciary duty "company stock" cases that have settled in recent years around the country.

D. The Reaction of the Settlement Class to the Fee Request Provides Powerful Evidence that the Requested Fee is Fair and Reasonable

The reaction of the Settlement Class Members, which has thus far been uniformly positive, also supports the requested fee.

This factor will be re-evaluated after the deadline for objections has run, but the lack of objections to Class Counsel's fee application to date supports the reasonableness of the Fee Request. The Class Notice mailed to 32,205 Settlement Class Members, published in *The Cincinnati Enquirer* and over the internet on *PR Newswire*, informed the Class of the proposed Settlement and the amount of attorneys' fees Class Counsel would seek as well as the procedure by which an individual Class member could object to the fee requested by Class Counsel. The fact that, as of the date of this filing, not a single objection to Class Counsel's Fee and Expense requests has been received is noteworthy. *See, e.g.*, *Lowther v. AK Steel Corp.*, No. 11-cv-877, 2012 WL 6676131, at *4 (S.D. Ohio Dec. 21, 2012) ("The Court notes the lack of any objectors to the settlement. The submissions herein reflect that the class notice was sent by mail to class members and that the notice advised the class members that Plaintiffs' counsel intended to apply for an award of attorneys' fees of $1,275,000.00 or 12% of the cash portion of the settlement. Members of the Class were informed that they could object to the amount of attorneys' fees or expenses requested. The deadline for objecting passed with no objection. The lack of objections is strong evidence of the acceptability of a fee request."). The absence of any objections to date strongly supports the Fee Request.

IV. THE COURT SHOULD REIMBURSE CLASS COUNSEL FOR EXPENSES INCURRED IN CONNECTION WITH THIS LITIGATION

It is well-recognized by courts in the Sixth Circuit that "class counsel [are] entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *See In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 08-cv-1998, 2010 WL 3341200, at *12 (W.D. Ky. Aug. 23, 2010) (quoting *In re Cardizem*, 218 F.R.D. at 535); *see also Musarra v. Digital Dish, Inc.*, No. 05-cv-545, 2008 WL 4372695, at *1 (S.D. Ohio, Sept. 23, 2008) ("There is no doubt that an attorney who has created a settlement for the benefit of the class is entitled to reimbursement of reasonable litigation expenses."); *In re Delphi Corp. Sec., Der., & "ERISA" Litig.*, 248 F.R.D. at 504 ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.").

Here, Class Counsel respectfully request reimbursement of $207,283.17 in expenses, which were advanced or incurred collectively while prosecuting this Action. The expenses were all reasonable, necessary, and directly related to the prosecution of the Action, and include standard litigation costs and expenses such as costs for experts, document depository, appellate printing costs, copying, postage, and other costs incurred during the litigation of this Action. These expenses were critical to Class Counsel's success in achieving the proposed Settlement. *See* Joint Decl. ¶ 65. A breakdown of these unreimbursed costs by category is contained in Exhibits 5-7 attached to the Joint Declaration. On a firm-by-firm basis, the expenses incurred are as follows:

Firm	***Expenses***
Kessler Topaz Meltzer & Check, LLP	$89,338.35
Gainey McKenna & Egleston	$117,904.82
Strauss Troy	$40.00
TOTAL	**$207,283.17**

Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep costs to a reasonable level and subsequently achieved that objective.

The categories of expenses for which Class Counsel seek reimbursement are the type of expenses routinely charged to hourly clients and should therefore be reimbursed here. These expenses incurred were necessary to secure the resolution of this litigation and are of the type routinely deemed to be expenses reasonable and worthy of reimbursement. *See, e.g.*, *In re Delphi Corp. Sec., Der., & "ERISA" Litig.*, 248 F.R.D. at 505 (reimbursing litigation expenses including "experts, management and photocopying of documents, on-line research, messenger service, postage, express mail and overnight delivery, long distance and facsimile expenses, transportation, meals, travel and other incidental expenses directly related to the prosecution of this action."). To date, no objections have been received regarding Class Counsel's request for reimbursement of expenses. Accordingly, Class Counsel respectfully requests that the Court grant the request for reimbursement of expenses in full.

V. THE REQUESTED NAMED PLAINTIFF CASE CONTRIBUTION AWARDS ARE FAIR AND REASONABLE

At the conclusion of a class action case, it is common for courts to exercise their discretion to award special compensation to the class representatives in recognition of the time, effort and risk they have borne for the benefit of the class. *See, e.g.*, *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) ("Incentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit."); *Griffin*, 2013 WL 6511860, at *9 (noting "[s]uch

awards have been approved by the Sixth Circuit."). *See also* Manual for Complex Litigation, § 21.62, n.971 (4th ed. 2004) (awards are "warranted for time spent meeting with class members, monitoring cases, or responding to discovery"). While the Sixth Circuit recently expressed concerns regarding incentive awards, it readily admitted that while "[o]ur court has never approved the practice of incentive payments to class representatives, though in fairness we have not disapproved the practice either." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, No. 15-cv-1544, 2016 WL 3163073, at *8 (6th Cir. June 7, 2016) (citing *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013)). Respectfully, the "bounty" concerns that the Sixth Circuit expressed in *Shane* are not warranted in this Action. Specifically, after determining that the counsel in that case only "argue[d] in conclusory terms that the awards compensate[d] the named plaintiffs for their time spent on the case," and concerned that the district court would have "no basis for knowing" whether the awards were warranted, the Sixth Circuit required that counsel provide "specific documentation" of the "time actually spent on the case by each recipient of an award." *Shane Grp., Inc.*, 2016 WL 3163073, at *8. Respectfully, these concerns are not present here.

In this Action, Class Counsel requests an award of $10,000 to each of the two Plaintiffs in recognition of their efforts. Here, Plaintiffs Dudenhoefer and Partovipanah have both been steadfastly involved since the investigation and commencement of their respective actions, through the consolidation of the actions, and through every step of the protracted litigation including the appeals. Both bore the risk to reputation that comes with being a named plaintiff in a class action litigation. This risk is heightened because Plaintiffs here were suing their current and/or former employers for their retirement benefits. Both Plaintiffs devoted substantial effort and time to this litigation on behalf of the Class, reviewing draft pleadings and motions,

searching for and producing relevant documents, reviewing filings, and communicating regularly with Class Counsel throughout the litigation process all the way to the Supreme Court and during the settlement negotiations. These are the types of actions that courts recognize justify a case contribution award. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 382 (awarding case contribution awards to two class representatives noting "[t]hese two Plaintiffs located willing counsel, initiated lawsuits, and invested their own time, effort, and funds (in the form of unreimbursed expenses) for the benefit of the Class."); *Griffin*, 2013 WL 6511860, at *9 (awarding case contribution awards to two class representatives, finding the case contribution awards "reasonable given their involvement in assisting in collecting documents from [defendant] and providing information to class counsel to assist in the preparation and litigation of the case.").

Both Plaintiff Dudenhoefer and Plaintiff Partovipanah have submitted declarations whereby they attest to, *inter alia*, their participation in the Action and the work they performed. Therein, each Plaintiff estimates that he devoted in excess of sixty-five hours to this litigation. *See* Joint Decl. Ex. 8 (Dudenhoefer Declaration) and Ex. 9 (Partovipanah Declaration). Class Counsel respectfully submits that the detailed discussion of the efforts and the amount of time spent by both Plaintiff Dudenhoefer and Plaintiff Partovipanah allay the concerns expressed by the Sixth Circuit in *Shane Grp., Inc.*

Indicative of the inherent propriety of the requested case contribution award, the amounts requested here are easily in line with amounts typically awarded in analogous cases in this Circuit and around the country. *See, e.g.*, *In re National City Corp. Sec., Derivative & ERISA Litig.*, No. 109-nc-70002-SO (N.D. Ohio Apr. 26, 2010) (Order and Final Judgment) (awarding $20,000 each to Class Representatives); *Rankin v. Rots*, No. 02-cv-71045 (E.D. Mich. June 27,

2006) (awarding $10,000 to Class Representative); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 467 (E.D. Pa. 2008) (granting plaintiffs' case contribution awards of $15,000 and $7,500); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-cv-7921 (N.D. Ill. Nov. 22, 2004) (awarding $10,000 to each class representatives). While the Sixth Circuit has not passed judgment on the appropriateness of incentive awards, the Circuit has stated that "there may be circumstances where incentive awards are appropriate." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013). Class Counsel respectfully submits that this Action is one such circumstance. In sum, without the efforts and service to the Settlement Class of the Named Plaintiffs, there would be no recovery for the Class. Accordingly, Class Counsel respectfully submits that the requested Case Contributions are reasonable and should be granted.

VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court approve Class Counsel's request for an award of attorneys' fees in the amount of $2,000,000, approve the reimbursement of expenses in the amount of $207,283.17, and approve Case Contribution Awards in the amount of $10,000 each to the two Named Plaintiffs.

Dated: June 9, 2016

Respectfully submitted,

By: */s/ Mark K. Gyandoh*

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Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 9, 2016, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

/s/ Mark K. Gyandoh
Mark K. Gyandoh

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DUDENHOEFFER, *et al.*,

Plaintiffs,

vs.

FIFTH THIRD BANCORP, *et al.*,

Defendants.

Civil Action No.: 08-cv-538

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS TO THE NAMED PLAINTIFFS

This matter comes before the Court on Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards to the Named Plaintiffs ("Fee Motion"). Plaintiffs' Fee Motion was heard on July 11, 2016. The Court having considered papers submitted in support of the Fee Motion and any opposition thereto, and finding that no objections have been filed with regard to the Fee Motion, and for good cause having been shown, Plaintiffs' Fee Motion is hereby granted.

IT IS FURTHER ORDERED that,

1. Class Counsel is hereby awarded attorneys' fees in the amount of 33 1/3% ($2,000,000.00) of the Settlement Fund, which the Court finds to be fair and reasonable, and $207,283.17 in reimbursement of Class Counsel's reasonable litigation expenses incurred in prosecuting the Action. The attorneys' fees and expenses so awarded shall be paid from the Settlement Fund pursuant to the terms of the Stipulation of Settlement ("Settlement" or "Agreement"), as provided in the Agreement, with interest on such amounts from the date the

Settlement Fund was funded to the date of payment at the same net rate that the Gross Settlement Fund earns. All fees and expenses paid to Class Counsel shall be paid pursuant to the timing requirements described in the Settlement Agreement.

2. Named Plaintiffs John Dudenhoefer and Alireza Partovipanah are hereby awarded Case Contribution Awards in the amount of $10,000 each.

3. In making this award of attorneys' fees and reimbursement of litigation expenses to be paid from the Settlement Fund, and the compensation awards to the Named Plaintiffs, the Court has considered and conditionally finds that:

a) The Settlement achieved as a result of the efforts of Class Counsel has created a fund of $6,000,000 in cash that is already on deposit, plus interest thereon, in addition to other substantial non-monetary relief, that will benefit thousands of Settlement Class Members;

b) Class Counsel have conducted the litigation and achieved the Settlement with skill, perseverance, and diligent advocacy;

c) The Action involves complex factual and legal issues prosecuted over several years and, in the absence of a settlement, would involve further lengthy proceedings with uncertain resolution of the complex factual and legal issues;

d) Had Class Counsel not achieved the Settlement, there would remain a significant risk that the Named Plaintiffs and the Settlement Class may have recovered less or nothing from Defendants;

e) The amount of attorneys' fees awarded and litigation expenses reimbursed from the Settlement Fund are consistent with awards in similar cases; and

f) The Named Plaintiffs rendered valuable services to the Plan and to all Plan participants. Without their participation, there would have been no case and no Settlement.

SO ORDERED this _____ day of _____, 2016.

_____

HON. SANDRA S. BECKWITH
United States District Court
Southern District of Ohio