UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MONROE COUNTY EMPLOYEES' RETIREMENT SYSTEM and ROOFERS LOCAL NO. 149 PENSION FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. THE SOUTHERN COMPANY, THOMAS A. FANNING, ART P. BEATTIE, EDWARD DAY, VI, G. EDISON HOLLAND, JR., JOHN C. HUGGINS and THOMAS O. ANDERSON, Defendants.	Civil Action No. 1:17-cv-00241-WMR CLASS ACTION LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Lead Counsel, on behalf of the Class and pursuant to Rule 23 of the Federal Rules of Civil Procedure, respectfully moves this Court to enter an order awarding attorneys' fees and expenses. This motion is based on the Memorandum of Law in

Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses, the declarations submitted in support thereof, the Stipulation of Settlement, all other pleadings and matters of record and such additional evidence or argument that may be presented at the hearing on this matter.

DATED: December 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on December 10, 2020, I electronically filed the above document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

s/ DARRYL J. ALVARADO

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I. INTRODUCTION

After more than three years of hard-fought litigation, Court-appointed Lead Counsel Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Lead Counsel") secured a cash settlement of $87,500,000 on behalf of the Class (the "Settlement Amount").[1] As compensation for its efforts, Lead Counsel respectfully applies for an award of attorneys' fees in the amount of thirty percent of the Settlement Fund.[2] Lead Counsel also seeks $853,866.45 in expenses that Lead Counsel reasonably and necessarily incurred to prosecute the litigation.

As detailed in the accompanying Alvarado Decl., Lead Counsel vigorously pursued this Litigation for more than three years, while committing the extensive human and financial resources necessary to prosecute this complex action to a successful resolution. Not only did the breadth of this Litigation present challenges, but from the outset Lead Counsel faced substantial risks establishing liability,

[1] The Settlement Amount, plus all interest earned thereon is the "Settlement Fund."

[2] Lead Counsel respectfully refers the Court to the accompanying Declaration of Darryl J. Alvarado in Support of: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Alvarado Decl.") for a detailed description of Plaintiffs' allegations, the procedural history, efforts of counsel, risks of proceeding with the Litigation, and the Settlement. Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation of Settlement, dated September 8, 2020 ("Stipulation"), and in the Alvarado Decl.

defeating affirmative defenses, proving damages, and obtaining and maintaining class certification against Defendants represented by highly-skilled defense counsel.

In this complex case, Plaintiffs' pleading and proof burdens were manifold. Plaintiffs had to show that Defendants' public representations about Southern Company's clean coal power plant in Kemper County, Mississippi (the "Kemper Plant") were: (i) false and misleading; (ii) material; and (iii) made with the requisite scienter. Defendants strenuously argued that many of the alleged misstatements are not attributed to any individual whom Plaintiffs alleged had scienter, and that a majority of the alleged misstatements are opinions, protected from liability under the securities laws. Alvarado Decl., ¶¶101-102. Even if Plaintiffs overcame these liability hurdles, proving price impact, loss causation, and damages was equally risky – whether Defendants' alleged misrepresentations impacted the price of Southern Company's stock during the Class Period and whether the alleged disclosures of corrective information proximately caused the Company's stock price to drop was hotly contested at every stage of this Action. *Id.*, ¶108-110.

The result achieved here is particularly impressive given that no other firm sought to be lead counsel in this case, and fact discovery was conducted without the benefit of any governmental charges or convictions. Lead Counsel faced these risks head-on by pleading and proving a strong case and devoting the resources necessary

to successfully litigate this Action for more than three years against two of the most prominent defense firms in the country.

Among many other things, Lead Counsel: (i) conducted an exhaustive factual investigation, including confidential witness interviews and review of publicly available information concerning Southern Company, Mississippi Power Company, and the Kemper Plant; (ii) opposed Defendants' motion to dismiss, motion for reconsideration, and motion for leave to appeal in connection with the Court's order upholding in large measure the Complaint; (iii) successfully obtained class certification after extensive briefing and a two-day evidentiary hearing; (iv) briefed an opposition to Defendants' Rule 23(f) petition; (v) successfully opposed a motion to exclude Plaintiffs' expert on market efficiency and damages; (vi) deposed several fact witnesses and Defendants' expert witness, and defended the deposition of Plaintiffs' expert witness in connection with class certification; (vii) defended the depositions of Plaintiffs' respective Rule 30(b)(6) representatives; (viii) reviewed 2.1 million pages of documents ultimately produced by Defendants and third parties following pitched discovery battles; and (ix) successfully mediated a resolution of the Action with the assistance of an experienced mediator. *See generally* Alvarado Decl.

The result of Lead Counsel's hard work and perseverance is an all cash settlement of $87.5 million, which has been earning interest for the benefit of the

Class. It is against this backdrop that Lead Counsel – with the express endorsement of Plaintiffs[3] – respectfully submit this request for an award of attorneys' fees equal to thirty percent of the Settlement Fund.

Lead Counsel's fee request is in accord with Eleventh Circuit authority, which adopts the percentage-of-the-fund method of awarding attorneys' fees and rejects the lodestar approach. *See Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, ***attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund*** established for the benefit of the class.").[4] This approach is consistent with the PSLRA. *See* 15 U.S.C. §78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

A percentage-based fee award accomplishes several objectives:

> First, it is consistent with the private market place where contingent fee attorneys are regularly compensated on a percentage of recovery method.

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[3] *See* Declaration of Darris Garoufalis in Support of Application for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses ("Garoufalis Decl.") and the Declaration of Michael Grodi in Support of Application for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses ("Grodi Decl."). attached as Exhibits 1 and 2, respectively, to the Alvarado Decl.

[4] Citations and internal footnotes are omitted and emphasis is added throughout unless otherwise indicated.

> Second, it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. . . . Finally, the percentage approach reduces the burden [on] the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members.

Garst v. Franklin Life Ins. Co., 1999 U.S. Dist. LEXIS 22666, at *83-*84 (N.D. Ala. June 25, 1999). Each of these rationales supports the percentage-based award requested by Lead Counsel. Likewise, the relevant factors articulated by the Eleventh Circuit in *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) further support the requested fee.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

A. Lead Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Similarly, the Eleventh Circuit holds that attorneys who create a common fund are entitled to be compensated for their efforts with a "percentage of the fund established for the benefit of the class." *Camden*, 946 F.2d at 774; *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999). The common fund "doctrine serves the 'twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of

equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts.'" *Dasher v. RBC Bank United States*, 2020 U.S. Dist. LEXIS 142012, at *49-*50 (S.D. Fla. Aug. 10, 2020). This is especially true where class counsel prosecuted the case on a contingent basis. *See Mosser v. TD Bank, N.A.*, 2013 U.S. Dist. LEXIS 187627, at *107 (S.D. Fla. Mar. 18, 2013) ("when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment").

B. The Requested Attorneys' Fees Are Reasonable

The Eleventh Circuit holds that the range of reasonable common fund fee awards "fall between 20% to 30% of the fund," and that this range is a "bench mark" that "may be adjusted in accordance with the individual circumstances of each case." *Camden*, 946 F.2d at 774-75 ("[A]n upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded."); *Waters*, 190 F.3d at 1294. "Indeed, district courts in the Eleventh Circuit routinely approve fee awards of one-third of the common settlement fund." *Hanley v. Tampa Bay Sports & Entm't LLC*, 2020 U.S. Dist. LEXIS 89175, at *16 (M.D. Fla. Apr. 23, 2020).

Here, a fee of thirty percent is reasonable given the complexity of the case, the fact that Lead Counsel prosecuted this Action for over three years without any compensation, and in view of the excellent result obtained despite Defendants'

vigorous opposition at every stage. *See, e.g.*, *Waters v. Cook's Pest Control, Inc.*, 2012 U.S. Dist. LEXIS 99129, at *47 (N.D. Ala. July 17, 2012) ("Class Counsel accepted this matter on a contingent basis" and "have incurred significant expenses in prosecuting this action over the course of [three] years and received no compensation" with "a real possibility that Class Counsel would not recover anything for the Class").

The requested thirty percent fee is also well within the range of percentage fees awarded within the Eleventh Circuit in common fund settlements. *See, e.g.*, *Mosser*, 2013 U.S. Dist. LEXIS 187627, at *94-*95 (approving 30% fee of $62 million settlement and noting that "[t]he Court firmly believes this kind of initiative and skill must be adequately compensated to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future"); *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017) (awarding 35% fee and noting that "[c]ourts within this Circuit have routinely awarded attorneys' fees of 33 percent or more of the gross settlement fund"); *Reyes v. AT&T Mobility Servs., LLC*, 2013 U.S. Dist. LEXIS 202820, at *10 (S.D. Fla. June 21, 2013) ("Class Counsel's request for one-third of the settlement fund is also consistent with the trend in this Circuit."); *In re Flowers Foods, Inc. Sec. Litig.*, 2019 U.S. Dist. LEXIS 216816 (M.D. Ga. Dec. 11, 2019) (awarding 33-1/3% fee plus expenses); *Cervantes v. Invesco Holding Co. (US), Inc., et al.*, No. 1:18-cv-02551-AT,

slip op. at 2 (N.D. Ga. Aug. 13, 2020) (awarding 33% fee plus expenses); *see also In re Netbank, Inc. Sec. Litig.*, No. 1:07- cv-02298-TCB, slip op. at 5 (N.D. Ga. Nov. 9, 2011) (awarding 34% of settlement); *In re Theragenics Corp. Sec. Litig.*, No. 1:99-cv-0141-TWT, slip op. at 12 (N.D. Ga. Sept. 29, 2004) (awarding 33-1/3% of settlement); *Local 703, I.B. of T. Grocery and Food Employees Welfare Fund v. Regions Financial Corp.*, No. 2:10-cv-02847-KOB (N.D. Ala. Sept. 14, 2015), slip op. at 3 (awarding fees of 30% plus expenses on $90 million settlement); *see also* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) (finding that, over a four year period, the mean fee award in the Eleventh Circuit was 30% and the median award was 33%).

C. The Percentage Fee Approved by the Plaintiffs Is Entitled to a Presumption of Reasonableness

In enacting the PSLRA, Congress intended to encourage investors with substantial financial stakes in the litigation to serve as lead plaintiffs and play an active role in supervising and directing the litigation, including selecting and monitoring class counsel. *See Local 703, I.B. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1260 (11th Cir. 2014). Accordingly, fees negotiated between a properly selected PSLRA lead plaintiff and its counsel should be

accorded a presumption of reasonableness. *See In re HealthSouth Corp. Sec. Litig.*, No. 2:03-cv-01500-KOB-TMP, slip op. at 3 (N.D. Ala. July 20, 2010) ("This involvement of sophisticated lead Plaintiffs, such as those in this case, in negotiating and thus exercising control over fees represents one of the biggest reforms enacted by Congress in PSLRA.").

Here, the two institutional investor Plaintiffs – the type of investors Congress wanted to direct class actions like this one – approve and endorse the requested fee as fair and reasonable in light of, among other things, the substantial work Lead Counsel has performed, the risks of continuing the Litigation through trial, and the excellent result obtained for the Class. *See* Garoufalis Decl., ¶4; Grodi Decl., ¶4. Accordingly, the requested fee is entitled to a presumption of reasonableness.

D. The Circumstances of the Litigation Justify the Fee Award

Although "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case," the Eleventh Circuit recommends that district courts consider several factors to determine what constitutes a reasonable percentage award. *See Camden*, 946 F.2d at 773-775. These factors include: (i) the time and labor required; (ii) the novelty and the difficulty of the questions; (iii) the skill requisite to perform the legal service properly; (iv) the preclusion of other

employment by the attorney due to the acceptance of the case; (v) the customary fee; (vi) whether the fee is fixed or contingent; (vii) time limitations imposed by the client or the circumstances;[5] (viii) the amount involved and the results obtained; (ix) the experience, reputation, and ability of the attorneys; (x) the "undesirability" of the case; (xi) the nature and length of the professional relationship with the client;[6] and (xii) awards in similar cases. *Id.* at 772 n.3. "These twelve factors are guidelines; they are not exclusive." *Dasher*, 2020 U.S. Dist. LEXIS 142012, at *53.

> Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration.

Camden, 946 F.2d at 775. While each of the above factors (and any consideration unique to a particular case) may be an appropriate consideration, "[t]he factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary." *Id.* An analysis of the relevant factors confirms that the thirty percent fee requested by Lead Counsel is reasonable and should be awarded.

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[5] This factor is not applicable to the circumstances of this case.

[6] This factor is not applicable to the circumstances of this case.

1. The Amount Involved and the Results Obtained

While listed as the eighth *Camden* factor, Lead Counsel discusses this factor first because the result achieved is one of the most important factors considered in determining an appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (assessing the reasonableness of a fee, the "most critical factor is the degree of success obtained"); *see also Ressler v. Jacobson*, 149 F.R.D. 651, 655 (M.D. Fla. 1992) ("It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained.").

The Settlement is outstanding. It is the ***third largest*** federal securities class action settlement ever achieved in this District and the ***seventh largest*** federal securities class action settlement ever achieved in the Eleventh Circuit. Alvarado Decl., ¶112. The Settlement is not only large relative to other cases, but represents a significant recovery for Class Members. Based on analyses by in-house and independent experts, Lead Counsel estimates that the Settlement represents between 16% and 28% of the maximum recoverable damages. *Id.* Given that the median ratio of settlement amount to investor losses in securities litigation was 2.1% in NERA Economic Consulting's most recent study, the Settlement represents an outstanding

recovery.[7] And make no mistake, Defendants maintained that the Class suffered little or no damages at all. The Settlement is therefore an outstanding result.

Notably, the $87,500,000 settlement here far exceeds the median settlement in securities fraud class actions, particularly for a case of this size. According to a recent report published by Cornerstone Research, the median settlement in securities class actions in 2019 where a pension fund served as lead plaintiff was $20 million.[8] That Lead Counsel secured more than ***four times*** that amount in the face of significant risks demonstrates that the requested fee of thirty percent is both reasonable and fair.

2. The Novelty and Difficulty of the Legal and Factual Issues

Courts have recognized that the novelty and difficulty of the claims in a case are significant factors to be considered in awarding a fee. *See Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *see also In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009) ("The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter,

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[7] *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA Feb. 12, 2020) at 20, Fig. 13, available at: https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_Final.pdf.

[8] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2019 Review and Analysis*, at 12, fig. 11 (Cornerstone Research 2020), available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis.

reliance, and materiality of misrepresentation are notoriously difficult to establish."). As discussed in the Alvarado Decl. and the Settlement Memorandum, filed herewith, substantial risks and uncertainties in this type of litigation under the PSLRA, and in this case in particular, made it far from certain that a recovery – let alone $87,500,000 – would ultimately be obtained.

This case involved a large, complex construction project. Defendants have maintained that they had no motive to lie to their investors about the achievability of the May 2014 COD as they gained nothing by making such a misrepresentation and, in fact, warned of potential delays. Alvarado Decl., ¶101-102. Defendants argued that Plaintiffs' alleged fraudulent motives were actually incentives for management to do everything possible to achieve the May 2014 COD. *Id.*, ¶105. Defendants challenged Plaintiffs' scienter allegations with evidence that they had a reasonable basis for believing that the May 2014 COD was achievable based on workarounds designed to offset any scheduling delays, and because they received and reasonably relied on feedback from their "independent" monitors and consultants regarding the achievability of the May 2014 COD. *Id.*, ¶106.

Assuming Plaintiffs established falsity and scienter over Defendants' many fact bound arguments, they would also have to prove loss causation and damages – *i.e.*, that the revelation of the alleged fraud in a series of corrective disclosures during 2013

proximately caused the substantial decline in the price of Southern Company stock in the days following those disclosures. *Id.*, ¶108. Defendants have steadfastly maintained that any losses suffered by Class Members were not attributable to any alleged disclosures because those disclosures did not correct any alleged misstatements. *Id.*, ¶¶109-110. Defendants also claimed that Southern Company's alleged disclosures contained information unrelated to the alleged fraud that would have to be "disaggregated" from the impact of the information at issue, which Defendants and their expert claimed would significantly reduce or entirely eliminate any damages. *Id.* Defendants further asserted that there were no statistically significant price drops in response to nearly all of the corrective disclosures, which, if proven, would have significantly reduced recoverable damages. *Id.* Finally, Defendants argued that because Plaintiffs purportedly relied on a "materialization of the risk" theory of liability, Plaintiffs' expert would be unable to account for the varying levels of risk throughout the Class Period. *Id.*, ¶109. Defendants' Rule 23(f) petition to the Eleventh Circuit related to these issues was pending at the time this Settlement was reached. There was therefore a risk that the Eleventh Circuit would grant the petition and reverse the Court's class certification order.

As detailed above and in the Settlement Memorandum, Plaintiffs faced all the "multi-faceted and complex legal questions endemic" to cases based on alleged

violations of the federal securities law. *Ressler*, 149 F.R.D. at 654. Although Plaintiffs believe they could rebut all of Defendants' arguments on liability and damages and defeat Defendants' pending Rule 23(f) petition, survive summary judgment, and prevail at trial, the issues between the parties required, and would continue to require, a tremendous amount of legal and factual expertise and would be resolved through a battle between experts, the outcome of which is notoriously uncertain. *See, e.g.*, *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury.").

3. The Skill Requisite to Perform the Legal Service Properly

The skills and resources required to prosecute complex securities fraud actions like this one are significant. Lead Counsel is one of the preeminent class action securities litigation firms in the country, with decades of experience in prosecuting and trying complex class actions. *See* www.rgrdlaw.com. That experience and skill was demonstrated by the efficient and successful prosecution of this Action, culminating in the outstanding Settlement. *See In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) ("Class Counsel took on a great deal of risk in bringing this case, and turned a potentially empty well into a significant

judgment. That kind of initiative and skill must be adequately compensated to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future.").

The quality of opposing counsel is also important in evaluating the quality of services rendered by Lead Counsel. *See In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001) ("[I]n assessing the quality of representation, courts have also looked to the quality of the opposition the plaintiffs' attorneys faced."). This Litigation was defended by Jones Day and Latham and Watkins LLP, two of the world's preeminent law firms, with a well-deserved reputation for vigorous advocacy in the defense of complex actions. Nevertheless, Lead Counsel presented a strong case and demonstrated its willingness and ability to prosecute the Action through trial and the inevitable appeals, resulting in a highly favorable settlement for the Class. *See Dasher*, 2020 U.S. Dist. LEXIS 142012, at *57-*58 ("'Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results.'").

4. The Time and Labor Expended by Lead Counsel Supports the Requested Fee

For more than three years, Lead Counsel dedicated an enormous amount of time and money to successfully litigate this case. *See generally* Alvarado Decl., and *see*

Declaration of Darryl J. Alvarado Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), attached as Exhibit 4 to the Alvarado Decl. These efforts culminated in the $87.5 million recovery.

5. The Contingent Nature of the Fee Weighs in Favor of the Requested Award

The "customary fee" in a class action lawsuit of this nature is a contingency fee because virtually no individual possesses a sufficiently large stake in the litigation to justify paying his attorneys on an hourly basis. *Ressler*, 149 F.R.D. at 654. A determination of a fair fee must include an appreciation of the contingent nature of the fee and the significant risks of non-recovery. *Dasher*, 2020 U.S. Dist. LEXIS 142012, at *61 (Acknowledging that "Class Counsel assumed a significant risk of nonpayment or underpayment. That risk warrants an appropriate fee.").

> "Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing."

Mosser, 2013 U.S. Dist. LEXIS 187627, at *107-*108 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir.

1990)); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("attorneys' risk is '"perhaps the foremost" factor' in determining an appropriate fee award").

Lead Counsel prosecuted this Litigation for more than three years on a wholly contingent basis and bore all the risks of litigating the case through trial and possible appeals. Lead Counsel understood from the outset that it was embarking on a complex, expensive, and potentially lengthy litigation, which could (and did) require the investment of millions of dollars in expenses and attorney time, with no guarantee of ever being compensated for such investment. Lead Counsel also understood that Defendants were well-financed and would (and, in fact, did) retain highly experienced defense firms. In undertaking this risk, Lead Counsel ensured that sufficient resources were dedicated to the prosecution of this Action.

The risks of contingent litigation are highlighted by cases that have been lost after thousands of hours have been invested in successfully opposing motions to dismiss and pursuing discovery. *See In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005) ("Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy."). For example, a change in law that occurs during the pendency of a class action can – and

has – result in the dismissal of a case after the investment of significant time and resources. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 842 F. Supp. 2d 522 (S.D.N.Y. 2012) (granting judgment on the pleadings following change of law related to jurisdiction); *In re Williams Sec. Litig. - WCG Subclass*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming grant of summary judgment for energy company following change of law related to loss causation).

Even plaintiffs who survive summary judgment and succeed at trial may find their judgment overturned on appeal or on a post-trial motion. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction in light of subsequent change in law); *In re BankAtlantic Bancorp, Sec. Litig.*, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd sub. nom*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs reversed on appeal after almost seven years of litigation on loss causation grounds and judgment entered for defendant). Thus, there existed a very real risk here that Lead Counsel would invest substantial resources and years of efforts and receive nothing.

At bottom, the fee in this matter was entirely contingent and fraught with risk; there would be no fee without a successful result. Nevertheless, Lead Counsel committed significant resources to the vigorous and successful prosecution of this Action for the benefit of the Class and was fully prepared to litigate through trial, if necessary, to recover the damages suffered by Plaintiffs and the Class.

6. The Magnitude and Complexity of the Litigation Support the Requested Fee

Courts have long recognized that securities class actions are "'"notably difficult and notoriously uncertain."'" *In re Flag Telecom Holdings*, 2010 U.S. Dist. LEXIS 119702, at *43 (S.D.N.Y. Nov. 8, 2010). This Action was no exception. It raised many novel and complex issues.

Defendants raised compelling arguments in connection with the elements of falsity, materiality, scienter, loss causation, and damages. They consistently and forcefully argued that their statements were accurate and truthful and that even if false, they were not material or made with the requisite scienter. With respect to loss causation and cognizable damages, Defendants challenged the impact their statements and omissions had on Southern Company's stock price. Defendants argued that any stock price drop could not be attributed to the revelation of any alleged fraud. These

and other issues required substantial efforts by Lead Counsel, often through analysis of the factual record and consultation with experts.

7. The "Undesirability" of the Case

This was a complex case that presented difficult issues, and the risk of no recovery was high. When Lead Counsel undertook representation of Plaintiffs and the Class in this matter, it was with the knowledge that they would have to spend substantial time and money and face significant risks without any assurance of compensation. These risks must be assessed as they existed at the time counsel undertook the case and not in light of the settlement ultimately achieved. *See, e.g.*, *Checking Acct.*, 830 F. Supp. 2d at 1364.

Here, outside of Lead Counsel, there was ***no one*** – neither federal nor state governmental agencies nor other private plaintiffs – seeking remuneration for Class Members damaged by Defendants' alleged fraudulent scheme. *Cf. In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 352 (N.D. Ga. 1993) ("Were it not for the considerable skill and effort of plaintiffs' counsel, the action would never have been certified as a class action and members of the class would receive nothing in return for their claims against defendants."). Moreover, ***no other entity sought to be lead plaintiff and no other firm was willing to take on the risk of pursuing this difficult case as lead counsel***. Alvarado Decl., ¶140; *see also Dasher*, 2020 U.S. Dist. LEXIS

142012, at *59 ("'A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk.'").

8. No Substantive Objection to the Fee Request Has Been Filed

In further confirmation of the reasonableness of the requested fee, no member of the Class has, to date, filed a substantive objection to the fee.[9] Pursuant to the preliminary approval order, over 650,000 Notices of this Settlement have been mailed to putative Class Members and nominees. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, ¶11, attached as Exhibit 3 to the Alvarado Decl. The lack of any real objection evidences that the requested fee is fair. *See Pinto*, 513 F. Supp. 2d at 1343 ("That this sizeable class did not give rise to a single objection on the fees request further justifies the full award."); *Ressler*, 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of the fee request).[10]

[9] Counsel did receive one letter from an individual, but it does not establish membership in the Class. Nor does it raise any substantive objection to the fees requested. The letter is a scattershot attack on class actions in general, without any real reference to this Litigation, and the tremendous amount of time, effort, and expense required to obtain the outstanding result.

[10] Should any timely objections to the fee and expense request be filed, Lead Counsel will address them in its reply, which will be filed no later than January 7, 2021.

9. Public Policy Considerations Further Support the Requested Fee

Public policy strongly favors rewarding firms for bringing successful securities actions like this one. *See Flag*, 2010 U.S. Dist. LEXIS 119702, at *84-*85 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Dasher*, 2020 U.S. Dist. LEXIS 142012, at *61-*62 ("Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the request fee.").

In sum, the requested thirty percent fee is reasonable under the circumstances, and should be approved by the Court.

III. THE REQUESTED EXPENSES ARE REASONABLE

Lead Counsel's application includes a request for expenses, costs, and charges totaling $853,866.45 that were reasonably incurred in furtherance of the claims on behalf of the Class. These expenses are itemized in the Robbins Geller Decl., attached as Exhibit 4 to the Alvarado Decl. These expenses and charges are properly recovered by counsel. *See, e.g.*, *Ressler*, 149 F.R.D. at 657; *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) ("all reasonable expenses incurred in case preparation,

during the course of litigation, or as an aspect of settlement of the case" may be recovered).

The categories of expenses for which Lead Counsel seeks payment here are the type that are necessarily incurred in litigation and routinely charged to hourly clients, and, therefore, should be paid out of the common fund.[11] There has been no objection to these expenses. In addition, the total number of documents produced by all parties (more than two million pages) required a system called Relativity, which is a sophisticated database management program for the hosting of documents collected or produced in the litigation. The amount requested for this category reflects charges for the management of the database. Robbins Geller Decl., ¶6(h).

Lead Counsel was also required to travel in connection with the Litigation and thus incurred the related costs of meals, lodging and transportation. As detailed in Robbins Geller Decl., in connection with the prosecution of this case over the last three-plus years, the firm paid for travel expenses to, among other things, attend court hearings and depositions and meet with witnesses, mediators and opposing counsel. *See* Robbins Geller Decl., ¶6(c).

[11] The largest component of these expenses was devoted to Plaintiffs' experts and consultants; the Alvarado Decl. explains how each expert and consultant contributed to Lead Counsel's prosecution of the Litigation. Alvarado Decl., ¶¶79-84.

Lead Counsel also incurred the costs of computerized research. *See* Robbins Geller Decl., ¶6(g). It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These charges are for electronic research and data retrieval charges provided through vendors such as Courtlink, LexisNexis Products, PACER, Thomson Financial, and Westlaw. Other expenses that were necessarily incurred in the prosecution of this Litigation include mediation fees, photocopying, and filing and transcripts expenses. Because these were all necessary expenses incurred by Lead Counsel, they should be paid from the Settlement Fund.

IV. CONCLUSION

The $87,500,000 Settlement of this Action is the culmination of the diligent work and skillful litigation by Lead Counsel. For its efforts, Lead Counsel respectfully requests that the Court approve the fee and expense application and enter an order awarding fees of thirty percent of the Settlement Amount and payment of expenses of $853,866.45, plus interest earned on both amounts at the same rate as earned by the Settlement Fund.

DATED: December 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on December 10, 2020, I electronically filed the above document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

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