UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MELBOURNE POFF, and BARBARA POFF, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **PHH MORTGAGE CORPORATION, itself and as successor by merger to OCWEN LOAN SERVICING, LLC,** **Defendant.**	**Case No. 4:20-cv-04018**

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARDS AND MEMORANDUM OF LAW IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs Melbourne Poff and Barbara Poff ("Plaintiffs" or "Settlement Class Representatives") and their counsel ("Class Counsel") have reached a settlement with Defendant PHH Mortgage Corporation ("PHH" or "Defendant") that will provide substantial benefits to Settlement Class Members (the "Settlement"). Under the Settlement, PHH will pay $1,300,000.00 into a common fund that will be used to make payments to Settlement Class Members (the "Settlement Fund") and pay Court approved fees and costs. Each Settlement Class Member who does not opt out will automatically receive a *pro rata* payment from the Gross Settlement Fund within sixty days of the Settlement date. This common fund represents 32.5% of the total amount of Convenience Fees paid by Settlement Class Members during the Class Period (roughly $4 million) that Plaintiffs allege were improperly collected by Defendant. Unclaimed funds will be re-distributed in a secondary distribution to those who participated in the initial distribution, if economically feasible. Thereafter, any residual funds will be disbursed as a *cy pres* award. Thus, no funds from the Gross Settlement Fund will revert to Defendant.

As compensation for their efforts, Class Counsel request attorneys' fees of $429,000, representing 33% of the Gross Settlement Fund, plus reimbursement of Class Counsel's litigation costs, and a service award for each Class Representative in the amount of $5,000. These amounts are fair and reasonable based upon the relief obtained in this action; the skill, time and effort required to obtain such relief; the complex legal issues and technical matters presented; the contingent nature of the representation; the risks assumed; and customary fees and awards in similar actions. Class Counsel's

combined lodestar is $364,519.65 and their litigation costs are $7,866.40.

The benefits achieved through settlement were reached only after extensive factual investigation, motions practice, and discovery and are the product of arm's-length negotiations, including a full-day mediation session by experienced counsel with a firm understanding of strengths and weaknesses of their clients' respective claims and defenses.

Court-approved Class Notice was issued advising Settlement Class Members that (i) Class Counsel intended to apply to the Court for an award of attorneys' fees representing up to 33% of the Gross Settlement Fund and reimbursement of their actual out-of-pocket litigation costs and expenses; and (ii) Plaintiffs would seek service awards of $5,000 for each Class Representative. *See* Settlement at Ex. A, Doc. 87-3. As of the filing of this Memorandum, Class Counsel have received no objections to any aspect of the Settlement.

II. OVERVIEW OF THE LITIGATION

A. Summary of Plaintiffs' Claims

The operative complaint (the "Amended Class Action Complaint" or "Complaint") in this action (the "Action") alleges, on behalf of Plaintiffs and all others similarly situated, that PHH violated the Texas Debt Collection Act ("TDCA") and federal regulations regarding mortgages insured by the Federal Housing Administration ("FHA") by assessing fees to borrowers that are either not permitted by law or are expressly prohibited by their mortgage agreements. (Doc. 60). Specifically, Plaintiffs allege that PHH employed the unfair and unconscionable practice of "collecting or

attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer[.]" Tex. Fin. Code § 392.303(a)(2).

B. Plaintiffs and Their Counsel Vigorously Litigated on Behalf of the Class

Following an investigation, Plaintiffs filed the instant action on behalf of the Class that proceeded as follows:

On July 17, 2020, Plaintiffs, individually and on behalf of a purported class, filed a lawsuit in the United States District Court for the District of New Jersey, asserting claims against Defendant for violations of the TDCA and for breach of contract. Plaintiffs' claims were based on the Defendant's practice of assessing Convenience Fees when its customers made their mortgage payments using online or telephonic payment methods. (Doc. 1).

On August 17, 2020, Defendant filed a motion to dismiss (Doc. 7), which was administratively terminated on August 18, 2020. (Doc. 8).

On September 4, 2020, Defendant filed a motion to stay class-related proceedings because it had reached a proposed nationwide settlement in separate litigation in Florida that, if approved, would wipe-out the claims of all Class Members here. (Doc. 15). Plaintiffs filed an opposition to Defendant's motion to stay on September 21, 2020. (Doc. 23). And, on November 2, 2020, the district court entered an order denying Defendant's motion to stay. (Doc. 32).

On November 12, 2020, the district court ordered parties to file a joint letter

stating their positions on a transfer of the case to federal court in Texas. (Doc. 36). In response, on November 23, 2020, the Parties filed a joint letter informing the district court that they had conferred and agreed to a transfer of the matter. (Doc. 37). Consequently, on November 24, 2020, the case was transferred to the United States District Court for the Southern District of Texas (the "Court"). (Doc. 38).

Following transfer of the Action to this Court, Plaintiffs filed an Amended Complaint on January 11, 2021. (Doc. 60). The Amended Complaint retained the TDCA class claims, dropped breach of contract claims previously asserted, and added a claim for declaratory relief for an FHA sub-class, seeking a declaration that Convenience Fees are not legally chargeable to FHA borrowers and an injunction requiring PHH to comply with the TDCA. *See id.*

Defendant moved to dismiss the Amended Complaint on February 1, 2021. (Doc. 63). Plaintiffs filed an opposition on February 22, 2021 (Doc. 64), and Defendant filed a reply on March 15, 2021 (Doc. 67). In an order dated August 11, 2021, this Court granted in part and denied in part Defendant's motion to dismiss. (Doc. 72). Specifically, the Court dismissed Plaintiffs' declaratory relief claim while denying dismissal of the TDCA claim. *See id.* By separate order of that same date, the Court stayed this matter pending resolution of the Parties' dispute concerning the applicable statute of limitations. (Doc. 73).

Following expedited discovery on the statute of limitations issue, Defendant filed a motion for partial summary judgment, seeking dismissal of claims that sought to recover Convenience Fees paid more than two years before the filing of the initial

complaint as time-barred under the two-year statute of limitations. (Doc. 74). Plaintiffs filed an opposition to Defendant's motion, arguing that because no statute of limitations expressly governs claims brought under the TDCA, a four-year statute of limitations should be applied. (Doc. 75).

In an order dated May 31, 2022, the Court found it appropriate to apply a two-year limitations period, and dismissed all TDCA claims based on payments made prior to July 17, 2018 (*i.e.*, two years before the filing of the initial complaint), which included all claims advanced by Ursula Williams, one of the three original named plaintiffs in this Action. (Doc. 77).

Following this ruling, the Parties agreed to mediate the claims remining in dispute and requested a settlement conference before United States Magistrate Judge Andrew M. Edison. (Doc. 79). The Parties participated in a mediation session before Magistrate Judge Edison on August 15, 2022. During that mediation session, the Parties reached a tentative agreement in principle on the principal terms of a potential settlement.

Following mediation, the Parties filed a Joint Notice of Settlement on September 13, 2022, informing the Court that the Parties had reached an agreement in principle and were working on memorializing the terms of said agreement. (Doc. 82).

On October 31, 2022, the Parties fully executed the Settlement Agreement, which memorialized the terms and conditions of the proposed Settlement and embodies all relevant exhibits thereto. A copy of the Settlement Agreement has been filed with the Court at Doc. 87-3.

C. Plaintiffs and Class Counsel Negotiated an Excellent Settlement

The proposed Settlement requires Defendant to establish a cash settlement fund of $1,300,000.00 (the "Settlement Fund") for the benefit of Settlement Class Members. (Doc. 87-3). Subject to Court approval, the Settlement Fund will be used to make payments to Settlement Class Members; pay the costs of Class Notice and Settlement Administration; pay Service Awards in the amount of $5,000 to each named Plaintiff; and pay Class Counsel's attorneys' fees, and litigation costs. (Doc. 87-3, ¶ 4.1 – 4.4). Payments will be made to Settlement Class Members without the need for any claim forms. No money will revert to PHH.

In the event that Individual Allocation relief remains undeliverable three hundred days after the Final Settlement Date despite the Settlement Administrator's efforts to locate the Settlement Class Members, the remaining funds will be paid to Homes for Our Troops, "a privately funded 501(c)(3) nonprofit organization that builds and donates specially adapted custom homes nationwide for severely injured – post 9/11 Veterans, to enable them to rebuild their lives." https://www.hfotusa.org/mission/ (last visited July 18, 2023).

On November 4, 2022, Plaintiffs filed their Unopposed Motion for Preliminary Approval of Class Action Settlement and Memorandum of Law in Support. (Doc. 86). This Court granted preliminary approval of the Settlement on April 18, 2023, (Doc. 90), and notice was issued to the Class in accordance with the Court's order.

III. ARGUMENT

A. Legal Standard for Attorneys' Fees Awards

Under the common fund doctrine, Class Counsel are entitled to a reasonable attorneys' fee from the fund created for the benefit of the Class. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 962 (E.D. Tex. 2000) (citing *Boeing*). To determine a reasonable fee, courts in this Circuit use either the percentage of fund method or the lodestar method, which multiplies the number of hours reasonably expended by counsel by hourly rates and an adjustment, if warranted. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 745 (S.D. Tex. 2008); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012).

Regardless of which fee method is used, courts also apply the twelve *Johnson* factors to assess the reasonableness of the fee. *Dell*, 669 F.3d at 643; *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by attorneys because they accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19; *Dell*, 669 F.3d at 644.

B. The Court Should Use the Percentage of the Fund Method Here

Most federal courts use the percentage of the fund approach in common fund cases like this. *In re Enron Corp.*, 586 F. Supp. 2d at 748. Although the Fifth Circuit does not require the percentage method (as some circuits do), it is "amenable to its use, so long as the *Johnson* framework is utilized to ensure that the fee award is reasonable." *Dell*, 669 F.3d at 643. In *Dell*, the controlling authority on common fund fees in class actions here, the court "endorse[d] the district courts' continued use of the percentage method cross-checked with the *Johnson* factors." *Id.* The court recognized that "district courts in this Circuit regularly use the percentage method blended with a *Johnson* reasonableness check" and that for some district courts it is the "preferred method." *Id.* (collecting cases); *see also Shaw*, 91 F. Supp. 2d at 964 (percentage method is "superior" to lodestar method for assessing reasonableness of fees); *Schwartz v. TXU Corp.*, No 3:02-CV-2243-K, 2005 WL 3148350, at *26, (N.D. Tex. Nov. 8, 2005) ("there is a strong consensus in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery").

Both before and after *Dell*, courts in this circuit have used the percentage of fund methodology to assess fees in a wide variety of class actions. *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1075 (S.D. Tex. 2012) (using percentage method in class action against payment processor; collecting cases); *Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, No. 4:17-CV-3852, 2019 WL 387409, at *4 (S.D. Tex. Jan. 30, 2019) (awarding fees of 1/3 based on percentage approach); *Ramirez v. J.C. Penney Corp., Inc.,* No. 6:14-CV-601, 2017 WL

6462355, at *5 (E.D. Tex. Nov. 30 2017) (awarding fees based on percentage); *Welsh v. Navy Fed. Credit Union*, No. 5:16-CV-1062-DAE, 2018 WL 7283639, at *16 (W.D. Tex. Aug. 20, 2018) (using percentage method in overdraft fee class litigation); *Erica P. John Fund, Inc. v. Halliburton Co.*, 3:02-cv-1152-M, 2018 WL 1942227, at *8 (N.D. Tex. Apr. 25, 2018) (applying percentage method in securities class action); *In re Enron Corp.*, 586 F. Supp. 2d at 748 (same).

These courts and others recognize that the percentage of fund approach has advantages over lodestar in a common fund case, especially where, as here, the value of the relief obtained is certain. *See Shaw*, 91 F. Supp. 2d at 964 ("lodestar method voraciously consumes enormous judicial resources, unnecessarily complicates already complex litigation, and inaccurately reflects the value of services performed," while percentage rewards efficiency); *see also Schwartz*, 2005 WL 3148350, at *25, *29 (lodestar creates incentive to "run up the bill" and disincentivizes early settlement).

The Court should use the percentage method in this case for similar reasons. This is a common fund case, the amount recovered is certain – $1.3 million – and the amount of each Class Members' share is mathematically calculable. *See Schwartz*, 2005 WL 3148350, at *25. Class Counsel undertook the case on a contingent basis under an agreement with the Plaintiffs that Class Counsel would seek a percentage-based fee of up to one third of any recovery. The results obtained are excellent, and applying a lodestar framework would impose a greater burden on this Court given the more than 533 hours Class Counsel have spent on this litigation. Declarations of James Kauffman at ¶ 11 and Randall K. Pulliam at ¶ 8. There are no objections to the 33% fee percentage. The

requested fee should be assessed based on a percentage of the fund, using the *Johnson* factors to confirm its reasonableness. *See Al's Pals Pet Care*, 2019 WL 387409, at *4 (confirming reasonableness of one-third fee using *Johnson* factors).

Some courts also use a lodestar cross-check against a percentage-based fee, to ensure that the fee does not result in a windfall. *See In re Enron Corp.*, 586 F. Supp. 2d at 751 (purpose of lodestar cross-check is to avoid windfall). The lodestar cross-check entails a more limited review than a full lodestar analysis. *Erica P. John Fund*, 2018 WL 1942227, at *9 (citing *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1086-87) (the lodestar cross-check does not require a court to "scrutinize counsel's billing records with the thoroughness required were the lodestar method applied by itself"). To do a detailed review of the time records "would undermine the utility of the percentage fee." *In re Enron Corp.*, 586 F. Supp. 2d at 825.

Here, the requested fee produces a lodestar cross-check multiplier of just 1.16, which confirms Class Counsel's requested fee is reasonable.

C. Class Counsel's Requested Fee Is Reasonable Under the Percentage Approach

1. The Requested One-Third Fee Is Consistent with Fees Approved by Courts in this Jurisdiction and Elsewhere in Common Fund Cases

Although the Fifth Circuit has not set a specific benchmark for attorneys' fees in class actions, courts here refer to fees of 33% as commonly approved, though higher ranges have been accepted as well. *See e.g., Al's Pals Pet Care*, 2019 WL 387409, at *4 (collecting cases).

In *Al's Pals Pet Care*, 2019 WL 387409, at *4-5, which was a case against a credit card processor, the court awarded fees of one-third of a $15 million settlement, noting one third is an "oft-awarded percentage in common fund class action settlements in this Circuit," and citing nine other cases awarding similar fees, including: *Wolfe v. Anchor Drilling Fluids USA Inc.*, No. 4:15-CV-1344, 2015 WL 12778393, at *3 (S.D. Tex. Dec. 7, 2015) (awarding fees of 40% in FLSA case); *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014) (awarding fees of one-third in over-draft fee class action against bank); *cf. Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (S.D. Miss. 2003) (finding that awards commonly fall between 20% and 30% with multiple awards of 33.3%, but ranging up to 50% on the higher end); *Ramirez*, 2017 WL 6462355, at *5 (noting that "[i]t is not unusual for attorney's fees awarded under the percentage method to range between 25% to 30% of the fund or more"). *See also, Casey v. Reliance Trust Co.*, No. 4:18-CV-00424-ALM-CMC (E.D. Tex. Aug. 6, 2020) (attorneys' fees of one third awarded to class counsel Bailey & Glasser in ERISA class action). In *Erica P. John Fund*, when awarding a fee of one-third of the settlement, the court observed that "numerous courts in this Circuit have awarded fees in the 30% to 36% range," listing more than 20 cases. 2018 WL 1942227, at *9.

In sum, Class Counsel's 33% fee request is within the range of fees commonly approved in common fund class actions.

The requested fee is also consistent with attorneys' fees approved in other convenience fee class actions throughout the country. *See Caldwell v. Freedom Mortg. Corp.*, No. 3:19-cv-02193, Doc. 118 (N.D. Tex. Dec. 17, 2021) (awarding fees of

$749,925, representing one-third of settlement fund); *Alexander v. Carrington Mortg. Svcs., LLC*, No. 1:20-cv-02369, Doc. 67 (D. Md. Nov. 10, 2022) (awarding fees of 40% of settlement fund); *McWhorter v. Ocwen Loan Servicing, LLC*, No. 2:15-cv-01831-MHH, 2019 WL 9171207, at *14 (N.D. Ala. Aug. 1, 2019) (awarding fees of one third in class action challenging pay-to-pay fees to make mortgage payments, using the same *Johnson* factors that apply here); *McDaniels v. Westlake Servs., LLC*, No. CIV.A. ELH-11-1837, 2014 WL 556288, at *13 (D. Md. Feb. 7, 2014) (awarding fee of 1/3 of common fund in class action challenging convenience fees in car loans); *Montesi v. Seterus, Inc.*, No. 2015CA010910, 2020 WL 1951751, at *2 (Fla. Cir. Ct. Apr. 1, 2020) (approving fees of one-third of common fund in convenience fees case).

2. Application of the Relevant *Johnson* Factors Confirms the Fee is Reasonable

Once the court confirms the requested fee is within the appropriate range, the court should use the applicable *Johnson* factors to see whether the fee is fair, reasonable and adequate. *Erica P. John Fund*, 2018 WL 1942227, at *10. Consideration of the applicable factors supports Class Counsel's requested fee here – in particular, the results obtained, the time and labor invested, and the complexity and risks involved.

a) The Class Claims Asserted Required Substantial Time and Labor

Class Counsel have committed significant time to bringing this lawsuit to a conclusion. The time expended was reasonable and necessary to the vigorous prosecution and successful resolution of this complex class action.

As detailed in Section II(B), *supra*, Class Counsel have vigorously litigated this

lawsuit since its inception and moved it forward expeditiously, including, among other things, (1) substantial pre-filing and continuing investigation; (2) researching the law applicable to Plaintiffs' claims and Defendant's defenses; (3) researching, drafting and filing the complaints; (4) reviewing documents; (5) motions practice, including opposing Defendant's motion to dismiss; (6) drafting discovery; (7) drafting Plaintiffs' mediation statement; and (8) successfully negotiating this Settlement. Even after the Settlement was reached between the Parties, Class Counsel devoted significant hours to finalize the Settlement Agreement and all related settlement documents.

The motions practice in this lawsuit included opposing PHH's motion to stay class-related proceedings based on a nationwide settlement it reached in the Southern District of Florida which threatened to release the claims of Class Members here. Kauffman Decl. ¶ 19. Class Counsel also filed a motion to intervene in that case to protect the rights of the Class Members in this Action, and the settlement was ultimately withdrawn. Class Counsel also litigated PHH's motion for summary judgment on the statute of limitations issue, attended pretrial conferences and hearings; prepared a detailed mediation statement; engaged in multiple mediations; participated in negotiations following mediation; and spent weeks documenting the terms and conditions of the Settlement after an agreement in principle was reached. *Id.*[1]

[1] Bailey & Glasser's time in this case includes time spent on the related case *LaShell Bell, Ursula Williams, and Melbourne and Babarba Poff* v. *PHH Mortgage Corp.*, Civ. No. 1:20-03187, filed in the District of New Jersey on March 24, 2020. That case involved the same parties as the parties to this Action and the same claims. The case was ultimately dismissed voluntarily and a new case with Ms. Williams and the Poffs was filed, and was ultimately transferred to this Court. *See* Kauffman Decl. at ¶ 19.

All work performed by Class Counsel was necessary, performed without duplication, and successfully advanced this litigation toward Settlement. As such, the effort and time expended by Class Counsel in navigating the complex legal and factual issues presented in this litigation supports the requested fee. *Compare Ramirez*, 2017 WL 6462355, at *5 (finding fee of 30% justified where counsel's work mainly involved extensive discovery and preparing for and engaging in mediation).

b) The Case Presented Novel and Difficult Issues

The novelty and difficulty of the issues presented by a case is a significant factor in awarding attorneys' fees. Two months after the case was filed, PHH filed a motion to stay all class related proceedings because it had reached a proposed nationwide settlement in a class action in the Southern District of Florida, which would have wiped out the claims of the putative Class here. (Doc. 15-1). The Plaintiffs successfully opposed that motion and preserved the claims of the Class. (Doc. 32). Thereafter the Parties addressed whether the case should be transferred, ultimately agreeing to a transfer. Defendants next sought summary judgment of claims based on the statute of limitations, which was fully briefed after a period of targeted discovery. After one of the Class Representatives was dismissed, Class Counsel continued to litigate the case and advance it toward a settlement for the newly defined Class. The challenges that were presented to Class Counsel at various points of the litigation magnified the risk of success and threatened to derail the litigation. Class Counsel was able to navigate these challenges and ultimately push this case to a favorable and timely resolution for the Class Members. *See Billitteri v. Sec. Am., Inc.*, No. 3:09-cv-01568-F, 2011 WL 3585983, at *6 (N.D. Tex.

Aug. 4, 2011) (fee supported by fact that legal questions involved in class action were difficult and sometimes entirely novel, requiring substantial research and briefing); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014) (applying the second *Johnson* factor, noting that fees were supported by fact that claims at issue were relatively new, and that courts were coming to different conclusions about them, and that class counsel were in the forefront of the litigation of the claims).

Plaintiffs' core allegations regarding the legality of Convenience Fees were also strongly contested by PHH, including whether the payments were allowed under the applicable mortgage contracts, whether the payments were subject to the voluntary payment defenses, or whether the transactions were even covered by the relevant state debt collection statutes. PHH vigorously denied all of the Plaintiffs' allegations in the case, asserted affirmative defenses and otherwise defended its actions with respect to the payments. If the lawsuit were to proceed through trial, Plaintiffs would have to overcome these defenses and arguments.

Notwithstanding the complexity and difficulty of the issues involved in this case, Class Counsel were able to negotiate an excellent recovery for the Settlement Class, providing further support for the fee requested.

c) Obtaining a Successful Outcome Required Skilled and Experienced Class Counsel

Class Counsel are among a handful of law firms litigating cases involving Convenience Fees across the country, and are in the forefront of that litigation. *See* Doc. 86 at ¶¶ 3-6, and Exs. A-B. The litigation of cases like these involving challenges to

mortgage payments is a specialized field as it requires an understanding of the terms of form mortgages, statutory provisions and regulations governing FHA mortgages, and the applicable debt collection laws of multiple states.

Both firms also have years of experience litigating class actions, including consumer financial class actions, ERISA, and securities cases. *Id.* James Kauffman has over fifteen years of complex class action experience, and has served as class and appellate counsel in a wide variety of cases involving consumer protection, securities fraud, and ERISA. Mr. Kauffman has served as class counsel in more than 20 cases challenging Convenience Fees in courts across the country, most of which have now settled on a class-wide basis. Kauffman Decl. ¶¶ 6-7.

Mr. Pulliam of Carney Bates & Pulliam, PLLC has significant experience as lead or co-lead counsel in a variety of class actions and other complex litigation and has achieved excellent recoveries for his clients. *See Phillips v. Caliber Home Loans, Inc.*, Case No.: 19-CV-02711-WMW-LIB (D. Minn.) (class action involving similar claims regarding convenience fee that ultimately received a $5 million settlement); *Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp.*, 1:16-CV-00789-TWP-MPB (S.D. Ind.) (TCPA class action that resulted in a $17 million settlement); *Ebarle, et al. v. Lifelock, Inc.*, Case No. 3:15-CV-00258 (N.D. Cal.) (serving as co-lead counsel in class action that secured an $81 million settlement). *See* Pulliam Decl. at ¶ 2.

The work Class Counsel performed and the results they achieved in this litigation reflect their skill and experience in this field and in complex class litigation. *Id.*

In addition, PHH is one of the largest mortgage lenders in the United States, and it

services the loans of over one million borrowers. It is represented by effective and experienced counsel from a large firm. Because of their experience, Class Counsel were able to efficiently and successfully handle the complex legal and factual issues this case presented on behalf of the Class, despite vigorous and resourced opposition, which further demonstrates Class Counsel's skill and experience.

d) Time Spent on this Litigation Precluded Class Counsel from Taking on Other Work

Class Counsel, in taking this case on a contingency basis, was required to expend significant time and resources on this case in order to advance it towards a successful resolution. The significant time spent litigating and managing this case prevented Class Counsel from working on other cases or taking on new work because of the risks and challenges that this case presented. Had Class Counsel not taken this case, they would have been free to allocate their time and resources elsewhere. *See Shaw*, 91 F. Supp. 2d at 970.

e) The Fee Is Consistent with the Customary Fee for Similar Work and Is Entirely Contingent

Class Counsel took this case on a wholly contingent fee basis, and they have not received any compensation for their work to this point. Doc. 87, Ex. A to Ex. C. *See Billitteri*, 2011 WL 3585983, at *7 (noting relevancy of contingency fee). The fact that their compensation is contingent on obtaining a result for the Class is particularly relevant given the complexity and uncertainty presented by Convenience Fee cases, and the possibility of non-recovery. *Id*. Class Counsel have invested significant time into working and managing this case without a guarantee of payment. Class Counsel did so

with the very real possibility of no recovery or a very limited recovery. Finally, the requested fee is consistent with fees awarded in similar cases, as described above in Section III(C)(1).

f) The Results Obtained by Plaintiffs and Class Counsel Are Excellent

The Fifth Circuit has repeatedly held, as have other courts including the Supreme Court, that the most important factor in determining the reasonableness of a fee award is the results obtained. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir.1998); *Johnson v. Eaton*, 80 F.3d 148, 152 (5th Cir.1996); *Hensley v. Eckerhart*, 461 U.S. 424, 440 (U.S. 1983) ("the extent of plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees"); *see also Shaw*, 91 F. Supp. 2d at 971.

Here, each member of the Settlement Class who does not opt out will receive their pro rata share of the $1,300,000.00 Settlement Fund. The amount recovered represents 32.5% of the Convenience Fees paid by the Settlement Class Members during the Class Period. Doc. 87 at ¶ 9. They will receive these benefits without having to submit any claims forms; checks will be automatically mailed to them. Doc. 86 at § III(A). Equally important, the claims that the Class Members will release are specifically tailored to practices concerning Convenience Fees charged by PHH and do not alter or affect any other rights or obligations of the Settlement Class or PHH with respect to the Settlement Class's relationship with PHH. *Id*.

Moreover, as discussed in Plaintiffs' Motion for Preliminary Approval, Doc. 86, this Settlement's recovery of 32.5% of fees collected is in line with or exceeds amounts

obtained in other Convenience Fee settlements. *See e.g., Fernandez v. Rushmore,* 8:21-cv-00621-DOC (C.D. Cal.) (plaintiff recovered 29.93% of class damages; fees of one-third approved*); Phillips v. Caliber Homes Loans Inc.,* 19-cv-2711 (D. Minn.) (plaintiff recovered 29% of class damages; fees of one third approved); *Caldwell v. Freedom Mortg. Corp.*, No. 3:19-cv-02193, Doc. 118 (N.D. Tex., Dec. 17, 2021) (approving settlement where fund represents approximately 35% of class damages); *Garcia v. Nationstar Mortgage, LLC*, No. 2:15-cv-1808 (W.D. Wash.), Doc. 122 ($3.875 million non-reversionary common fund representing approximately 33% of damages); *Elbert v. Roundpoint,* Case No. 3:20-cv-250-MMC, DE 98 (N.D. Cal. Apr. 18, 2022) (plaintiff recovered 35% of class damages; fees of one-third approved); *Silveira v. M&T Bank*, No. 2:19-cv-06958-ODW-KS (C.D. Cal.) (comprised of a $3,325,000 non-reversionary common fund representing 34.7% of class damages).

As courts in this Circuit have noted, "in the context of a class action settlement, 'compromise is the essence of a settlement, and the settlement need not accord the plaintiff class every benefit that might have been gained after full trial.'" *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 n.69 (5th Cir. 1978)). "Inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Lee v. Metrocare Servs.*, No. 3:13-cv-2349-O, 2015 WL 13729679, at *6 (N.D. Tex. July 1, 2015) (internal citations omitted).

A certain recovery for the Settlement Class now far outweighs the mere possibility of future relief after years of costly litigation. *See Klein*, 705 F. Supp. 2d at 651 ("When the prospect of ongoing litigation threatens to impose high costs of time and money on

the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened.") (citing *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004)); *In re Equifax Inc. Customer Data Security Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132, at *7 (N.D. Ga. Jan. 13, 2020) (weighing risk in evaluating data breach settlement).

g) This Case Presented Substantial Risk

Consideration of the contingent nature of the representation also weighs in favor of the requested fee. *Billitteri*, 2011 WL 3585983, at *7 (finding the contingency fee arrangement of a class action "particularly relevant" to the *Johnson* analysis "considering the difficulty presented by the facts and legal questions in [such] case[s] and the very real risk of obtaining no recovery at all."); *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 618 (W.D. Tex. 2010) (finding the fact that "[c]lass counsel undertook [the] case on a contingency fee basis" relevant to the *Johnson* analysis); *City of Omaha Police & Fire Ret. Sys. v. LHC Group*, No. 6:12-cv-1609, 2015 WL 965696, at *7 (W.D. La. Mar. 3, 2015) (accord). Bearing the full risk of no recovery at all, Class Counsel proceeded knowing that there was a chance that Plaintiffs might not prevail and that, even if Plaintiffs did prevail, there was a chance that the case would take years to bring to trial and would not be resolved without a lengthy appeal. For these reasons, the contingent nature of the representation in this action further supports the fee award requested herein.

As stated above, Class Counsel's work in this case involved a number of complex and difficult legal and factual issues, with uncertain outcomes, due in part to the unsettled nature of the law regarding Convenience Fees. *See e.g.*, *Lish v. Amerihome Mortg. Co.,*

LLC, No 220CV07147JFWJPRX, 2020 WL 6688597, at *2 (C.D. Cal. Nov. 10, 2020) (granting motion to dismiss, finding that plaintiff challenging convenience fees failed to state a claim for violation of California debt collection law); *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 220CV07301ODWEX, 2021 WL 1253578, at *3 (C.D. Cal. Apr. 5, 2021) (granting motion to dismiss similar claims brought under FDCPA and California law); *Turner v. PHH Mortgage Corp.*, 467 F. Supp. 3d 1244, 1246 (M.D. Fla. 2020) (dismissing similar case alleging convenience fees violated FDCPA and state debt collection law, finding such fees were for a separate service and therefore not debts).

Although success at trial could have potentially yielded a higher recovery, Class Members faced the risk of certifying the Class and maintaining certification throughout trial, and proving liability and damages in the face of vigorous opposition by Defendant.

PHH is a large corporation with substantial resources. It could afford a vigorous, and prolonged defense. "'Undertaking expensive litigation against … well-financed corporate defendants on a contingent fee' has been held to make a case undesirable, warranting a higher fee." *Erica P. John Fund*, 2018 WL 1942227, at *12 (quoting *Braud v. Transport Serv. Co.*, 2010 WL 3283398, at *13 (E.D. La. Aug. 17, 2010)).

If the Court had ruled against Plaintiffs at any juncture – either at the pleading stage, class certification, dispositive motions, or on appeal – Class Counsel would receive nothing for the time and expenses they invested in the case. There were many opportunities for this case to be derailed, and Class Counsel's willingness and ability to persist and bear those risks weigh in favor of the requested award.

h) Awards in Similar Cases

As discussed in Section III(C)(1) above, the requested fee in this case is well within the range of fees awarded in similar cases here and across the country.

D. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

When the Fifth Circuit in *Dell* affirmed the district court's use of a percentage fee coupled with a *Johnson* factors analysis to confirm reasonableness, it did not also require a lodestar cross-check. 669 F.3d at 643. Nonetheless, some courts after *Dell* have used a lodestar cross-check to do so, relying on summary reports of time spent. *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1086–87; *Erica P. John Fund*, 2018 WL 1942227, at *9 ("courts using a lodestar as a cross-check to the percentage method have relaxed the degree of scrutiny applied to counsel's billing records").[2]

As noted above, Class Counsel have spent approximately 533 hours combined litigating this case, not including time spent on final approval briefing and this fee application. Kauffman Decl. ¶ 11; Pulliam Decl. ¶ 8, resulting in a combined lodestar of $364,519.65. The hourly rates contained in Class Counsel's declarations are reasonable for nationwide practice of this nature. Kaufman Decl. ¶ 13; Pulliam Decl. ¶ 10. *See e.g.*, *Casey v. Reliance Trust Co.,* No. 4:18-cv-00424-ALM-CMC (E.D. Tex. Aug. 6, 2020) (approving class action fee application in 2020 for Bailey & Glasser attorneys, including Kauffman and Ryan, based on rates of $575 and $715 respectively).

[2] Though not required, Class Counsel will submit their detailed billing records to the Court prior to the Fairness Hearing if the Court so requests.

The amount of time spent was reasonable as well. Class Counsel have provided a narrative description of their work on this case as well as the number of hours performed by each timekeeper in the firm. *See* Kauffman Decl. at ¶ 11; Pulliam Decl. at ¶ 8. Class Counsel spent the 533 hours preparing, researching, briefing, litigating, settling, and administering this case and the issues therein. *See* Kauffman Decl. at ¶ 11; Pulliam Decl. at ¶ 8. Knowing it was possible they would never be paid for their work, Class Counsel had no incentive to act in a manner that was anything but economical. Indeed, every reasonable effort was made to avoid duplication or repetition of task. *See* Kauffman Decl. at ¶ 12; Pulliam Decl. at ¶ 9. The time reported was necessary to the successful outcome of this case over a relatively short period of time. In addition, the reported time was adjusted in the exercise of billing judgment, omitting time spent that may have been duplicative, or non-essential. Kauffman Decl. ¶ 12; Pulliam Decl. ¶ 9.

Here, the requested fee results in a modest multiplier of 1.18 of Class Counsel's lodestar. As such, a lodestar cross-check further demonstrates the reasonableness of the requested fee, which is in fact below lodestar enhancements approved by courts in similar cases. *See Di Giacomo v. Plains All Am. Pipeline*, No. CIV.A.H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19, 2001) ("courts typically apply multipliers ranging from one to four," citing *Faircloth v. Certified Fin., Inc.,* No. 99-cv-3097, 2001 WL 527489 at *7 (E.D. La. May 16, 2001); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1141 (W.D. La. 1997); *see also DeHoyos v. Allstate Corp*., 240 F.R.D. 269, 326 (W.D. Tex. 2007) (applying *Johnson* factors and finding multiplier of 1.68 was warranted given results achieved, risk undertaken, and other factors); *Garza v. Sporting Goods Props.,*

Inc., No. 93-cv-108, 1996 WL 56247, at *33 (W.D. Tex. Feb. 6, 1996) ("The range of multipliers in large and complicated class actions have ranged from 2.26 to 4.5.").

The rates contained in Class Counsel's declarations are within the range of rates recently approved by and reported to courts in similar cases in this jurisdiction and other class actions.[3] *See* Kauffman Decl. ¶ 13, Pulliam Decl. ¶ 10. In *Antonio, Texas v. Hotels.com, L.P.*, No. 5:06-cv-00381, 2017 WL 1382553, at *11 (W.D. Tex. Apr. 17, 2017), a class action against hotel booking sites for failing to pay hotel taxes, the magistrate approved rates of $625 an hour in 2017 for lawyers with more than 20 years' experience. *See also Sierra Club v. Energy Future Holdings Corp.*, No. 12-108, 2014 WL 12690022, at *6 (W.D. Tex. Aug. 29, 2014) (awarding out-of-district counsel in a Clean Air Act case $925 per hour after finding that rate reasonable given their home market); *MidCap Media Fin., LLC v. Pathway Data, Inc.*, No. 15-60, 2018 WL 7890668, at *2 (W.D. Tex. Dec. 19, 2018) (approving a $755 hourly rate in a breach-of-contract case).

E. Class Counsel's Request to be Reimbursed Reasonable Litigation Expenses is Reasonable and Appropriate

Attorneys whose work creates a common fund are routinely reimbursed for the reasonable expenses they incurred to bring the case. *Billitteri*, 2011 WL 3585983, at *10 ("Expenses and administrative costs expended by class counsel are recoverable from a common fund in a class action settlement."). "Reimbursable expenses include court costs, transcripts, travel, contractual personnel, document duplication, [and] expert witness

[3] An "accepted method of compensating for a long delay in paying for attorneys' services is to use their current billing rates in calculating the lodestar." *In re Enron Corp.*, 586 F. Supp. 2d at 763.

fees." *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-2835, 2020 WL 434473, at *7 (D. Md. Jan. 28, 2020). Counsel may be reimbursed for these expenses "in addition to the fee percentage." *Id*.

Collectively, Class Counsel have incurred $7,866.40 in out-of-pocket expenses in the investigation, prosecution and settlement of this Action. Kauffman Decl. ¶ 23; Pulliam Decl. ¶ 19. These expenses include filing fees, *pro hac vice* fees, and mediation fees. As detailed in Class Counsel's accompanying declarations, each expense was actually incurred, and was both reasonable and necessary to prosecute this Action. Further, they are the type of expenses that attorneys in non-contingency cases generally charge to their paying clients. Consequently, these expenses should be reimbursed.

F. Service Awards of $5,000 Are Appropriate

Courts "commonly permit payments to class representatives above those received in settlement by class members." *Smith*, 216 F.R.D. at 367-68; *see In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 503-04 (N.D. Miss. 1996). Such awards are justified in part by the fact that class representatives must be familiar with the case to be adequate representatives and spend time meeting with counsel and gathering documents. *See* Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006). "Serving as a class representative is a burdensome task and it is true that without class representatives, the entire class would receive nothing." *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015) (quotation and citation omitted).

Here, Plaintiffs request Service Awards of $5,000 for each Class Representative

for their efforts in obtaining benefits for the Settlement Class. By participating in this Action, Plaintiffs have subjected themselves to significant public attention by suing PHH. Additionally, over the course of the litigation, Plaintiffs invested significant time in collaborating and communicating with Class Counsel about the case, reviewing case filings, and conferring regarding settlement.

The requested Service Awards are well within the range of awards approved by courts in the Fifth Circuit and elsewhere. *See Caldwell v. Freedom Mortg. Corp.*, No. 3:19-cv-02193, Doc. 118 (N.D. Tex. Dec. 17, 2021) (approving service awards of $5,000 in case challenging convenience fees); *In re Conn's, Inc. Sec. Litig.*, No. 4:14-cv-00548 (KPE), slip op. at 4 (S.D. Tex. Oct. 11, 2018), Doc. 194 (awarding over $22,000 to class representative); *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 306 (S.D. Miss. 2014) (approving the requested service awards of $5,000 for each of the seven (7) class representatives); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *7 (E.D. Pa. Jan. 3, 2008) (awarding $30,000 to each class representative); *McBean v. City of New York*, 233 F.R.D. 377, 391-92 (S.D.N.Y. 2006) (approving incentive awards of $25,000-$35,000, which are "solidly in the middle of the range"); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 WL 3008808, at *18 (D.N.J. Nov. 9, 2005) (awarding $30,000).

IV. CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion for Award of Attorneys' Fees and Costs and for Named Plaintiffs' Service Awards.

Dated: July 26, 2023

Respectfully submitted,

/s/ Elizabeth Ryan .
Elizabeth Ryan (admitted *pro hac vice*)
BAILEY & GLASSER LLP
176 Federal Street, 5th Floor
Boston, MA 02110
617-439-6730
617-951-3954 (fax)
eryan@baileyglasser.com

Randall K. Pulliam (admitted *pro hac vice*)
Edwin Lee Lowther (admitted *pro hac vice*)
CARNEY BATES & PULLIAM, PLLC
519 W. 7th St.
Little Rock, AR 72201
501-312-8500
501-312-8505 (fax)
rpulliam@cbplaw.com
llowther@cbplaw.com

James L. Kauffman (admitted *pro hac vice*)
BAILEY & GLASSER LLP
1055 Thomas Jefferson Street, Suite 540
Washington, DC 20007
202-463-2101
202-463-2103 (fax)
jkauffman@baileyglasser.com

Patricia M. Kipnis
BAILEY GLASSER LLP
923 Haddonfield Road, Suite 300
Cherry Hill, NJ 08002
856-324-8219
304-342-1110 (fax)
pkipnis@baileyglasser.com

CERTIFICATION OF COUNSEL

I hereby certify that this document complies with the word count limit and contains 7,118 words, excluding the caption, table of contents, table of authorities, and signature block.

/s/ Elizabeth Ryan .
Elizabeth Ryan

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) on July 26, 2023.

/s/ Elizabeth Ryan .
Elizabeth Ryan