SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE, et al.,

Appellants/Defendants,

vs. Case No. 85,618

DAVID KUHNLEIN, SCOTT ENOS, BARBARA BLANCHAR, JOEL CURRAN, and KATHERINE CURRAN, both individually and on behalf of all others similarly situated,

Appellees/Plaintiffs.

_____/

CLASS PLAINTIFFS' ANSWER BRIEF ON ATTORNEY'S FEES AWARD

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A. Nature Of The Case

This is an appeal of an attorney's fee award. The standard of review is whether the trial court abused its discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Thus, the sole issue in this appeal is whether the court abused its discretion in awarding Class Counsel a fee of 10 percent of the common fund, which represented a reduction from the requested fee of 14 percent.

The trial court rendered its decision after personally supervising this litigation on a daily basis for the past three years and after holding a two-day evidentiary hearing regarding the reasonableness of the fee request. (R. 3234-37, Final Judgment on Class Plaintiffs' Petition for Fees and Expenses, ¶ 5, hereinafter "Final Judgment"). Seven witnesses testified. Six additional affidavits were presented, as well as exhibits, detailed time records and more. All of the witnesses testified that the requested fee was eminently reasonable in light of the risks and results obtained. No member of the 648,000 - member class appeared to object to the fee request. (See Tr. at 3).[1] The State presented no evidence that the requested fee was unreasonable. No reported decision holds that a 10 percent contingent fee under similar circumstances is an abuse of discretion.

B. Course of Proceedings[2]

1. Class Counsel Initiated The Challenge To The Constitutionality Of The Impact Fee Statute

On July 1, 1991, the Vehicle Impact Fee statute, § 319.231, Florida Statutes, became effective. Under this statute, persons whose vehicles were previously titled in another State were assessed a $295 Impact Fee. In late 1991, Class Counsel was contacted by class members interested

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[1] Transcript will appear as Tr. at __ for 7/6/95 hearing and as Tr. at __A for 7/7/95 hearing.

[2] The State's Statement of the Case and Facts is deficient as it fails to include the factual and procedural predicate necessary for an understanding of Class Counsel's efforts on behalf of the Class. Counsel's efforts are obviously relevant to the Circuit Court's fee award.

in challenging the Impact Fee statute. (R. 2774). Counsel determined that undertaking this case would entail substantial risk and require a great deal of experience in constitutional law, significant resources and commitment. (R. 2779). It is in light of the risks and prior to filing suit that Class Counsel entered into contingent fee agreements with the named class representatives pursuant to the Florida Supreme Court/Bar Association Model contract. (R. 2454, Ex.C to Motion for Incentive Bonuses). In general terms, it was agreed that Class Counsel would recover up to 25 percent of any recovery obtained if the case was successfully litigated through the appellate level. Id.

Class Counsel made demand upon the State in December of 1991. (R. 2774). The State rejected the demand, making clear that it would continue to collect the Vehicle Impact Fee until told otherwise by a court of law. (R. 2346). The State also indicated that certain bills had been "pre-filed" in the Florida Legislature which might repeal the statute. This repeal never occurred and, in early August 1992, Class Plaintiffs filed their Complaint against the State.

2. Roadblocks Erected By The State

Immediately after Class Counsel filed the Complaint, the State moved to dismiss based upon § 215.26, Florida Statutes, and the purported need for each Class Member to exhaust administrative remedies. Raising those arguments were some of the State's most experienced and talented litigators. They contended that § 215.26 was, on its face, the "exclusive" procedure and remedy for refund claims. They further argued that the Department of Revenue was not a proper party and that Class Plaintiffs lacked standing.

After extensive research, Class Counsel developed a multi-prong attack to the hurdle, including: a) the "exclusive" jurisdiction of the Circuit Court in tax matters; b) appeals from agency determination under § 215.26 flow to the courts through § 72.011, Florida Statutes -- which on its

face is inapplicable; c) the State was estopped from contesting jurisdiction in light of its contention in the Adams case in federal court that the Circuit Court had jurisdiction; and d) § 215.26 had no applicability in the context of a constitutional case like this one. Finally, Counsel demonstrated that the Class did have standing, and that the case was properly brought as a class action.

While the State contended throughout the litigation that no plaintiff had ever received a refund of tax monies from the State Treasury without complying with § 215.26, Class Counsel prevailed in that dispute. The importance of that victory cannot be overstated -- as the State well knew. Indeed, few individuals will ever file their own administrative claim raising complex constitutional claims. Fewer still will "exhaust" their administrative remedies and then assert their claims in court. Even fewer still will have the resources, time, commitment and experience to press complex constitutional claims and win. See Woosley v. California, 838 P.2d 758 (Cal. 1992), cert. denied, 113 S. Ct. 2416 (1993) (taxpayer class action challenging vehicle tax could not proceed; taxpayers instead required to exhaust administrative remedies); Bailey v. North Carolina, 412 S.E. 2d 295 (N.C. 1991) (taxpayers required to exhaust administrative remedies).

Because of the importance of the Circuit Court's ruling, the State filed a Petition for Writ of Prohibition and Motion for Immediate Stay with the District Court of Appeal. As in the trial court, Class Plaintiffs prevailed before the District Court of Appeal.

In light of the State's argument that the Comptroller was a necessary party, Counsel filed an Amended Complaint, naming the Comptroller as a defendant. When named as a defendant, however, the Comptroller filed its own Motion to Dismiss raising the defense of sovereign immunity, the purported exclusivity of § 215.26, the need to exhaust administrative remedies and the purported inability to bring a class action lawsuit in the taxpayer context. Class Counsel worked diligently to

defeat those claims too. When the Circuit Court denied the Comptroller's Motion, the State filed a second Petition for Writ of Prohibition and Motion for Emergency Stay, but this time with the Florida Supreme Court. (R. 2349-50). Like the Fifth District Court of Appeal and the Circuit Court, this Court denied the Comptroller's Petitions.

3. Discovery: "Locking" The Defendants Into Their Story

While battling with the State over threshold legal issues, Class Counsel was also initiating the discovery process. Document Requests, Interrogatories and Requests for Admission were served upon the State, and depositions of its officers were taken to gain an understanding of the facts and circumstances surrounding the creation, passage, operation, administration and enforcement of the Vehicle Impact Fee statute. (R. 2774). Counsel was not, however, operating in a vacuum.

There is precedent for the proposition that where a court decides an issue of first impression for which resolution was not clearly foreshadowed, a court may deny a remedy (in this case a refund) to persons whose rights were violated before the date of the court's decision -- such a decision is said to be not "retroactive." See American Trucking Assoc., Inc. v. Smith, 496 U.S. 167 (1990) (refusing to grant full refund to out-of-state truckers who brought a class action challenging an Arkansas tax that was declared unconstitutional). Thus, a significant risk in the case was a ruling that even if the Vehicle Impact Fee was unconstitutional, the ruling would not be retroactive because the State reasonably relied on settled precedent or the court's decision was not clearly foreshadowed. A related risk was a ruling that the State provided an adequate predeprivation opportunity to contest the tax under McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

Discovery was therefore carefully drafted to address these issues and to obtain the admissions necessary to overturn the Vehicle Impact Fee. However, before doing so, Class Counsel had to

defeat the State's Motion for a Protective Order to preclude discovery. (R. 2351). Even after the Court denied the State's Motion, Counsel had to file additional Motions to Compel and for Sanctions to obtain the State's compliance with discovery requests. After those matters were finally resolved, Counsel obtained the significant admissions that the State had not conducted any constitutional analysis of the statute, and that there were no impact studies supporting the statute. Class Counsel obtained proof that the statute was not passed in reliance upon any settled precedent; instead the Executive branch denied involvement in the passage of the legislation. Counsel learned that the express legislative purpose of the statute was to target new residents -- a Commerce Clause prohibition. Class Counsel further secured the reluctant admission that there was no predeprivation remedy for the review of the validity of § 319.231 prior to payment. (R. 2352).

With respect to the administrative remedy that each Class Member was supposedly required to exhaust, Counsel secured equally significant evidence. Class Counsel learned that while the State was arguing in Court that Class Members must exhaust their administrative remedies, those individuals who did so received a form letter from the State telling them that their claim could only be adjudicated in the Circuit Court. Class Counsel's discovery also demonstrated that the Impact Fees were collected "involuntarily" within the meaning of Florida law, thereby defeating the State's argument that taxes "paid voluntarily" cannot be recovered. (R. 2774).

Finally, Class Counsel's discovery revealed the amount of Vehicle Impact Fees collected, the information the State had concerning the identities of Class Members, and how it maintained its records so that the Class could be tracked if the suit proved successful. (R. 2352).

4. Overcoming Attempts By The Adams Plaintiffs To Prevent A Refund

In early 1993, Class Counsel attempted to work with the plaintiffs in a related case, Adams

v. Dept. of Revenue, Case No. 91-5912. (R. 2776). In that case, one plaintiff challenged the Vehicle Impact Fee actually paid under a predecessor statute not at issue, and the other plaintiff never paid any Vehicle Impact Fee at all. Their claims were brought under § 1983. Id. Neither sought a refund. Despite the divergence in legal theories and standing questions, it was Class Counsel's hope that the two cases could be efficiently prosecuted together. Id. Unfortunately, it became evident that the Adams plaintiffs were not willing to work with the Class towards the goals of having the statute declared unconstitutional and seeking a refund. Instead, the Adams plaintiffs took the position in the Circuit Court and through their appeal to the Fifth District Court of Appeal that a refund was not available to the Class. They joined the State and argued that a refund was not permitted under the doctrine of sovereign immunity. (R. 2777). The Adams plaintiffs were therefore viewed as potentially adverse during at least some time period of the litigation.[3] (R. 2353).

When the Adams plaintiffs' Motions to Disqualify Judge Kirkwood and "Abate" the class action were denied, they filed a Petition for Writ of Prohibition with the Fifth District Court of Appeal. Class Counsel prepared a response to the Adams petition and prevailed before the Fifth District Court of Appeal.

5. Summary Judgment

In August of 1993, Class Counsel concluded that, having overcome all of the State's initial hurdles and having performed its discovery, the case was ripe for summary judgment. Using evidence developed in the course of discovery and through Class Counsel's own independent efforts, Class Counsel focused its brief on the constitutional infirmities of the statute, the lack of any analysis

[3] Class Counsel was relieved that the attorney responsible for the matter in the Florida Supreme Court had a different view and strongly supported the Class Plaintiffs' right to a refund.

of the constitutionality of the statute prior to its passage, the lack of evidence that the State had any purpose in passing § 319.231 other than to generate revenue from new residents, the lack of impact studies demonstrating that new residents impose burdens on the State of Florida, the exemption in the statute for Florida motor vehicles dealers and many other points. By doing so, the debate shifted from an analysis under American Trucking Assoc., Inc. v. Smith, which would have involved an analysis of the State's reliance upon precedent, to a McKesson inquiry as to whether or not the State was required to refund the Vehicle Impact Fees or tax all persons similarly situated who had not been previously taxed. Counsel also prepared an exhaustive memorandum in opposition to the State's own Motion for Summary Judgment which raised serious substantive and procedural arguments.

Even after briefing, Counsel was forced to address still other defenses, including the possibility of "severing" certain language of the statute to make it constitutional. Class Counsel argued the case to the Circuit Court, and on November 30, 1993, the court granted summary judgment and ordered a full refund to the Class.

6. Motion For Escrow

Just three days after the Circuit Court's order, Class Counsel filed motions to modify the automatic stay to prevent the State from collecting the Vehicle Impact Fee during the pendency of its appeal and/or to escrow the monies. (R. 2778). Like many issues in this case, these motions involved novel and complex questions of procedure and policy. While the motion was unsuccessful, it was important strategically. Specifically, the State was forced to admit the difficulties of tracking individuals registering their vehicles if the Impact Fees were not collected at the time of the registration. This, of course, ultimately proved to be an important admission insofar as this Court found the State's suggestion that it could retroactively tax the previously "non-burdened group" an

unworkable solution and therefore required a refund.[4]

7. The Appeal

To expedite the case, Counsel filed a "Suggestion for Certification of Appeal and Cross-Appeal for Direct Review by the Florida Supreme Court." (R. 2779). The State fought Class Plaintiffs' Suggestion for Certification by filing an extensive brief in opposition, while continuing to collect Vehicle Impact Fees. The Fifth District Court of Appeal rejected the State's argument and certified the case to this Court. Prevailing in this battle allowed the case to be fully briefed and argued within two months of the Fifth District Court of Appeal's ruling. As a result of this victory, the Circuit Court's ruling was upheld quickly and fewer individuals paid the unconstitutional Vehicle Impact Fee than if the State had been successful in its delay tactics.

With over $120 million at stake and representing hundreds of thousands of taxpayers, Class Counsel devoted substantial time and resources toward upholding the Circuit Court's decision. Hundreds of decisions relating to the procedural and constitutional issues before the Court were carefully analyzed, and draft after draft of the appellate brief were prepared. The State argued that: a) the Florida Supreme Court should uphold the statute or avoid the matter if the case could be resolved on non-constitutional grounds; b) the Court should sever the exemption in the statute; c) Class Plaintiffs lacked standing; d) the Circuit Court lacked jurisdiction; e) the Class failed to comply with the legislature's terms and conditions for the waiver of the State's sovereign immunity; f) a class action lawsuit could not be brought seeking a refund; g) the statute was constitutional; and h) the trial court erred by not allowing the legislature to create in hindsight a clear and certain remedy.

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[4] In addition, under McKesson, a State's refusal to escrow monies may be used against it when determining the appropriate remedy. See McKesson, 110 S. Ct. at 2244 n.5.

As in the trial court, Counsel prepared extensively for the successful oral argument before this Court. After this Court's September 30, 1994 ruling, the Florida Legislature filed a Motion for Clarification. Class Counsel immediately prepared a Response to that Motion. On November 30, 1994, this Court issued its decision on the Motion for Clarification affirming its earlier ruling.

8. Class Counsel's Efforts For The Class Continued Even After The Supreme Court's Ruling

On December 8, 1994, Class Plaintiffs moved for prejudgment and postjudgment interest, filed a Motion for Expedited Discovery, served the State with discovery, and moved for an expedited case management conference. (R. 1685, 1695). As has been the pattern in this litigation, the State filed a Motion for Protective Order and a Temporary Stay of Discovery and a Motion to Suspend the Dates for Class Notice and the Filing of Attorney's Fees. (R. 1752, 1759). The State also sought a delay until the end of January to conduct the case management conference. (R. 1756). Class Counsel, however, succeeded in prevailing upon the Court for a case management conference and obtained the agreement of all parties for the expedited treatment of the matters of prejudgment and postjudgment interest, the briefing on claims administration, the appointment of an escrow agent and other points. (R. 1793).

Class Counsel expended considerable efforts to prepare for the hearings on the interest issues. While the State contended that it had never been required to pay interest on a tax refund, Class Counsel believed it incumbent upon them to seek the millions of dollars in lost interest for Class Members based upon: a) a review of Florida statutes and cases which provides for the recovery of interest on "all judgments;" b) this Court's Palm Beach County decision; and c) a review of the equities. As this Court is aware, the issues relating to prejudgment and postjudgment interest are not

easy and there are a variety of authorities which are seemingly contradictory.

Class Counsel also negotiated with the State to save Class Members from incurring significant cost relating to the administration of the refund plan. (R. 2007). While typically claims administration and escrowing costs are borne by the Class Members out of the common fund, Class Counsel negotiated an agreement whereby the State assumed such tasks, with an independent group, Peterson Consulting, Ltd., monitoring the process. As a result of this agreement, the hundreds of thousands of dollars in costs which would normally be borne by the common fund are being paid by the State.

9. The Fee Hearing Before The Circuit Court

In response to this Court's decision of June 9, 1995, the Circuit Court conducted a hearing on attorneys' fees and the refund plan on July 6-7, 1995. Prior to that hearing, Class Counsel submitted its Petition for Fees and Expenses. (R. 2342-2410). Class Counsel's Petition stated that it was entitled to 25 percent under the Florida Supreme Court/Florida Bar Association Model Contract for contingency fee cases as agreed to by the Class Representatives, but in light of the magnitude of the common fund, it had agreed to reduce its fee request to 14 percent of the common fund. (R. 2460, Ex. C to Motion for Incentive Bonuses). This percentage was reached by applying the 25 percent to the first $50 million of Impact Fees collected, and then a lesser rate of 10 percent to the remainder, as supported by applicable case law. Id.

The State and Class Counsel agreed upon a notice of the fee hearing which was submitted to and approved by the Circuit Court. (R. 3247). The approved notice was published at Class Counsel's expense in the twelve largest newspapers across Florida. Although there was considerable media attention both prior to and during the hearing, not a single member of the 648,000-person class

appeared at the two-day hearing to object to the reasonableness of the requested fee. (Tr. at 3).

At that hearing, Class Counsel presented the testimony of numerous expert witnesses regarding the reasonableness of the requested fee. Former Chief Justice Raymond Ehrlich testified that the percentage recovery method was the proper approach, and that the 14 percent requested by Class Counsel was eminently reasonable. (Tr. at 124, 116). He noted that Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991), is persuasive, and 25 percent is the benchmark fee in common fund cases. (Tr. at 123, 135; Ehrlich Aff. ¶¶ 6, 11, App. to Fee Petition filed 6/26/95). He further observed that the Florida Supreme Court and Rules of Professional Conduct allow contingency fees of up to 40 percent of the recovery. In his view, the fee was particularly appropriate in this case since no other firm in Florida was willing to take on the State in this risky, resource-consuming litigation. Indeed, he noted that Holland & Knight, the largest firm in the State and the firm in which he is a partner, turned down the representation because of the riskiness of the case. (Tr. at 116-17). Former Chief Justice Ehrlich also stated that the fee was reasonable in light of the excellent results achieved by Class Counsel and the quality of the representation. (Tr. at 118, 129-32).

Class Counsel also presented the expert testimony of Eugene O. Duffy, an attorney who specializes in class action taxation cases. (Tr. at 6-7). Duffy stated that the percentage method of recovery was the only proper method for awarding attorney's fees in this case. (Tr. at 24-26). Duffy testified regarding the attorney's fee awards in the state taxation cases that have been filed in the wake of Davis v. Michigan, 489 U.S. 803 (1989), in which the Court found unconstitutional the state taxation of federal retirement benefits. (Tr. at 67-72). Duffy stated that in the various state refund cases following Davis, state courts have routinely awarded common fund percentages far in excess

of the 14 percent fee requested by Class Counsel. (Id.; see also Appendix to Answer Br., Tabs 6-13, hereinafter "App."). In his view, the 14 percent request was eminently reasonable when compared to these Davis cases because Class Counsel here was required to litigate the constitutionality of the tax on the merits and obtain a refund, whereas the Davis plaintiffs were only faced with the need to obtain a refund. (Tr. at 42-57). He also identified numerous other class actions where the awarded fee percentage was far in excess of the 10 percent awarded here. (Tr. at 68-72; R. 3223, 3224). Further, he noted that in studies of class action cases across the country, class members typically only receive seven cents on the dollar for their claims, with the attorneys recovering 31 percent of that amount. (Tr. at 61-63; App. to Fee Petition, Tab 15). In contrast, the Class will receive one-hundred cents on the dollar in this case with the attorneys petitioning for 14 percent. (Id.).

Class Counsel then presented the testimony of the Honorable Donald L. Smith, a sitting emergency judge in North Carolina who, prior to returning to the bench, was lead counsel in several cases seeking a refund under Davis. (Tr. at 232, 234-35). During his sixteen years on the bench, Judge Smith has presided over hundreds of attorney's fee petitions, including ones such as that presented by Class Counsel. (Tr. at 233). Judge Smith testified that the fee requested was supported by the numerous substantive and procedural hurdles Class Counsel faced and overcame in obtaining a full refund for the class. (Tr. at 243-46). In his expert opinion, the percentage approach was the proper method, and the 14 percent fee requested by Class Counsel was eminently reasonable. (Tr. at 242-3; R. 2573, App. to Fee Petition, Tab 4).

Former Chief Justice Alan C. Sundberg testified, by affidavit, that the percentage method was the appropriate approach for determining a fee award for Class Counsel. (R. 2582, App. to Fee Petition, Tab 2, ¶ 6). In his opinion, the requested fee of 14 percent was reasonable "in light of (1)

the very substantial risks that Class Counsel confronted when they undertook this case, (2) the complexity of the constitutional and other legal issues with which they were confronted, (3) the fact that Class Counsel have received no fees at all during the course of this case, and (4) the extraordinary results that they obtained for the Class, i.e., total victory with a 100 percent recovery." (R. 2589-90, App. To Fee Petition, Tab 2, ¶ 25).

James K. Green, the President of the American Civil Liberties Union of Florida and an accomplished constitutional and class action attorney, testified that the fee requested by Class Counsel was reasonable, particularly in light of the risks involved in litigating constitutional issues against the State. (Tr. at 158-63, 170-78). Green noted that the Adams plaintiffs, which the ACLU represented, actually joined with the State in arguing that a refund was not available under Florida law. (Tr. at 176). In Green's view, Class Counsel achieved an extraordinary result and a 14 percent fee was essential to ensuring that the average citizen has access to the judicial system to right wrongs. (R. 2531, App. to Fee Petition, Tab 8, ¶¶ 12-13).

Darryl M. Bloodworth, a former member of the Florida Bar Board of Governors with more than two decades of experience with litigation involving contingency fee arrangements, testified that the requested fee was reasonable in light of the complexity of the litigation, the risks involved, the excellent lawyering and the unprecedented results achieved. (Tr. at 196-98; R. at 2540-42, 2547, App. to Fee Petition, Tab 6, ¶¶ 10-18). He noted that the 14 percent requested was well under the statutory limitation for the recovery of fees in tort actions against the State, (see Section 768.28(8), Florida Statutes (1993)), consistent with the fee schedule in Rule 4-1.5 of the Rules Regulating the Florida Bar, (see The Florida Bar re: Amendment to Code of Professional Responsibility (Contingent Fees)), 494 So. 2d 960 (Fla. 1986), and far less than the 25 percent fee the Executive Branch has

agreed to pay attorneys in the Medicaid-tobacco litigation. See Section 409.910(15)(b), Florida Statutes (1994 Supp.); (Tr. at 196-227; App. to Fee Petition, Tab 6).

Jonathan C. Koch, a partner at Holland & Knight from 1986 to 1993, testified by affidavit that Holland & Knight turned down the opportunity to represent the Class in this litigation because "the Vehicle Impact Fee case represented an unacceptable risk of recovery." (R. 2535, App. to Fee Petition, Tab 9, ¶ 8). He stated that the "substantial procedural risks, tremendous potential expenses, and [the] substantial time commitment that must be made," when "balanced against the prospect of recovery[,] argued against taking this case -- particularly given that the State has unlimited resources and is frequently a tenacious adversary." Id. He noted that his firm had previously accepted a similarly risky class action involving a state tax, which resulted in a total loss to the firm. (R. 2535, App. To Fee Petition, Tab 19). He concluded that a substantial fee was necessary to ensure that such cases are brought and constitutional rights vindicated. (R. at 2535, App. to Fee Petition, Tab 9, ¶ 11).

Bruce B. Blackwell, a member of the Florida Bar Board of Governors with extensive contingency fee litigation experience, testified by affidavit that a fee award of 15 percent would be well warranted under applicable precedent and the Florida Supreme Court Rules. (R. 2550, 2552-53, App. to Fee Petition, Tab 5, ¶¶ 4, 9). Mr. Blackwell noted that in the tobacco litigation, the State has entered into a contract with counsel to represent the State's interest for 25 percent of any recovery in this $1.4 billion suit. (R. 2555, App. to Fee Petition, Tab 5, ¶ 18).

Mr. Blackwell further noted that if this lawsuit had been brought individually by all of the aggrieved litigants, the filing and service fees alone would have exceeded $100 million and swamped both the Attorney General's office and the State's county court system. (R. 2563-64, App. to Fee

Petition, Tab 5, ¶¶ 39-40). Mr. Blackwell viewed the State's arguments in opposition to the fee as "disingenuous." (R. 2565, App. to Fee Petition, Tab 5, ¶ 46).

Mel R. Martinez, the former President of the Academy of Florida Trial Lawyers with extensive contingency fee experience, similarly opined that the fee should be based on a percentage as in Camden I. (R. 2516, App. to Fee Petition, Tab 7, ¶ 7). Martinez noted that even a 15 percent fee was well within the range established by Florida Supreme Court Rule 4-1.5(f). (R. at 2517, App. to Fee Petition, Tab 7, ¶ 14). Mr. Martinez noted that the contingency fee system is designed, among other reasons, to create access to the courts for those who may otherwise be too indigent to enter. (R. at 2526, App. to Fee Petition, Tab 7, ¶ 37). Mr. Martinez noted that this case could not have been brought other than through a class action, and that a tremendous result was achieved against significant odds. Id.

Barry Richard, an attorney in private practice in Tallahassee who has handled taxpayer class action cases, including Coe v. Broward County, 327 So. 2d 69 (Fla. 4th DCA 1976), aff'd, 341 So. 2d 762 (Fla. 1976), and City of Miami v. Florida Retail Fed'n Inc., 423 So. 2d 991 (Fla. 3d DCA 1982), similarly testified by affidavit that the fee was reasonable. (R. 3068, ¶ 2). Mr. Richard testified that all three branches of Florida government have recognized 25 percent as a presumptively reasonable contingency fee. (R. 3069, ¶ 5(b)). Mr. Richard testified: "There are numerous examples of instances in our society in which compensation considerably beyond that justified solely by time investment is realized because of the large numbers of person willing to pay relatively small amounts of compensation for a potential return. Many examples can be found, for instance, in the entertainment and sports industries. Legal services are no less significant than athletic or entertainment performances." (R. 3070, ¶ 5(d)). Mr. Richard further based his opinion on applicable

precedent, the novel and difficult questions of law, the skill and expertise of Class Counsel, the fact that other highly competent law firms declined representation due to the anticipated amount of work and the risk of receiving little or no compensation, and the complete success achieved by Class Counsel. (R. 3070-71, ¶ 5(e)).

Robert J. Winicki, an attorney in private practice in Jacksonville who has substantial experience litigating constitutional tax matters against the State, testified by affidavit that the fee was reasonable under the circumstances. (App. to Fee Petition, ¶¶ 13-15, 22). Despite his vast experience, he was aware of no other case in which Class Counsel has achieved such a result against the State. (Id. at ¶ 12).

Finally, Co-Lead Counsel W. Gordon Dobie and Christopher K. Kay testified regarding the history of the litigation, the risks they undertook in agreeing to accept such a highly contingent case, and the numerous procedural and substantive obstacles they were required to overcome to succeed on the merits and obtain a full refund for the Class. Neither attorney would have taken this contingent case on anything but a percentage basis. They further testified that, in their view, the requested 14 percent fee was reasonable under the circumstances. (Tr. at 2A-55A, 55A-159A).

C. The State's Position Before the Circuit Court Directly Contradicts Its Position In Pending Litigation In Which It Seeks A Percentage Fee Award

In the face of Class Counsel's abundant and credible expert and lay testimony, the State did not present a single witness to testify regarding the reasonableness of the fee. Instead, it argued to the Circuit Court that the fee must be determined not upon the risks and results, but instead based on the hours expended on the litigation. However, Class Counsel has discovered that, at the same time the State was challenging the fee request on that basis, the State was seeking a common fund

attorney's fee award of $19.7 million in the Southern Bell litigation, even though it had expended less than 2115 hours in that litigation -- for a hourly rate of $9,315. (State's Fee Petition in Southern Bell at 6; App. Tab 2; Fee Summary, App. Tab 3). In its Southern Bell fee petition, it argued for a percentage recovery based on the purported risks taken and the results achieved. (Id. at 44-47).

D. Disposition By The Circuit Court

After carefully reviewing the evidence, applicable case law, briefs, affidavits and exhibits and having been familiar with Class Counsel's efforts on a day-to-day basis during the three years of litigation, the Circuit Court issued its 17-page Final Judgment. The Circuit Court found that a 10 percent contingent fee was reasonable in light of the excellent result, the high quality lawyering, the risks inherent in the case, and a variety of other factors enumerated in Camden I and Rule 4-1.5. (R. 3234-51).

Specifically, the court found that "Class Counsel's efforts in this case have resulted in the creation of a common fund of approximately $188.1 million." (R. 3237-38). The Court observed that counsel "agreed to undertake such a representation on a pure contingency fee basis, meaning that Class Counsel would receive no fees for its services if it failed to succeed on the merits in invalidating the Impact Fee under the United States Constitution and obtaining a refund of the impact fees. Class Counsel further agreed to front all the expenses of the litigation, and that it would not be reimbursed for such expenses unless it prevailed on the merits and secured a refund for the class." (R. 3235). The court also found that there were "substantial" risks in this case as the State raised numerous defenses including: "a) the failure to exhaust administrative remedies pursuant to § 215.26 . . .; (b) the ability of bringing this suit as a class action . . .; (c) the State's protection from suit under the doctrine of sovereign immunity; (d) the likelihood of prevailing on the merits and invalidating the

Impact Fee under the United States Constitution; (e) whether a ruling holding the Vehicle Impact Fee unconstitutional would be viewed as new precedent and thus not given retroactive application; and (f) the Class' right to a refund even if the Class prevailed on the merits and the Impact Fee was declared unconstitutional . . . ." (R. 3236). The Court further found that the case was indeed risky and had been rejected by the largest law firm in the State. (R. 3241). It was also "well aware that there were numerous contingent cases such as this where plaintiffs' counsel, after investing thousands of hours of time and effort have received no compensation whatsoever." (R. 3248). The court found that this was "not merely a 'single issue' statutory challenge" (R. 3243), but was instead "complicated and intense." (R. 3242). "The lengthy opinions by both the Circuit Court and the Florida Supreme Court in this case are indicative of the difficult and complex issues presented, each of which Class Plaintiffs were forced to address before obtaining favorable judgment." (R. 3243).

The Circuit Court also found that the fee award was justified by the high quality of lawyering. It observed that "Class Counsel filed extensive briefs and other papers in five separate appeals," "extensive discovery occurred," and "significant attorneys' time and labor were required to successfully prosecute this case on a wholly contingent basis." (R. 3242-43). The Court noted that "Class Counsel had extensive experience in complex class actions," (R. 3244), that Class Counsel litigated this matter with "economy and efficiency," and that the "high quality of Class Counsel's representation" supported the fee award. (R. 3245). "Whereas a vast majority of class actions settle for a small percentage of the amount lost by the plaintiff class, Class Counsel in this case achieved a full and complete refund for each of the members of the Class." (R. 3242).

Addressing the question of the methodology for calculating a reasonable attorney's fee, the court observed that the United States Supreme Court has "expressly recognized the propriety of the

percentage approach" and applied the percentage approach in every case in which it has addressed the computation of a common fund fee award. (R. 3239). The court also noted that the percentage approach was utilized by the Florida Supreme Court in the taxpayer common fund case of Tenney v. City of Miami Beach, 11 So. 2d 188 (Fla. 1942), and that "district courts of appeal have followed Tenney in awarding attorney's fees from common funds on a percentage basis." (R. 3239, Final Judgment at 6 (citing cases)). The Circuit Court observed that, consistent with the United States Supreme Court and this Court's Tenney decision, "the United States Court of Appeal for the Eleventh Circuit has mandated the percentage approach in all common fund cases. See Camden I, 946 F.2d at 774 (holding twenty-five percent is a reasonable benchmark)." (R. 3240).

The Circuit Court also found it particularly appropriate to use the percentage approach in light of the fact that the parties executed the Florida Supreme Court/Florida Bar Association Model Contract for contingency fee cases at the outset of the litigation. While the agreement was "not binding on the court," "it should serve as a starting point for the determination of a reasonable attorney's fee in this litigation." (R. 3240-41). Given the size of the judgment, however, the court found that a reduced fee of 10 percent constituted a reasonable attorney's fee in this case in light of all the evidence.

Finally, the court held that a percentage should be applied to the "entire common fund, consisting of the gross amount of vehicle impact fees collected by the State and which are eligible for a refund. Boeing Co. v. Van Gemert Management, 444 U.S. 472, 478 (1980)." (R. 3249-50). The Circuit Court further ordered that unclaimed Impact Fees (the "Residual Fund") should be distributed to the Class in a second distribution but limited so that no Class Member will receive more than what they paid ($295 in most instances), with Class Counsel receiving an additional ten percent of the

Residual Fund, and any remaining amount (which may be substantial) paid to the State. (R. 3151-52, Order on Class Plaintiffs' Motion for Distribution of Residual Funds).

II. SUMMARY OF ARGUMENT

The matter is before this Court on appeal of the Circuit Court's order awarding Class Counsel 10 percent of the common fund as a reasonable attorney's fee. This Court's review of this determination is governed by the abuse of discretion standard, under which this Court may disturb the Circuit Court's exercise of its discretion only where it finds "no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203.

The Circuit Court did not abuse its discretion. As an initial matter, the State offered no evidence at the fee hearing. "[W]hen the appellant has an opportunity to present evidence upon the reasonableness of the fee and fails to do so, he is not in a position to question the amount of the fee if there is evidence to support the amount set by the trial court." Quarngesser v. Quarngesser, 177 So. 2d 875 (Fla. 3d DCA 1965). Thus, the State has no standing to object to the fee award.[5]

Moreover, the Circuit Court's fee award is amply supported by expert and lay testimony, its first-hand experience during three years of litigation, and extensive precedent. In addition to numerous analogous cases awarding far higher percentages, each of the three branches of Florida government has approved a reasonable attorney's fee of at least 25 percent in contingent cases. See Florida Bar Re Amendment to Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960 (Fla. 1986); Florida Bar Rule 4-1.5; § 409.910(15)(b), Florida Statutes (1994 Supp.) (attorney's fee

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[5] In addition and as noted in Class Plaintiffs' Motion to Dismiss, because the fees are to be paid by the Class and not the State, the State has no standing to contest the Circuit Court's fee award. In its response to that Motion, the State concedes there are no cases supporting its novel and ultimately meritless "waiver" argument.

in Medicaid/tobacco litigation capped at 30 percent of common fund); § 768.28(8), Florida Statutes, (1993) (negligence statute permitting fees as high as 25 percent); § 16.53, Florida Statutes, (1994) (Attorney General may recover 30 percent fee in antitrust actions). In executing its agreement with the attorneys to represent the State in the Medicaid/tobacco litigation, the Executive Branch placed its imprimatur on such agreements by agreeing to pay its counsel 25 percent of its $1.4 billion claim. Indeed, not only has the State has conceded in its appeal brief that the percentage approach is appropriate under Florida law, (State's Br. at 9), it also has conceded in the Southern Bell litigation that a higher percentage than awarded here is reasonable (App. Tab 2) -- even where the case settles before trial. Therefore, the uncontradicted record in this case, coupled with these and other precedents, leads to the inescapable conclusion that the Circuit Court did not abuse its discretion in awarding Class Counsel a fee of ten percent of the common fund.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING CLASS COUNSEL A REASONABLE ATTORNEY'S FEE BASED UPON A PERCENTAGE OF THE COMMON FUND

A. The Circuit Court's Award Of Fees From The Common Fund Is Legally Correct

As the State concedes and the Circuit Court correctly held, attorneys who generate a common fund for the benefit of a class are entitled to have their fees paid by the class members. (State's Br. at 9); Trustees v. Greenough, 105 U.S. 527, 532-33 (1882). Under the "common fund doctrine," a lawyer who recovers a common fund for the benefit of persons other than himself is entitled to a reasonable attorney's fee from the fund as a whole. Tenney, supra; Fidelity & Cas. Co. v. O'Shea, 397 So. 2d 1196 (Fla. 2d DCA 1981); City of Miami Beach v. Jacobs, 341 So. 2d 236 (Fla. 3d DCA 1976), cert. denied, 434 U.S. 939 (1977); City of Miami v. Florida Retail Fed'n Inc., 423 So. 2d 991 (Fla. 3d DCA 1982). Courts have long recognized that the common fund doctrine plays a crucial

role "in vindicating the rights of individuals who otherwise might not consider it worth [their while] to embark on litigation in which the optimum result might be more than consumed by the cost." Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980).

B. The Percentage Method In Awarding Fees Is A Proper Approach

1. The Percentage-Of-Recovery Approach Is The Traditional Fee-Setting Approach In Common Fund Cases

The State further agrees that the Circuit Court may "utilize the percentage approach to determine a reasonable attorney's fee in this case." (State's Br. at 9). Indeed, the Circuit Court's award of fees based on a percentage of the common fund is supported by precedent from tax refund cases reaching back to at least the Civil War. Frost v. Inhabitants of Belmont, 88 Mass. 152, 164-65 (1863). See Dawson, Public Interest Litigation, 88 Harv. L. Rev. 849, 882 n.120 (1975); see also Newberg, Attorney Fee Awards, § 2.02 at 31 (1986); Third Circuit Task Force Report on Court Awarded Attorneys Fees, 108 F.R.D. 237, 242 (3d Cir. 1985) (hereinafter "Task Force Report"); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) ("the percentage basis method is grounded in tradition"). Historically, class counsel's entitlement to a percentage of the common fund derives from the equitable power of the courts under the doctrines of quantum meruit and unjust enrichment. Camden I, 946 F.2d at 771 (citing Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885)); Greenough, 105 U.S. at 527.

Under the percentage approach, courts have employed a variety of factors to set the reasonable percentage, the most common of which are the risks of the litigation, the quality of counsel and the "size of the fund or amount of benefit produced for the class."[6] Task Force Report, 108

[6] The other factors courts sometimes examine include the novelty and difficulty of the legal issues, the preclusion of other employment, the customary fee, the quality of counsel and the effort

F.R.D. at 242.

In Florida, every case that has addressed the issue has awarded a common fund fee based on a percentage basis. For instance, in Tenney, a class of taxpayers successfully sued a municipality for a refund of improperly collected taxes. The trial court applied a percentage-of-recovery approach and awarded class counsel 33 percent of the common fund. This Court affirmed the award from the common fund, finding the percentage to be reasonable in light of "the amount of the claims, the difficulties encountered, the expense attorneys are forced to incur, and the fact that the litigation ran over four years." 11 So. 2d at 190. This Court concluded that the 33 percent award was fully justified by the risks undertaken by counsel. Id.

The district courts of appeals have followed Tenney in awarding attorney's fees from the common fund on a percentage basis. For instance, in Jacobs, 341 So. 2d 236, class counsel successfully represented a class of individuals seeking a refund of certain "fire line charges." In a decision affirmed on appeal, the circuit court applied the percentage method and awarded class counsel 37 percent of the common fund in attorney's fees.

Similarly, in Florida Retail Fed'n Inc., 423 So. 2d 991, a group of merchants filed a class action seeking to recover the excess payments of occupational license taxes. The trial court ruled in favor of the merchants, ordered a refund of the tax payments, and awarded attorney's fees in "a sum equal to one-third of the gross amount of reimbursement for 1980-82." Id. at 992. (emphasis added). The Third District Court of Appeal affirmed the attorney's fee award as reasonable based "upon the benefit obtained for class members by the attorneys." Id. at 993.

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expended, the "undesirability" of the case and the nature and length of the professional relationship with the client. Camden I, 946 F.2d at 772 n.3; Florida Bar Rule 4-1.5.

Other courts have followed Florida in applying the percentage approach in common fund cases. For instance, in Blum v. Stevenson, 465 U.S. 886, 900 n.16 (1984), the Court noted that, unlike statutory fee-shifting cases, attorney's fees in common fund cases are "based on a percentage of the fund bestowed on the class." The Supreme Court's recognition that the percentage approach is necessary in common fund cases is consistent with the Court's use of such an approach in every case in which it has addressed the computation of a common fund fee award. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939); Pettus, 113 U.S. at 128; Greenough, 105 U.S. at 532. Thus, the Supreme Court has never endorsed the use of any other approach in common fund cases. See Camden I, 946 F.2d at 773.

Following Blum, the Eleventh Circuit has mandated the percentage approach in all common fund cases. In Camden I, the Eleventh Circuit specifically rejected the lodestar methodology as unworkable and unprincipled and found that, "after reviewing Blum, the Task Force Report, and the foregoing cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case." Camden I, 946 F.2d at 774. See also Ressler v. Jacobson, 149 F.R.D. 651, 653 (M.D. Fla. 1992). Numerous other courts, including the influential United States Court of Appeals for the District of Columbia Circuit, have followed Florida's and the Eleventh Circuit's lead and have required the application of the percentage approach in all common fund cases.[7]

In addition, in the Southern Bell antitrust litigation, the State, as co-counsel for the plaintiff class, has filed a fee petition seeking a fee based on a percentage of the common fund. In that fee

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[7] See Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993). See also Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993) ("this court [has] distinguished common fund cases from statutory fee cases and recognized the propriety of awarding attorneys' fees in the former on a percentage of the fund, rather than lodestar basis").

petition, counsel for the class have requested 30 percent of a common fund settlement purportedly valued at $237 million, for a fee award of $79 million. Of that amount, the State seeks a reasonable attorney's fee of $19.7 million as its share. The State's fee petition states: "this tribunal must apply a percentage of the recovery analysis." (State's Fee Petition in Southern Bell at 7 (emphasis added), App. Tab 2).

2. The Lodestar Approach Is Unworkable And Has Been Discredited In Common Fund Cases

Given this ample precedent and the State's concession that the percentage approach may properly be used, the Circuit Court can hardly be found to have abused its discretion in utilizing the percentage method. Although the percentage approach has long been the method courts have used to determine a reasonable fee in common fund cases, in the 1970s the United States Court of Appeals for the Third Circuit adopted the now criticized "lodestar" approach to determining a reasonable attorney's fee in common fund cases. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). Under this approach, a trial court faced with an attorney's fee request must first scrutinize the attorneys' time records to determine the reasonableness of the hours spent on each aspect of the litigation. It then takes the total fees so determined -- the "lodestar" -- and multiplies the figure by a "risk multiplier" to reflect the contingent nature of the litigation and the quality of the attorneys' work. Id. at 167-68.

Following Lindy, some courts began indiscriminately applying the lodestar method to both common fund and fee-shifting cases "without any real analysis of the propriety of doing so" even though "the public policy considerations in the two situations are not obviously identical." Task Force Report, 108 F.R.D. at 251; In re Fine Paper Antitrust Litig., 751 F.2d 562, 583 n.19 (3d Cir.

1984). However, the fundamental differences between fee-shifting cases and common fund cases require alternative methods for determining attorney's fees. For instance, an award from the common fund generated by class counsel "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." Camden I, 946 F.2d at 771. Because fees in common fund cases are awarded from the predetermined damage recovery rather than from the losing party, such fees "are neither intrinsically punitive nor designed to further any particular statutory public policy." Brown v. Phillips Petroleum, 838 F.2d 451, 454 (10th Cir. 1988).

Conversely, statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging the private parties to enforce substantive statutory rights where such claims often produce only nominal damages or declarations of rights. Newberg, Attorney Fee Awards, § 2.05; Riverside v. Rivera, 477 U.S. 561 (1986). Indeed, application of the lodestar method in fee-shifting cases is often necessary because of the lack of any "fund" from which to base an award of attorney's fees. Task Force Report, 108 F.R.D. at 247.

Because of the different policies involved in common fund and fee-shifting cases and the difficulties courts encountered in applying the cumbersome and subjective methodology required by the lodestar, the initial attraction of the lodestar approach quickly gave way to widespread condemnation. The United States Court of Appeals for the Third Circuit, the court which gave birth to the lodestar methodology, formed a Task Force headed by Professor Arthur Miller and comprised of judges and attorneys to study court-awarded attorneys fees. The Task Force strongly recommended the wholesale return to the percentage method in common fund cases.

Echoing the criticism from courts and commentators, the Task Force identified countless problems inherent in applying the lodestar approach in common fund cases:

- it greatly increases the workload on an already overtaxed legal system;
- its elements are insufficiently objective and produce results that are not homogeneous;
- it has spawned confusion and a lack of predictability in its application;
- it creates a great disincentive for the early settlement of cases and encourages the accumulation of excessive hours by the most expensive attorneys, often at the expense of the interest of the plaintiff class;
- it fails to discourage abuses and delays in the fee-setting process;
- it does not take into account the economic realities of the practice of law;
- it "creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law;" and
- it is "subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the fund."

Task Force Report, 108 F.R.D. at 246-49. See also Camden I, 946 F.2d at 774; Swedish Hosp., 1 F.3d at 1271. Noting the "widespread belief that the deficiencies of the [lodestar approach] either offset or exceed [its] benefits," the Task Force concluded that, while the lodestar approach continued to have some merit in statutory fee-shifting cases, fee awards in common fund cases should be based on a percentage of the fund. 108 F.R.D. at 245-46; accord Brown, 838 F.2d at 454.

The Task Force's recommendation for the adoption of the percentage approach in common fund cases was grounded in its recognition of the tangible advantages such an approach offers. For instance, awarding a percentage of the common fund is less subjective because the courts do not have to second-guess attorneys regarding the reasonableness of a particular task or the hours expended on it. It also relieves the already overburdened judiciary of the daunting task of scrutinizing

necessarily voluminous attorney time records for the life of the litigation, a review which often delays the disposition of funds to the plaintiff class. See Camden I, 946 F.2d at 774; Swedish Hosp., 1 F.3d at 1269-70. Thus, the percentage approach is consistent with the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Another benefit of the percentage approach is the removal of any incentive to unnecessarily increase hours or to forego an early settlement. See JFK Medical Center, Inc. v. Price, 647 So. 2d 833, 834 (Fla. 1994) ("Florida's public policy . . . encourages the settlement of civil actions"); Florida East Coast Ry. Co. v. Thompson, 111 So. 525 (Fla. 1927) (same); Home Ins. Co. v. Advance Mach. Co., 500 So. 2d 664, 667 (Fla. 1st DCA 1986) (same). For all these reasons, the witnesses at the fee hearing testified that the percentage approach was "absolutely" the proper method in this case. (Tr. at 123-31 (Ehrlich); Tr. at 69-72 (Duffy); Tr. at 250-51 (Smith)).

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING A REASONABLE ATTORNEY'S FEE OF 10 PERCENT

A. Where The State Failed To Present Any Evidence That The Requested Fee Was Unreasonable, It Cannot Now Complain That The Circuit Court Abused Its Discretion

This Court's review of the Circuit Court's fee award is governed by the abuse of discretion standard. Canakaris, 382 So. 2d at 1203.[8] A Circuit Court abuses its discretion "only where no

[8] The abuse of discretion standard applies in all types of attorney's fee awards, including those involving fees paid from a common fund. See Swedish Hosp., 1 F.3d at 1272 ("We can hardly imagine a more futile and foolhardy endeavor than struggling to review each district court's familiarity with a case to decide how much deference to grant its findings and conclusions"); Brown, 838 F.2d at 453 (16.5 percent common fund award, court held that "[a]n award of attorneys' fees is a matter uniquely within the discretion of the trial judge who has intimate knowledge of the efforts expended and the value of the services rendered").

reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Id.; Baptist Memorial Hosp., Inc. v. Bell, 384 So. 2d 145 (Fla. 1980). Under an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. Kuvin v. Kuvin, 442 So. 2d 203, 206 (Fla. 1983); Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976); Stagaman v. Fonenot, 532 So. 2d 44, 45 (Fla. 1st DCA 1988). Rather, the reviewing court is limited to a determination of whether the trial court's judgment is supported by sufficient evidence in the record. Kuvin, 442 So. 2d at 206 ([t]he test is whether the judgment is supported by competent evidence").

As stated more fully in Class Plaintiffs' Motion to Dismiss the State's Appeal, this Court should summarily deny this appeal because the State wholly failed to present any evidence to bring into question the reasonableness of the Circuit Court's fee award . See Quarngesser, supra; Huntley v. Baya, 136 So. 2d 248; Smith, 151 So. 2d 448; Community Redevelopment Agency v. Krause, 209 Cal. Rptr. 1, 5 (Cal. App. 3d 1984) (no abuse of the trial court's discretion could be found where the appellant "submitted no evidence showing the fees were unreasonable, only its opinion to that effect"); Taghon v. Kuhn, 497 N.W.2d 403 (N.D. 1993) (same); Trapani v. Trapani, 686 S.W. 2d 877, 879 (Mo. Ct. App. 1985) (same).

Finally, the State cannot legitimately contend that the Circuit Court abused its discretion given the admission by the Attorney General's office in the press that the law allows a reasonable attorney's fee of between 10 and 33 percent of the common fund (App. to Fee Petition, Ex. 14), not to mention its request for a $19.7 million fee in the Southern Bell litigation in which it expended less than one-third the hours Class Counsel did here.

B. The Circuit Court Properly Exercised Its Discretion in Light of The Numerous Risks In This Complex Litigation Which Made Recovery Highly Uncertain

The Circuit Court's fee award is fully supported by the record and justified by the risks and complexity presented by this litigation. Unless it was successful in demonstrating the unconstitutionality of the Vehicle Impact Fee on the merits and creating a common fund by obtaining a refund of all such fees extracted by the State, Class Counsel would not have received any compensation or reimbursement for the time, energy and expense of litigating this case to final judgment and through appeal. Try as it may, the State cannot now transform this case into the monolithic and straightforward case with a preordained conclusion which it was not. As the extensive record in this case attests and the Circuit Court correctly found, this litigation was far more risky and complex than the State now asserts. (R. 3236-41).

1. Exhaustion Of Administrative Remedies And Other Procedural Arguments Presented Substantial And Complex Risks

The law was not clear whether the Class would be required to exhaust administrative remedies pursuant to § 215.26, Florida Statutes, prior to filing suit challenging the unconstitutional tax. (Final Judgment at 3). The State advanced this issue at every juncture, including the filing of Petitions for Writ of Prohibition to the District Court of Appeal and the Florida Supreme Court. (R. 2275-76).

Although Class Counsel prevailed on this exhaustion of administrative remedies issue, the risk of a contrary decision was significant as stated most eloquently by the State itself: "[t]his is the first case in recorded Florida history affecting the State Treasury where Section 215.26, Florida Statutes, was not required." (R. 1874, State's Opp. to Interest at 27).

Cases in which similar suits were terminated based on a contrary finding are numerous. For example, in Woosley v. California 838 P.2d 758 (1992), cert. denied, 113 S. Ct. 2416 (1993), a class

challenged a California statute imposing a vehicle tax similar to the Impact Fee and the trial court found the statute unconstitutional and ordered a refund of $1 billion in fees. On appeal, the California Supreme Court agreed that the statute violated the Commerce Clause, but reversed the judgment on the ground that such taxpayer suits could not be brought as a class action without first exhausting administrative remedies. Id. at 775-78.

Similarly, the Class was met with strong arguments that the case should not be certified and that a class action may not be used in a taxpayer refund suit.[9] Although case authority supported such a suit, the State urged this Court to join a minority of states which have held that taxpayers may not sue as a class when seeking a refund from the state treasury. (See State's Memorandum in Support of Motion for Summary Judgment at 10, n.13 filed 8/12/93). Without the use of the class action mechanism, members of the Class, each with no more than $295 at stake, would have been left without legal redress, and Class Counsel would have found itself with its fees and expenses unpaid.

2. The Commerce Clause Issues Were Unsettled And Complex

Even if Class Counsel successfully navigated the Class through these dangerous procedural waters, there was no guarantee of success on the merits. The State raised strong arguments that: 1) the statute did not discriminate against interstate commerce; 2) it was a constitutionally permissible user fee; and 3) the Court had a duty to uphold its constitutionality, avoid the question, or sever a portion of the statute.

Although Class Counsel firmly believed from the outset that the Vehicle Impact Fee violated the Commerce Clause, recent decisions by the Supreme Court demonstrate that the Commerce

[9] Counsel also successfully overcame the State's argument that: (1) Class Plaintiffs lacked "standing" to challenge the statute, (R. 2775); and (2) the Circuit Court lacked jurisdiction.

Clause, despite its ancient origins, is a complex and fluid doctrine, the parameters of which continue to develop. See United States v. Lopez, 115 S. Ct. 1624 (1995). As Professor Tribe has explained: "[t]he Supreme Court's approach to commerce clause issues . . . often appears to turn more on ad hoc reactions to particular cases than on any consistent application of coherent principles." Laurence H. Tribe, American Constitutional Law 342 (1978). The Supreme Court itself has recognized that its cases have left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). (Tr. at 117) ("I know first hand . . . the Supreme Court unfortunately has not laid down sharp lines of demarcation, . . .the first McKesson, reflects that").

3. Class Counsel Faced A Substantial Risk That The Class Would Not Receive A Refund Even If The Statute Was Held Invalid

Despite what Class Counsel believed to be a likelihood of success on the merits, it was keenly aware at all stages of this litigation that the right of the Class to a refund of all unconstitutionally collected taxes was very much in dispute. Not only did the State argue repeatedly that the Court should deny relief to the class, but it was joined by learned and experienced Florida counsel from the American Civil Liberties Union representing the Adams plaintiffs, who argued vigorously that the Class was not entitled to a refund as a matter of law:

> The Class Plaintiffs are seeking damages against the State . . . . This is not permitted under the doctrine of Sovereign Immunity. Regardless of the Florida Supreme Court's recent denial of the State's petition, the State will still utilize every appellate step available to it to avoid having to pay damages to the Class Plaintiffs. The doctrine of Sovereign Immunity does not permit it.

(Adams Reply to Class Plaintiffs' Resp. to Pet. For Writ of Prohibition, filed 6/16/93, at 8-9).

The United States Supreme Court's decision in James B. Beam Distilling Co. v. Georgia, 501

U.S. 529 (1991), and McKesson amply demonstrate the unsettled nature of the law as it relates to the appropriate remedy. Indeed, in certain limited circumstances, states have some flexibility in fashioning a remedy for the collection of an unconstitutional tax. See American Trucking Assocs., Inc. v. Smith, 496 U.S. 167 (1990). Where a decision breaks new constitutional ground, a state may in certain instances deny retroactive relief. Id. Similarly, even when the ruling of unconstitutionality was clearly foreshadowed, the State, in some instances, may tax those citizens who were not subject to the fee -- and avoid a refund obligation. See McKesson, 496 U.S. at 40. Indeed, a plan to do just that was prepared by the State at great expense.[10]

The risks posed by all of these difficult and complex issues were magnified by the fact that defeat on any one of them would have foreclosed recovery to the Class and terminated the litigation. For this reason, James Green compared "this litigation [to] walking through a minefield. Any one of those issues could have been a mine that could have exploded and destroyed the case." (Tr. at 171). In Gene Duffy's words, "the risk against Class Counsel to win every one of these issues [assuming only eight issues], and it had to win every one of these issues when it started out the case, was at a minimum 256 to 1 against them. Had to come up heads eight times." (Tr. at 49-50). Based on these procedural and substantive hurdles, Duffy concluded that class action taxpayer cases "are almost unto themselves in terms of their risk." (Tr. at 57).

4. The Nature And Resources Of Class Counsel's Adversary Presented A Substantial Risk

The intensity of these risks was further magnified by the fact that Class Counsel's adversary was the State, an opponent not known for settlements or cave-ins, with its slew of talented attorneys

[10] Parties have prevailed on the merits only to find the refund door locked shut. (Tr. at 175) (discussing Royal Crown litigation).

and unparalleled resources committed to upholding and enforcing the laws enacted by the legislature. See Edmonds v. United States, 658 F. Supp. 1126, 1141-42 (D.S.C. 1987) (vigorous opposition of government a significant factor in fee award).[11]

The risks presented by this case far exceeded those at stake in most class actions, which are undertaken with the reasonable expectation that the defendant may agree to an early and favorable settlement. Here, the State made Class Counsel unmistakably aware from the outset that the State would litigate this case to judgment and appeal, and that there were no prospects of settlement whatsoever.

Thus, unlike many class actions in which a federal or state government agency assists a class of plaintiffs after the agency has uncovered sufficient evidence to almost guarantee recovery of a common fund, in this case Class Counsel faced those agencies as opponents. See RJR Nabisco, 1992 WL 210138 at *8 (S.D.N.Y. 1992)(justifying 25 percent fee of $72.5 million fund in part on fact that "[t]he facts in aid of plaintiffs' case were developed by plaintiffs' counsel, not by a government agency"). This was "not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." In re Gulf Oil/Cities Serv. Tender Offer Litig., 142 F.R.D. 588, 596 (S.D.N.Y. 1992). Thus, as the Circuit Court noted, litigating this action against, rather than with, the customary assistance found in securities litigation of a governmental agency is a "significant factor" supporting the fee award. See

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[11] (Tr. at 173) ("I think that the State, unlike a lot of local governments, the state of Florida and the Attorney General's office, in particular, are extremely vigorous litigators, who are prepared to outspend most plaintiffs' counsel by a large margin.")). (Tr. at 52-53) (the State is a "unique adversary" that "does not approach litigation in the same perspective that a private litigant does"); See also Winicki Aff. ¶ ¶ 19-21; Smith Aff. ¶ ¶ 14-18; Blackwell Aff. ¶ 25; Martinez Aff. ¶ 20, attached as Exhibits to App. to Fee Petition.

Ressler, 149 F.R.D. at 654 (citing cases).

In light of these numerous hurdles, it would defy reality to suggest that any lawyer would accept such a case for less than the 10 percent fee the Circuit Court awarded. Examples where such high stakes gambles were taken and lost -- and no fees or expenses were recovered -- are far too numerous to list here. See, e.g., Collier County v. Freni, 635 So. 2d 145 (Fla. 2d DCA 1994), cert. denied, 115 S. Ct. 1111 (1995) (taxpayer class action unsuccessful in four year battle seeking refund of local tourist taxes). (See also App. to Fee Petition, Tab 10, Winicki Aff. ¶¶ 8-12).

5. Experienced And Prominent Attorneys Refused This Case Because Of The Risk And Complexity

The risk and complexity of the case are revealed by the unwillingness of any other firms to represent the class. For instance, the largest law firm in the State was presented with the opportunity to represent the putative class. That firm, however, refused to do so on the ground that, in its view, the risks attendant to the litigation were prohibitive:

> While it is easy to second guess the decision now, in our view, the Vehicle Impact Fee case represented an unacceptable risk of recovery. We knew that a class action of the type typified by the Vehicle Impact Fee case would be a long and expensive undertaking for our firm. We understood that like any class action, there are substantial procedural risks, tremendous potential expenses, and a substantial time commitment that must be made. In our judgment at that time, those factors balanced against the prospect of recovery and argued against taking this case -- particularly given that the State has unlimited resources and is frequently a tenacious defendant.

(Koch, R. 2534, App. to Fee Petition, Tab 9, ¶ 9). See also Hawkins v. Thorp Loan & Thrift Co., 1992 WL 589727 at *2 (Minn. D. Ct. 1992) (awarding 25 percent fee where other firms refused representation because of risks).

6. The State's Assertion That This Was A "Single Issue" Case Is Meritless

In ignoring the record below, the State asserts that the Circuit Court's fee award is not

justified because the case allegedly is not as complex as securities, antitrust or consumer fraud cases. This argument suffers from several glaring flaws. First, the case was extremely complex as the numerous procedural and substantive defenses raised by the State indicate. Further, the State position is flatly contrary to the record. The witnesses unanimously testified that antitrust, securities and consumer fraud cases are often less complex and risky than cases such as this. (See Tr. at 32-33, Tr. at 161 ("I find that [constitutional cases] can be as complex" as antitrust cases); Tr. at 226 ("The substantive law in antitrust cases is not all that difficult. I'd say not as complex and difficult as the legal issues here")). In contrast, the State had no evidence to contradict this testimony. Indeed, the case law establishes that most private class actions settle before extensive discovery and few proceed even to the summary judgment stage. (R. 2405-08). Yet, as the State concedes, courts consistently award substantial fee requests in those cases.

Second, complexity itself is not the basis for setting a fee award, but instead is merely one factor a Court may consider in determining whether to depart from the benchmark of 25 to 30 percent awarded in common fund cases. See Camden I, 946 F.2d at 774-7 (citing cases). Although the case law makes clear that the most important factors governing a fee award determination are the risks undertaken by Class Counsel and the nature of the benefit Class Counsel conferred on the Class, the State's filing ignores these factors.

Third, courts have not limited substantial fee awards to the consumer fraud, antitrust and securities law contexts. In fact, courts routinely award substantial fees exceeding 30 percent in class action taxpayer cases such as this. See, e.g., Tenney, supra; Jacobs, supra; Florida Retail Fed'n Inc.; City of Ozark v. Trawick, 604 So. 2d 360 (Ala. 1992); Georgia v. Private Truck Council, 371 S.E.2d 378 (Ga. 1988). Indeed, Class Counsel presented expert testimony regarding the Davis actions

seeking refunds of State taxation of federal retirement benefits. In each case, the court awarded a fee based on a percentage of the common fund ranging from 15 to 33 percent -- despite the fact that the plaintiffs there faced no constitutional issues. (Tr. at 244-45; R. 3233, 3224).

C. The Circuit Court's Fee Award Is Not An Abuse Of Discretion In Light Of The Highly Successful Result Achieved

As the Circuit Court correctly held, the successful result obtained is the other most important benchmark for evaluating the reasonableness of a fee request. (R. 3241, Final Judgment at 8). The Circuit Court correctly found that Class Counsel conferred a $188,100,000 benefit on the Class, which was 100 percent of the amount claimed. This result speaks volumes about the reasonableness of the Circuit Court's reduced fee award.

Indeed, recent studies demonstrate that most class action cases settle for seven cents on the dollar with attorneys receiving an average fee of 31 percent of that recovery. (Tr. at 61-62; App. to Fee Petition, Tab 15). The Circuit Court properly rewarded Class Counsel for its determination in obtaining a full and complete refund for its clients.

Further, as the Circuit Court found, the benefit Class Counsel conferred upon the Class cannot be measured merely in monetary figures (Final Judgment ¶ 33(c)). Class Counsel not only secured a refund, it also removed the threat of criminal prosecution for the failure to comply with the unconstitutional statute. See Florida Retail Fed'n 423 So. 2d at 993 (33 percent attorney's fee in taxpayer class action reasonable because "benefit included not only reimbursement of funds, but removal of the threat of criminal prosecution as well"). Thousands of others also benefitted by never having to pay the Vehicle Impact Fee because of this Court's ruling.

Finally, this litigation saved each member of the Class the burden and expense of prosecuting

her own individual suit, which would have far exceeded the $295 fee and which, in the aggregate, would surely be many times the fee award requested here. (R. 2963-64, App. to Fee Petition, Tab 5, Blackwell Aff. ¶ 39 (filing of individual suits would have cost members an additional $117,975,000 in expenses)). The filing of tens of thousands of individual complaints in the circuit courts across Florida would have been a tremendous strain on an already heavily burdened judiciary, not to mention on the State's attorneys. (R. 2585, App. to Fee Petition, Tab 2, Sundberg Aff. ¶ 14).

D. The Circuit Court's Ten Percent Fee Award Is Also Supported By Contract

The Circuit Court correctly applied the law in holding that the starting point for determining a reasonable attorney's fee award is the contract between the class and its counsel, where one exists. Tenney, 11 So. 2d at 188. The law strongly encourages these agreements at the outset of contingent class action litigation because they protect the interests of the class by both removing any conflict of interest between attorney and class and focusing the energies and talents of counsel on the goal of achieving the maximum common fund recovery for the class. Camden I, 946 F.2d at 774; Task Force Report, 108 F.R.D. at 258; Pettus, 113 U.S. at 127-28. These agreements also are preferred because they infuse simplicity, certainty and fairness into the attorney's fee process. Task Force Report, 108 F.R.D. at 255; Swedish Hosp., 1 F.3d at 1269.

Because of these advantages, this Court and the district courts of appeal adhere to such agreements in awarding a reasonable attorney's fee. See Tenney, 11 So. 2d at 189 (enforcing contract of 33 percent). Other courts have done so as well. Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881, 884 (2d Cir. 1983) ("The presence of an arm's length negotiated agreement among the parties weighs strongly in favor of approval . . . ."), cert. denied, 466 U.S. 944 (1984).

Here, at the outset of this litigation, Class Counsel and the Class Representatives executed

the Florida Supreme Court and Florida Bar Association's Model Contract ("Supreme Court/FBA Model Contract") for contingency fee cases. This Court need look no further than the State for affirmative proof that the Model Contract represents a reasonable attorney's fee in litigation such as this one. Indeed, each of the three branches of the Florida Government approved a reasonable attorney's fee of at least 25 percent in contingent, common fund cases such as this. See Florida Bar Re Amendment to Code of Professional Responsibility (Contingent Fees), 494 So.d2d 960 (Fla. 1986); Florida Bar Rule 4-1.5 (Judicial Branch); § 409.910(15)(b), Florida Statutes (1994 Supp.) (Legislative and Executive branches agree to attorney's fee in Medicaid/tobacco litigation capped at 30 percent of common fund); § 768.28(8), Florida Statutes (1993) (Legislative and Executive Branches provide negligence statute permitting fees as high as 25 percent); § 16.53, Florida Statutes, (1994) (Attorney General may seek 30 percent of fee award in federal or state antitrust actions).

E. The Fee Award Is Comparable T o Awards In Analogous Cases

As the Circuit Court correctly found, the reduced 10 percent fee award is well within the range of reasonable attorney's fee awards in common fund cases and cannot properly be viewed as an abuse of discretion. Even the State concedes that the majority of attorney's fee awards in class action common fund cases fall between 20 to 30 percent of the common fund, with a maximum of 50 percent of the common fund. (State's Br. at 12); Camden I, 946 F.2d at 774-75 (benchmark is 25 percent with "an upper limit of 50 percent of the fund").

Nonetheless, relying exclusively on a selective quotation of Newberg's treatise on fee awards, the State contends that, in large common fund cases, a reduced percentage is necessary. However, the treatise on which the State relies, when read in its entirety, states that in large common fund cases, awards range from 6 percent to 16 percent, with the Lincoln Savings case awarding 29 percent of

recoveries in excess of $150 million -- an incentive approach that Newberg said: "[h]as much to commend it." Newberg, Attorney Fee Awards, § 2.09 at 58. Here, in light of the magnitude of the common fund, Class Counsel reduced its fee request from the 25 percent permitted in the Model Contract to 14 percent.

The benchmarks cited by Newberg and Camden I understate the reasonableness of the fee award here because they fail to take into account the fact that a vast majority of such cases settle soon after being filed. Where cases proceed to discovery, trial and, in the truly rare case, judgment and appeal, courts routinely award a larger percentage of the common fund to reflect the additional time, expense and risk undertaken by counsel for the class. See, e.g., Fickinger v. C.I. Planning Corp., 646 F. Supp. 622 (E.D. Pa. 1986) (33 percent awarded); In re AIA Indus., Inc. Sec. Litig., No. 84-2276, 1988 WL 33883 (E.D. Pa. March 31, 1988) (33 percent awarded); Greene v. Emersons Ltd., 1987 WL 11558 (S.D.N.Y. May 20, 1987) (fees and costs were 46.2 percent in protracted case).

The fee award is much less than the fees awarded in other class actions with similarly large common funds, even though such funds were the result of settlements, rather than prolonged litigation such as that here. For instance, in In re Infant Formula Antitrust Litig., MDL No. 878 (N.D. Fla. Sept. 7, 1993) (Paul, J.) (App. to Fee Petition, Tab 20), the class counsel settled an antitrust matter for $125 million, and the court granted the petition for a 25 percent fee award, thus resulting in a fee of $31.4 million. In In re American Continental Corp./Lincoln Sav. & Loan Secur. Litig., MDL No. 834 (D. Ariz. July 24, 1990)(App. to Fee Petition, Tab 19), the trial court awarded class counsel 25 percent of the first $150 million of any settlement, 29 percent for all amounts thereafter, plus additional percentages as incentives to settle the case expeditiously. See also In re San Juan Dupont Plaza Hotel Fire Litig. 768 F. Supp. 912 (D.P.R. 1991) ($35 million award from a

$220.9 million settlement);[12] In re RJR Nabisco Secur. Litig., MDL. No. 818 (MBM), No. 88 Civ. 7905 (MBM), 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992)(App. to Fee Petition, Tab 18)($17.7 million award, representing 25 percent of $72.5 million settlement fund); In re Plywood Antitrust Litig., MDL 159 (E.D. La. 1988) (App. to Fee Petition, Tab 18) (15 percent of $171 million).

The 10 percent fee is also substantially less than the 30 percent awarded in taxpayer class actions in Florida and elsewhere. See Jacobs, supra; Tenney, supra; City of Ozark v. Trawick, supra; State v. Private Truck Council, supra. The State also ignores the percentage awards ranging from 14 percent to 33.3 percent in the cases involving refunds of state taxes of federal retirement benefits following the United States Supreme Court's decision in Davis v. Michigan.

Curiously, as it did below, the State grounds its excessive fee argument principally on In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 350-51 (N.D. Ga. 1993). In that case, the class counsel settled its $6 billion claim, over the Florida Attorney General's objection, in exchange for $50 million in cash and "coupons" purportedly valued at $250 million to $300 million. The Florida Attorney General objected that "the entire proposal is a promotion masquerading as a settlement." (App. Tab. 14). After subtracting $20 million in administrative expenses, the district court awarded the class counsel $14.4 million in fees and $1.6 million in expenses, or a whopping 53 percent of the cash. Such an award, where class counsel settled the case for pennies on the dollar over the objections of 23 State Attorneys General, including Florida's, demonstrates the reasonableness of the fee award here where, until the end, Class Counsel faced the real risk of

[12] The State also misstates the holdings in In re San Juan DuPont Plaza Hotel Fire Litig., 768 F. Supp. 912 (D.P.R. 1991), and In re MGM Grand Hotel Fire Litig., 660 F. Supp. 982 (D. Nev. 1987). Those cases involved fee awards to plaintiff steering committees and did not discuss the fees awarded counsel in general. Indeed, in the MGM Grand case, the private attorneys received 26.3 percent of the $205 million settlement. 660 F. Supp. at 524.

nonrecovery and obtained a full cash refund for every member of the Class.

The other cases cited by the State support, rather than undermine, the reasonableness of the fee award. For instance, in In re Activision Sec. Litig., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989), the court, in awarding a 32.8 percent award, expressly rejected any focus on billable hours, stating: "The question this court is compelled to ask is, 'Is this [hours] process necessary?' Under a cost-benefit analysis, the answer would be a resounding 'No!'." Id. at 1375. Similarly, in In re Warner Communications Sec . Litig., 618 F. Supp. 735, 745, 750 (S.D.N.Y. 1985), although the class counsel settled the case for only 12 cents on the dollar, the court awarded a fee of 25 percent. In doing so, it refused to limit the award by the hours billed, finding hours to be an inappropriately "nebulous, highly variable standard." Id. at 747. Likewise, in In re King Resources Sec. Litig., 420 F. Supp. 610, 631 (D. Colo. 1976), the court awarded a 20 percent fee and found hours "not [to] be a very reliable yardstick to determine attorneys' fees in complex litigation where an extremely large recovery is achieved with attendant risks and circumstances." In Brown, 838 F.2d 451, the court held that it was not an abuse of discretion to apply a straight percentage approach, and awarded a 16.5 percent fee while noting that hours billed are not an important factor in common fund cases.[13]

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[13] In both Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993), and Bailey, Hunt, Jones & Busto, P.A. v. Langen, 632 So. 2d 82 (Fla. 3d DCA 1993), the courts awarded hefty percentages (29 percent and 25 percent respectively) of the common fund without reference to hours billed. In Swedish Hosp., 1 F.3d at 1269, the court awarded the requested 20 percent fee, but defined the common fund more narrowly than did the class counsel. The Swedish Hosp. court did not, as the State suggests, tie the award to the lawyers' billable hours. In Steiner, 835 F. Supp. at 771, the court noted the difficulties in its hours-based approach and awarded the equivalent of 25 percent of the common fund. In re Agent Orange Product Liability Litig., 818 F.2d 226 (2d Cir. 1987), is not relevant here since the court in that case did not utilize the percentage approach but instead awarded a straight lodestar amount. Similarly, In the Matter of Continental Illinois Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992) does not touch on any of the issues presented here as counsel in that case agreed to limit itself to an award of $9 million, and counsel simply submitted time records to support such an award. In Fidelity and Cas. Co. of New York v. O'Shea,

F. Contrary To The State's Assertions, The Number Of Hours Worked By Class Counsel Is Not The Touchstone For Determining A Reasonable Fee

The gravamen of the State's position on appeal is that the Circuit Court abused its discretion by failing to lower the fee based on the relationship between the fee award and the number of hours Class Counsel expended in the three years prosecuting this case. As noted above, however, this case was undertaken on a contingency fee basis -- not an hourly basis. The State's position, then, is really nothing more than an argument in favor of the discredited lodestar approach. Under the State's view, Class Counsel would only be rewarded if it had undertaken thousands of additional hours of motion practice, discovery, asserted additional constitutional and state law claims, and otherwise "ran the meter" to the detriment of the court system, Defendant, and even Plaintiffs.[14]

The State's argument finds no basis in law or fact and must be rejected. The State's approach is directly contrary to the law in Florida and elsewhere governing fee awards, would effectively close the courthouse doors to Florida citizens by deterring qualified counsel from undertaking important contingent fee cases such as this, reward the inefficient and punish the productive, discourage the settlement of meritorious lawsuits and result in the needless waste of scarce judicial resources.

The State's argument cannot be taken seriously. On the very same day it filed its brief in this Court urging it to reduce further the Circuit Court's fee award based on the hours billed in this

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397 So. 2d 1196 (Fla. 2d DCA 1981), the court reversed an "interim fee award" on the ground that no common fund had yet been created.

[14] Class Counsel reviewed all legal theories potentially supporting the Class' claims. While several possible causes of action were evaluated, including federal due process, equal protection, and state law constitutional arguments, counsel chose a "rifle shot" approach focusing on the key constitutional issues under the Commerce Clause and Privilege & Immunities Clause. By avoiding the "everything but the kitchen sink" litigation approach, Class Counsel presented this Court with a precise legal issue in which the State was at its greatest disadvantage. This strategic decision permitted Class Counsel to also proceed with a more limited discovery plan, as discussed above.

litigation, the State was participating in a fee hearing in Washington, D.C. in the Southern Bell litigation. (App. Tab 2). In that fee hearing, the State, as co-counsel for the plaintiff class, requested a percentage-based attorney's fee of $19.7 million. In support of its requested fee, the State argued that its requested fee was reasonable in light the settlement results it achieved (see App. Tab 2, State's Fee Petition 15-24, 35, 42-43) and the numerous risks involved in the litigation (see App. Tab 2, State's Fee Petition 3-4, 30-31).

An examination of the State's Southern Bell time records demonstrates its two-faced litigation approach. (App. Tab 2) Those time records show that the State expended only 2114.7 hours on the case, yielding a "lodestar" value of $425,292. (App. Tab 3). The requested $19.7 million dollar fee thus yields a multiple of 46.3, and an average hourly rate of $9,315 per hour, which is far in excess of the figures present here. (Id.; App. Tab 2 at 6). By taking diametrically inconsistent positions in this Court and in the federal court regarding the law governing percentage fee awards, the State has forgotten its duty of candor to this tribunal. See Florida Rule of Professional Conduct Rule 4-3.3.

In any event, the Circuit Court did analyze Class Counsel's "time and labor" and found, inter alia, that: a) "a substantial effort was expended since the case began" three years earlier; b) extensive discovery occurred; c) the lawsuit was complicated and intense; d) counsel was involved in "five separate appeals in this case"; and e) "significant attorneys' time and labor were required to prosecute this case on a wholly contingent basis." (R. 3238, Final Judgment at 9-10).

While the Circuit Court considered Class Counsel's time and labor, other factors including the risk and results achieved predominate over all other considerations in the analysis. Tenney, 11 So. 2d at 190 (focusing on risks and results). As a leading commentator in this area has noted, fee awards "normally fall within the usual 20 to 30 percent approximate range regardless of the time expended."

Newberg, Attorney Fee Awards, § 2.08 (emphasis added). See also id. at § 2.09 (an hours-based approach "cannot fairly determine a reasonable fee . . . when a substantial recovery has been obtained after the expenditure of a relatively modest number of hours").[15]

Florida has similarly rejected the State's contention that a court should drastically reduce a fee award based upon the hours expended in a common fund case. For instance, when this Court awarded a fee of 33 percent of the common fund in Tenney, it did so based primarily on the risks counsel bore in litigating the contingent case. It made no mention whatsoever of the hours counsel billed or to any relationship between the fee award and the hours billed. Similarly, in both Jacobs and Florida Retail Fed'n the courts awarded fees of more than 30 percent of the common fund. The courts based these awards on the risks undertaken and the results achieved, and did not examine the number of hours counsel billed or the relationship between the fee award and the hours billed.

Further, the State's approach is irreconcilable not only with the State's position in the Southern Bell case, but also with: 1) the Florida Supreme Court/Bar Association Model Contract for contingency fee cases; 2) the State's own conduct in the Medicaid/tobacco litigation; and 3) the Legislative and Executive branches' approval of such fees in a variety of contexts discussed above.

The State ignores these authorities and instead cites only a single federal district court case -- Meshel v. Nutri-System, 102 F.R.D. 135, 137 (E.D. Pa. 1984) -- for its sweeping proposition that "the purpose of awarding attorney's fees is to compensate for the reasonable value of a lawyer's services." (State's Br. at 11). However, that case arose in the Third Circuit prior to the Task Force Report, which effectively overruled any emphasis on hours billed in favor of a focus on risks

[15] See also Bowles v. Washington Dep't of Retirement Sys. 847 P.2d 440, 452 (Wash. 1993) ("Under the percentage of recovery approach, the attorneys are to be compensated according to the size of the judgment recovered, not the actual hours expended").

undertaken and results obtained. Moreover, contrary to the State's suggestion, the Meshel court rejected a focus on hours: "[w]here success is a condition precedent to compensation, 'hours of time expended,' is a highly nebulous, highly variable standard, of limited significance" because "[o]ne thousand plodding hours may be far less productive than one imaginative, brilliant hour." Id. at 39. In the Meshel court's view, "[t]he contingent nature of the fee requires that the award be generous . . ." Id. at 140. Accordingly, rather than focusing on hours billed, the court noted the "excellent" results and the "wholly contingent" nature of the fee in awarding a fee of approximately 24 percent of the common fund. Id.

V. THE CIRCUIT COURT CORRECTLY FOLLOWED *BOEING CO. V. VAN GEMERT* AND AWARDED FEES AGAINST THE ENTIRE COMMON FUND

The Circuit Court correctly held that the attorney's fee award must be assessed against the entire common fund of Vehicle Impact Fees collected by the State. The United States Supreme Court has held 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) (emphasis added). Thus, the fee award must be assessed against both the claiming and non-claiming members alike. Id.

The rationale for awarding fees against the entire common fund is grounded in equity. As the Supreme Court noted in Van Gemert, by prevailing in litigation and securing a monetary award, class counsel confers a benefit on class members regardless of whether the members exercise their rights to collect the award. Id. at 480. Thus, to avoid unjust enrichment to absent class members, the Supreme Court held that it could "prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." Id. at 478. Further,

failing to award such fees could permit the wrongdoer to reap a gain from its unlawful conduct.

The State feebly attempts to distinguish Van Gemert by arguing that the Van Gemert non-claiming class members would have been unjustly enriched had fees not been assessed against them because their stock increased in value, whether or not they made a claim. However, that was not the equitable benefit the Court identified as relevant to the fee determination. Rather, the Court identified the "right to share in the harvest of the lawsuit upon proof of their identity" as the benefit that required fees to be paid from the entire fund. Id. at 480.

The State's untenable interpretation of Van Gemert has been rejected by every court that has addressed it. See, e.g., Koppel v. Wien, 743 F.2d 129, 134 (2d Cir. 1984) ("It is immaterial to an award of attorney's fees whether beneficiaries claim or accept the benefits obtained on their behalf; equity demands that they share the costs of obtaining the objective benefit secured."); Edmonds, 658 F. Supp. at 1129) (same); Pavlidis v. New England Patriots Football Club, Inc., 675 F. Supp. 707, 710 (D. Mass. 1987) (same).[16]

Equally important, the State's position in this case is impeached by its position in the Southern Bell litigation: "in Van Gemert the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed. (App. Tab 2, State's Fee Petition in Southern Bell, (quoting Newberg, § 14-14) (emphasis added).

[16] Nor can the State escape the grasp of Van Gemert and its progeny by relying on Jacobs, 341 So. 2d 236, which was decided four years before Van Gemert and did not address the issue squarely.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING A PERCENTAGE OF THE UNCLAIMED IMPACT FEES TO CLASS COUNSEL

Although Class Counsel obtained a full refund for all members of the class, as with any large class action, the court and the parties will be unable to locate some of those entitled to refunds because of death, lack of interest, or for some other reason. The State currently predicts that unclaimed refunds due class members who cannot be located may total $25 million. The Circuit Court ruled that this "residual fund" will be distributed to located and claiming class members in a "second distribution," with Class Counsel receiving an additional 10 percent as part of its reasonable fees.[17] Even with this additional amount, Class Counsel will receive less than the 14 percent called for by the contract with the Class members.

The State's brief on appeal does not challenge the Circuit Court's decision to have a second distribution to claiming class members. It does, however, challenge Class Counsel's entitlement to 10 percent of the residual fund. (State's Br. at 24-25).

The Circuit Court's decision regarding disposition of the residual fund is well within its discretion. The State has offered no law and presented no evidence to contradict the court's decision. See Newberg On Class Actions, § 10.17 at 46 (1992) ("[T]he court has the power, and of course should exercise its equitable control, over any fund from which it is expected that a surplus will result after satisfaction of individual claims"); see also id. § 10.15 at 38 (in absence of an agreement, "the court will have to make a determination about the distribution of the surplus"). In Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 816 (5th Cir. 1989), the Fifth Circuit approved the allocation of a portion of the residual to the class counsel. In that case, the court allocated 35.5 percent of the

[17] Any funds remaining after the second distribution will be returned to the State.

residual on the ground that the class counsel had an equitable claim to the residual fund.[18]

The State erroneously contended below that an order directing the residual to Class Counsel would constitute an improper award of damages against the State under § 284.30, Florida Statutes. The Circuit Court properly rejected that argument. That provision applies only to situations where the fee award is being "paid by the State." Here, the Circuit Court has awarded fees -- including the percentage from the residual -- directly from the common fund, not from the State. These monies belong to the Class to reimburse them for fees, not the State. (R. 3151, Residual Order ¶ 2).

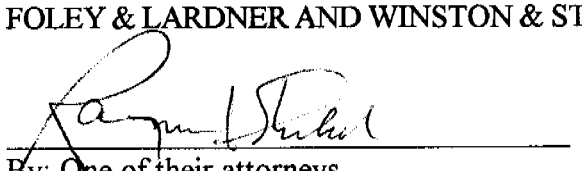
[18] Unlike the present case, in Wilson the claiming class members did not have equitable rights to a portion of the residual fund because they had been paid their full measure of compensation. Here, claiming class members will not be fully compensated without the residual because each claiming class member's refund will be reduced to provide attorney's fees and expenses, and therefore, they have an equitable right to that reduction amount.

CONCLUSION

The Circuit Court, in its unique position as the trier of fact and having supervised this litigation on a daily basis over the past three years, properly examined all relevant factors and determined that a fee of 10 percent of the common fund was reasonable under the circumstances and that Class Counsel was entitled to 10 percent of the residual funds. In light of the absence of evidence to the contrary and the reasonableness of the Circuit Court's fee award, there can be no doubt that the Circuit Court did not abuse its broad discretion. This Court should affirm the Circuit Court's decision.

RESPECTFULLY SUBMITTED,

FOLEY & LARDNER AND WINSTON & STRAWN



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by ~~telecopy and by Federal Express~~ Hand Delivery to ERIC J. TAYLOR, Esq., Assistant Attorney General, The Capitol, Tax Section, Tallahassee, FL 32399-1050; and by Fed Ex to JOSEPHINE A. SCHULTZ, Assistant Attorney General, Office of the Comptroller, Hurston South Tower, #S225, 400 W. Robinson Street, Orlando, FL 32801, this 10th day of August, 1995.

Michael J. Beaudine

Michael J. Beaudine