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Order on Attorneys' Fees (LARRIE GRANT PLYMEL)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LARRIE GRANT PLYMEL, *et al.*,	)(	
	)(	**CIVIL ACTION**
Plaintiffs,	)(	**FILE NO. 2004-CV-84312**
	)(	
v.	)(	
	)(	
TEACHERS RETIREMENT SYSTEM OF GEORGIA, *et al.*,	)(	
	)(	**CLASS ACTION**
	)(	
Defendants.	)(	

FILED IN OFFICE
FEB 29 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON ATTORNEYS FEES

Counsel for the parties appeared at hearings held on October 4 and 5, 2007, and January 16, 2008, to present oral argument and testimony regarding the application of counsel for Plaintiffs ("Class Counsel") for an award of attorneys' fees. The Court, having considered the record of the case, the arguments and evidence presented during the hearings, and the briefs submitted on the issues, finds as follows:

Class Counsel for Plaintiffs (individually, "Class Members", or, collectively, the "Class") seeks an award of attorneys' fees and expenses as a percentage of the common fund in this action, (the "Fees Fund").[1] As agreed upon by Class Counsel, all expenses related to this litigation, previously incurred or anticipated to be incurred as a result of this action, shall be deducted directly from the Fees Fund. The Court addresses further disbursements and allocations from the Fees Fund in its Final Order and Judgment. The amount remaining in the Fees Fund after all such allocations and

[1] The Court's Final Order and Judgment, filed contemporaneously with this Order, defines the elements that make up the common fund itself in Paragraph 8 of that Order.

payments and as required in this Order, shall be the amount awarded as attorneys' fees in this action.

I. UNDER GEORGIA LAW, A PERCENTAGE OF THE COMMON FUND GENERATED IN CLASS ACTION CASES IS GENERALLY AWARDED AS ATTORNEYS' FEES.

Under Georgia law, where a common fund is generated in litigation for the benefit of persons other than the named plaintiff, reasonable attorneys' fees are paid from the fund:

> "[A] person who at his own expense and for the benefit of persons in addition to himself, maintains a successful action for the preservation, protection or creation of a common fund in which others may share with him is entitled to reasonable attorney fees from the fund as a whole."

Barnes v. City of Atlanta, 281 Ga. 256, 260 (2006) (quoting State v. Private Truck Council of America, Inc., 258 Ga. 531, 534-35 (1988)). This principle is an exception to the ordinary rule that each litigant bears his own attorneys' fees. It is grounded in substantial part on "'the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" Barnes, 281 Ga. at 260.

The Georgia courts have also held that the fees to be paid from the common fund should be based on a percentage of the fund. In adopting this rule, the Court of Appeals canvassed federal authorities and selected the common fund approach. "We ...hold that when assessing attorney fees in a common fund case, a percentage of the fund analysis is the preferred method of determining these fees... ." Friedrich v. Fidelity Nat'l Bank, 247 Ga. App. 704, 707, (2001). The Court of Appeals imposed the following requirements on this Court's decision-making process:

> [W]e also conclude that when awarding attorney fees in this type of case, a trial court must "articulate specific reasons for selecting the percentage upon which the . . . award is based." [Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991)] at 775. The trial court's order must identify all factors on which the court relied and explain how each factor affected the selection of the percentage awarded as attorney fees. Id. at 775. While these factors may vary from case to case, Camden I identifies several that should be considered:
>
>> [T]he Johnson factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases. 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 [trial] court's consideration.

Friedrich, 247 Ga. App. at 707-708 (quoting Camden I, 946 F.2d at 775). The "Johnson factors" are standards enumerated by the U.S. Court of Appeals for the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), for use by courts in analyzing and setting a statutory award of fees. That Court's analysis of the basis for awards of attorneys' fees is well accepted by all federal and most state courts. The Johnson factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

In Camden I, relied upon by the Georgia Court of Appeals in Friedrich, the U.S. Court of Appeals for the Eleventh Circuit identified the result obtained by class counsel as *the* pre-eminent consideration: "In this context, monetary results achieved predominate over all other criteria." 946 F. 2d at 774. The court also noted that a majority of common fund fee awards fall between twenty and thirty percent (20% to 30%) of the fund, with an upper limit of fifty percent (50%) as a general rule. The court recognized twenty five percent (25%) as a "'bench mark' percentage fee award which may be adjusted in accordance with the individual circumstances of each case." Id. at 775. Subsequently, the Eleventh Circuit has recognized a district court's use of a thirty percent (30%) bench mark. Waters v. International Precious Metals Corp., 190 F.3d 1291, 1294 (11th Cir. 1999) (thirty percent bench mark used by the district court and adjusted upward to a final award of thirty three and one-third percent in part because the case advanced public policy concerns).

B. A PERCENTAGE OF 30% OF THE COMMON FUND IS THE PROPER PERCENTAGE FOR AN AWARD TO COVER FEES, EXPENSES, AND OTHER DISBURSEMENTS IN THIS CASE.

The benchmark for an award of attorneys' fees is between twenty and thirty percent (20-30%) of the common fund, and, consistent with the case law, this Court views twenty-five percent (25%) as an appropriate starting point in this case. Upon consideration of the relevant factors, the Court concludes that the benchmark should be adjusted upward to thirty percent (30%) because of the extraordinary result and reward to the Class, the risk and responsibility assumed by Class Counsel, and the significant obstacles facing the Class.

In order to determine whether the starting point of twenty five percent (25%) should be adjusted upwards or down, the Court makes the following analysis as required by Friedrich:

1. The Johnson Factors[2] Support an Upward Adjustment.

a. Difficulty and Novelty of Issues in this Case Increased the Time, Skill, Dedication, and Compensation Risks in Bringing this Action.

This action was filed in April, 2004, and has taken nearly four (4) years to reach the stage of a final judgment. In litigating this case, Class Counsel addressed novel and difficult issues which required a significant amount of time, labor, and resources to identify, understand, and effectively argue. O.C.G.A. §§ 47-3-1, *et seq.*

Not only did Class Counsel have to sue the agency charged[3] with interpreting and administering the plan, but they had to argue difficult and novel questions of law. TRS, as the administrator, held the information and had unparalleled familiarity with the system and its governing statutes, but had been misinterpreting the statute for twenty (20) years. When faced with this litigation, TRS vigorously defended their position, including arguing that their interpretation of the statute was entitled to special consideration because of their familiarity with the statutes and the plan. TRS even rejected a proposed settlement after the Supreme Court held that their calculations were not actuarially equivalent, and thus, that it was liable to the Plaintiff Class.

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[2] In Class Counsel's petition for attorneys' fees award, they did not address the fifth (customary fees) or the eleventh (nature and length of professional relationship with client) Johnson factors. In light of the abundance of evidence justifying an upward award adjustment, the Court will base its analysis on the remaining ten factors addressed.

[3] Because of the need to sue an agency of the State of Georgia, many may perceive this case to be undesirable, thus satisfying the tenth Johnson factor.

Because of the extremely complex nature of the case, Class Counsel first had to master the underlying statutory scheme of the retirement plan, O.C.G.A. §§ 47-3-1, *et seq.*, and its underlying subject matter – actuarial science. In order to do so Class Counsel employed considerable legal skill in first mastering a working knowledge of the plan and its calculations and then examining experts in these fields. In this process, Class Counsel hired six (6) actuaries to assist them in understanding the complicated calculations underlying the payments in question.

Because of the difficulty and importance of the case, Class Counsel devoted substantial amounts of their time and percentage of their practices to this case, to the exclusion of other cases. For the last four (4) years, Mr. Gregory dedicated a "majority" of his practice to this case; Mr. Forehand dedicated roughly 30% of his practice to it; and, Mr. Cook spent "much" of his time litigating this case. Necessarily, Class Counsel's involvement in this case significantly precluded their work on other matters.

It is important to note Class Counsel's willingness to make this case such a priority given their contingent-fee based representation and risk of zero recoupment. For example, this case was dismissed on an earlier motion for summary judgment, which would have foreclosed the opportunity for Class Counsel to recoup expenses (at that time, approximately $200,000.00) and fees associated with this action had the Georgia Supreme Court not found TRS liable, reversed the earlier judgment, and remanded the case on the remaining issues.

b. The Time Considerations for the Affected Class Members Justify an Upward Adjustment of the Common Fund Award.

Time is running out for many Class Members. The nature of this case – seeking redress for elderly retirement beneficiaries – starkly demonstrates time limitations

related to any meaningful recovery for Class Members. This is truly a case in which justice delayed is justice denied for many members of the Class. Moreover, all retired teachers live on the modest fixed incomes that their membership in TRS provides. The extra dollars that they would have received had TRS correctly calculated their benefits would have made a substantial difference in the quality of their lives over the years of their retirement.

c. The Result Obtained and the Amount of Recovery for the Class Are Exemplary.

In accordance with the Georgia Supreme Court's decision, TRS failed to use the correct mortality tables and incorrectly calculated "option" member benefits. Before 2003, TRS had not updated its mortality tables for calculating the "option" benefits since 1983; thus, the Class consists of over 15,000 members.

The sum of back benefits, with interest, and future benefits reduced to present value, for each Class Member, constitutes the common fund[4] in this case. Because the Class is so numerous, the breaches spanned a twenty (20) year period, and the Class is recapturing one hundred percent (100%) of its damages, the common fund is estimated to be over $ 500,000,000. As Camden I recognizes, the "'*common fund is itself the measure of success* . . . [and] represents the benchmark on which a reasonable fee will be awarded.'" Camden I, supra, 946 F.2d. at 774 (quoting Newburg, Attorney Fee Awards § 2.07 at 47 (1986)).

Most important, however, is not the final dollar amount, but that the Class award represents a total recovery. The Class recovery is not a settlement of a compromised and negotiated portion of the initial recovery sought, but Plaintiffs are getting every

[4] The common fund is specifically defined in Paragraph 8 of this Court's Final Order and Judgment, filed contemporaneously herewith.

dollar that they sought. In accordance with the Friedrich standard, the award of attorneys' fees should be commensurate with this significant result.

d. The Combined Experience, Reputation, and Ability of Class Counsel Are Significant.

The combined experience of lead Class Counsel, Mr. Cook, Mr. Gregory, and Mr. Forehand, is one-hundred and eleven (111) years of practicing the law in Georgia.

Mr. Cook is a well-known litigator who has practiced law for over five (5) decades and who was recognized as one of Georgia's Super Lawyers in 2006 and 2008. Mr. Gregory, a member of the bar since 1966, has been a litigator, a Superior Court Judge, and a Georgia Supreme Court Justice. Mr. Gregory also authored the treatise, *Georgia Civil Practice* (LexisNexis/Mathew Bender), now in its third edition. Mr. Forehand has nineteen (19) years litigation experience, including previous work against Georgia's retirement systems and work on other complex cases. Mr. Forehand also co-authored a chapter in Kaplan's Nadler, *Georgia Corporations, Limited Partnerships and Limited Liability Companies* (Thompson/West).

In addition, Mr. Richard H. Sinkfield represents Class Counsel on the issue of an award of attorneys' fees. Mr. Sinkfield has been a member of the State Bar of Georgia since 1971, and is well-known as a skilled trial lawyer in this state. Mr. Sinkfield was also recognized as a 2006 and 2008 Georgia Super Lawyer, and he is a Fellow of the American College of Trial Lawyers.

Each of these attorneys has substantial experience, a good reputation, and the ability to address the issues presented in this case. The efforts of each have been necessary to bring the case successfully to this point on behalf of the Class.

e. An Award of 30% is Consistent with Similar Cases.

The Johnson factors include consideration of awards in similar cases. The following is a sampling of cases that illustrate the range of recovery granted to counsel in common fund cases in Georgia.

- 1. Barnes v. City of Atlanta, Civil Action No. 2000CV24809 (Fulton County Superior Court). Barnes was a hard-fought case in which attorneys practicing law in the City of Atlanta contested the City's right to collect occupation taxes. This Court awarded thirty three and one-third percent (33⅓ %) of the common fund of $18.3 million to compensate counsel for the class. City of Atlanta v. Barnes, 276 Ga. 449 (2003); Barnes v. City of Atlanta, 281 Ga. 256 (2006).
- 2. Mabry v. State Farm Mutual Auto Ins. Co., Civil Action No. SU99CV4915 (Muscogee County Superior Court). Mabry was a case on behalf of State Farm policyholders with property damage claims. The primary question was whether policyholders should have been paid for the diminished value of their vehicles when they submitted claims. The case settled after the Georgia Supreme Court ruled on the merits, with a settlement fund of $100 million, and $100 million attributed to "going forward relief" to Georgia policyholders. State Farm Mutual Auto. Ins. Co. v. Mabry, 274 Ga. 498 (2001). Counsel's fee award of $50 million represented twenty five percent (25%) of the combined recovery.

- 3. Friedrich v. Fidelity National Bank, Civil Action No. 98-CV-01383 (Fulton County Superior Court). Friedrich was a class action arising out of a failed securities offering. The case was settled for $500,000.00 after about three (3) years of litigation. After an appeal on the question of attorneys' fees, this Court awarded twenty five percent (25%) of the common fund to class counsel. Friedrich v. Fidelity Nat. Bank, 247 Ga. App. 704 (2001).
- 4. In re Tri-State Crematory Litigation, MDL Docket No. 1467 (Northern District of Georgia (2004)). Tri-State arose from the infamous operation of a crematory in northwest Georgia. The case was brought on behalf of relatives of the persons whose remains had been mishandled by the crematory. The case was settled, with the settlement fund estimated to reach approximately $80 million. Judge Murphy awarded attorneys' fees for class counsel in the amount of thirty three percent (33%) of all amounts collected.
- 5. Flournoy v. Honeywell Int'l, Civil Action No. CV-205-184 (Southern District of Georgia (2007)). Flournoy was a suit by coastal property owners for injury caused by chemical contamination of the Turtle River Estuary. The case settled for $25.3 million, and Judge Alaimo awarded counsel the bench mark twenty five percent (25%) of the fund.

Mabry, Friedrich and Flournoy each were awarded twenty five percent (25%) of the common fund whereas Barnes and Tri-State were awarded thirty three percent

(33%). This case, like Barnes, Mabry, and Friedrich was appealed. Also, this case, like Barnes, achieved a high Class return and was not a settlement, whereas the other cases highlighted in this section were resolved through settlements. Finally, this case, like Barnes, brought about a result that but for class representation would not likely have happened: TRS refused requests from retired teachers to voluntarily recalculate the option benefits, and the individual Class Members most likely would have been unable to obtain or pay for individual representation. To date, TRS has even refused to pay amounts that it does not dispute it owes to Class Members. Thus, this case, like the Barnes case, warrants an upward adjustment of the common fund percentage because of the degree of difficulty, the overall monetary award, and the results for the Class Members.

2. Freidrich Additional Factors also Support an Upward Adjustment.

The Freidrich additional factors take into consideration the time to resolution, objections by Class Members, non-monetary benefits, the economics of the lawsuit, and any factors unique to the case. Considering that this suit was appealed to the Court of Appeals and the Georgia Supreme Court, that the TRS trustees rejected a settlement which their counsel recommended that they accept, and that TRS has thus far refused to pay even amounts they do not contest, the four (4) year journey to resolution was replete with obstacles. Second, only three (3) out of the 15,000 Members opted out of the Class and no Class Members objected to the final notice or terms. Third, the resolution of this suit will bring significant non-monetary benefits in that it requires statutory compliance by TRS and the correct future calculations of all benefits owed to Class Members. (And, in fact, this litigation can benefit other State retirees if they are

participants in systems that have used outdated actuarial tables in their benefits calculations.) In addition, the dollar amount owed to each Class Member, by itself, could not have justified or supported the legal challenge necessary to succeed on the merits of this case.

Finally, a unique factor not to be overlooked in this lawsuit is that the Class Members are retired teachers who served this State and its citizens. These teachers invested a portion of their modest salaries into the TRS retirement fund and now are merely seeking a full return of their investment to which they are entitled. This money, while a significant amount in sum total, is, in reality, going to be a payment of some several thousand dollars to each Class Member. That money will be significant in its impact on the retired, fixed-income recipients. The Class Members spent their lives serving Georgia's children, educating the State's future leaders and future taxpayers, and it is past time for them to receive the retirement benefits they are due under the law of this State.

II. CONCLUSION.

The factors that the Court has reviewed and considered demonstrate that, based on the results obtained, the absence of a settlement, the substantial legal questions and risk involved, and the work performed on behalf of the Class, the benchmark is properly adjusted upward in this case. Accordingly, the Court **GRANTS** an award of thirty percent (30%) of the common fund as the Fees Fund from which attorneys' fees, expenses of this litigation, and incentive payments to Class Representatives are to be paid, in accordance with this Order and the Court's separate Final Order and Judgment. The Court also **GRANTS** reimbursement to Class Counsel from the Fees Fund for

The Court also **GRANTS** reimbursement to Class Counsel from the Fees Fund for reasonable expenses previously incurred in the amount of $233,539.45, and **DIRECTS** TRS to allocate $30,000.00 from the Fees Fund for payment of reasonably expected future administration expenses to be incurred by Class Counsel. The Court specifies further disbursements and allocations from the Fund in its Final Order and Judgment. The Court directs that amounts already paid pursuant to Paragraph 12 of the Court's Order of October 22, 2007, and any costs incurred in conjunction with the final notice, shall also be allocated to the Fee Fund. The amount remaining in the Fees Fund after all such allocations and payments shall be the amount awarded as attorneys' fees in this action.

SO ORDERED, this 29 day of Feb, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
SUPERIOR COURT OF FULTON COUNTY

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