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11 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

12 *San Francisco Division*

13
14 LAWRENCE TORLIATT,
on behalf of himself and
15 all others similarly situated,

16 Plaintiff,

17 v.

18 OCWEN LOAN SERVICING,
LLC,

19 Defendant.

20 CONSOLIDATED WITH:

21 Lawrence Torliatt v. PHH Mortgage
Corp., Case No. 3:19-cv-04356-WHO
22
23

Case No. 3:19-cv-04303-WHO

**PLAINTIFF’S NOTICE OF MOTION,
MOTION AND MEMORANDUM IN
SUPPORT FOR AWARD OF
ATTORNEYS’ FEES AND LITIGATION
COSTS, AND SERVICE AWARD**

The Honorable William H. Orrick

Date: November 16, 2022

Time: 2:00 p.m.

Location: Courtroom 2

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on November 16, 2022, at 2:00 p.m. in Courtroom 2 of
4 the United States District Court for the Northern District of California, located at 450 Golden
5 Gate Ave., San Francisco, CA 94102, Plaintiff Lawrence Torliatt (“Plaintiff” or “Torliatt”), by
6 and through undersigned counsel and pursuant to the Settlement Agreement and Release, dated
7 June 24, 2022 (Doc. 164-3) (the “Settlement Agreement”), and this Court’s Preliminary Approval
8 Order, dated July 20, 2022 (Doc. 168) (the “Preliminary Approval Order”), will and hereby does
9 move this Court for an order granting his Motion for Award of Attorneys’ Fees and Litigation
10 Costs, and Service Award.

11 More specifically, Plaintiff respectfully requests this Court enter an order, in substantial
12 form to the proposed order attached as Exhibit 1 to Plaintiff’s Motion for Final Approval, filed
13 herewith, (i) approving his request for a Service Award of \$10,000, and (ii) awarding Class
14 Counsel attorneys’ fees and expenses of 33% of the Settlement Fund, or \$2,310,000.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 As detailed in Plaintiff’s Motion for Final Approval of Settlement, which is being filed
18 herewith, Plaintiff and Class Counsel have reached a settlement in this class action (“Settlement”)
19 that will result in a \$7,000,000 settlement fund (the “Settlement Fund”).¹ The Settlement Fund
20 will be used to make payments to Settlement Class Members, and pay administrative costs,
21 attorneys’ fees and expenses, and a service award, all subject to Court approval. The Settlement
22 Fund represents approximately 42% of the Convenience Fees paid by the Settlement Class during
23 the Class Period that were allegedly improperly collected. Cash payments will be made
24 automatically to Settlement Class Members. Unclaimed funds will be paid to a *cy pres* recipient;
25 there will be no reverter to Defendants Ocwen Loan Servicing, LLC (“Ocwen”) or PHH
26

27 ¹ Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth
28 in the Parties’ Settlement Agreement.

1 Mortgage Corporation (“PHH,” collectively with Ocwen, “PHH Defendants”). As an additional
2 benefit to the Settlement Class, PHH Defendants have agreed to stop charging Convenience Fees
3 for a period of two years from the Final Settlement Date to borrowers whose loans are subject to
4 the Rosenthal Act. *See* Declaration of James Kauffman (“Kauffman Decl.”), attached, ¶ 26.

5 To compensate them for their efforts, Class Counsel request a fee and expense award of
6 \$2,310,000, which represents 33% of the \$7,000,000 Settlement Fund relief, and approximately
7 19% of the total settlement value, inclusive of the injunctive relief as discussed below. Class
8 Counsel’s request includes reimbursement of \$78,938 in litigation costs that include filing fees,
9 expert fees, mediation fees, and travel expenses. Kauffman Decl. ¶ 29; Declaration of Lee
10 Lowther (“Lowther Decl.”) ¶ 29. The requested award recognizes the results Class Counsel
11 achieved for the Settlement Class given the substantial risks they faced, and the quality and
12 efficiency of their work. A lodestar crosscheck, while not required, confirms the reasonableness
13 of this request.

14 Finally, Class Counsel requests that the Court approve a Service Award to Mr. Torliatt in
15 the amount of \$10,000 for his work on behalf of the Class. Mr. Torliatt actively participated in
16 this Action over the three years it has been pending. He assisted in Class Counsel’s investigation,
17 reviewed the pleadings, produced thousands of pages of documents, sat for a deposition,
18 participated in five mediations, conferred with Counsel on settlement discussions, and was ready
19 and willing to testify at trial. Kauffman Decl. ¶ 31. Without him there would be no class
20 Settlement.

21 **A. Plaintiff And Class Counsel Negotiated An Excellent Settlement After Hard**
22 **Fought Litigation Spanning Three Years**

23 This class action has been pending now for more than three years. During the course of
24 that time, Plaintiff’s counsel’s efforts on behalf of the Class have included successfully opposing
25 two motions to dismiss, prevailing on a contested motion for class certification, fully briefing
26 and arguing cross-motions for summary judgment, prevailing on a motion to be appointed Rule
27 23(g) counsel, prevailing on a motion to stay this case pending the outcome of an appeal in
28

1 another case challenging Convenience Fees, conducting widespread discovery including expert
2 discovery, and participating in five mediation sessions. Additionally, Class Counsel vigorously
3 challenged a settlement in a competing class action that would have released Settlement Class
4 Members' claims for only 18% of the amount PHH Defendants collected and would have
5 amended their mortgage agreements to expressly *permit* PHH Defendants to collect convenience
6 fees moving forward. Indeed, the competing settlement proposed a claims process with a reverter
7 to PHH Defendants, that if approved, would have resulted in Settlement Class Members receiving
8 even less than 18% of the amount the PHH Defendants collected from them. PHH Defendants
9 abandoned that settlement as to Settlement Class Members only after this Court granted
10 Plaintiff's motion for class certification and Plaintiff successfully opposed PHH Defendants'
11 petition for interlocutory review under Federal Rule of Civil Procedure 23(f). Were it not for
12 Plaintiff's and Class Counsel's tenacity, the likely result for most members of the Settlement
13 Class would be to receive 18% on the dollar (or less) and a perpetual grant of authorization to
14 PHH Defendants to collect the very fees challenged in this lawsuit.

15 ***Initial Filing.*** On July 26, 2019, Plaintiff filed this class action ("the Ocwen Action") on
16 behalf of himself and all others similarly situated. On July 30, 2019, Plaintiff filed a putative
17 class action against PHH Mortgage Corp., also in this district (the "PHH Action"), both asserting
18 various claims against PHH and Ocwen based on their practice of charging fees, ranging from
19 \$7.50 to \$19.50, to borrowers when they paid their mortgages by phone or online ("Convenience
20 Fees"). The Ocwen and PHH Actions were consolidated under this case (the "Action") (Doc.
21 14).

22 ***Early Mediation Efforts.*** On October 16, 2019, the Parties moved to stay this Action
23 while they attempted early mediation (Doc. 28). Following a full-day mediation, the Parties
24 continued their attempts, through the mediator, to reach a resolution (Doc. 30), but their efforts
25 proved unsuccessful and they moved to lift the stay (Doc. 32).

26 ***Amending the Complaint.*** On February 14, 2020, Plaintiff filed an Amended
27 Consolidated Class Action Complaint (the "Amended Complaint") against the PHH Defendants
28

1 (Doc. 34). The Amended Complaint asserted four claims: (1) violation of the federal Fair Debt
2 Collection Practices Act (“FDCPA”), (2) violation of California’s Rosenthal Fair Debt Collection
3 Practices Act (“Rosenthal Act”), Cal. Civ. Code § 1788, *et seq.*, (3) violation of the California
4 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*, and (4) breach of
5 contract.

6 ***First Motion to Dismiss.*** Following consolidation, the PHH Defendants filed a Motion
7 to Dismiss the Amended Complaint on March 6, 2020 (Doc. 36). The PHH Defendants argued
8 dismissal was warranted because (i) the Convenience Fees were fully disclosed and consented to
9 in advance, (ii) Plaintiff failed to allege that Ocwen or PHH was a debt collector under either the
10 Rosenthal Act or the FDCPA, and (iii) Plaintiff failed to allege that his Deed of Trust was
11 breached.

12 Plaintiff opposed the motion, and on April 17, 2020, the Court entered an order granting
13 the motion in part, and denying it in part (Doc. 49). The Court granted the Motion to Dismiss as
14 to Plaintiff’s FDCPA and breach of contract claims, but denied the Motion as to Plaintiff’s
15 Rosenthal Act and UCL claims. The Court further ordered that Plaintiff “shall file an amended
16 complaint by May 1, 2020.” (*Id.* at p. 10.)

17 ***Second Motion to Dismiss.*** Plaintiff filed a Second Amended Consolidated Class Action
18 Complaint (“Second Amended Complaint”) on May 1, 2020 (Doc. 50). On May 15, 2020, the
19 PHH Defendants filed (i) a Motion to Dismiss Plaintiff’s Second Amended Complaint (Doc. 54),
20 and (ii) a Motion for Leave to File a Motion for Reconsideration and, in the Alternative, for
21 Conditional Certification of an Interlocutory Appeal, with Accompanying Memorandum of
22 Points and Authorities (Doc. 55).

23 On May 29, 2020, Plaintiff filed (i) a Notice of Voluntary Dismissal of Counts II and IV
24 of the Second Amended Complaint (Doc. 56), (ii) an Opposition to PHH Defendants’ Motion to
25 Dismiss Plaintiff’s Second Amended Complaint (Doc. 57); and (iii) a Response to PHH
26 Defendants’ Motion for Leave to File a Motion for Reconsideration and, in the Alternative, for
27 Conditional Certification of an Interlocutory Appeal (Doc. 58).

1 On June 22, 2020, the Court entered an order denying the PHH Defendants' Motion to
2 Dismiss Plaintiff's Second Amended Complaint and denying PHH Defendants' Motion for
3 Leave to File a Motion for Reconsideration and, in the Alternative, for Conditional Certification
4 of an Interlocutory Appeal (Doc. 62).

5 ***Extensive Discovery.*** In addition to engaging in extensive motions practice, the Parties
6 also engaged in wide ranging and comprehensive discovery. In particular, the PHH Defendants
7 produced 925 documents (totaling 4,281 pages and comprising spreadsheets with data on
8 hundreds of thousands of transactions) in response to 68 requests for production served by
9 Plaintiff; responded to 20 total interrogatories; and made three separate corporate representatives
10 available for depositions in response to 64 combined 30(b)(6) deposition topics.

11 In turn, Plaintiff produced 679 documents (totaling 3,875 pages) in response to the PHH
12 Defendants' requests for production, and the PHH Defendants also took Plaintiff's deposition.
13 The Parties also engaged in expert discovery. Plaintiff offered the opinions of Ms. Patricia Forcier
14 concerning her opinions on the uniformity of loan documents, while the PHH Defendants offered
15 the opinions of Dr. Andrew Carron concerning the absence and individualized nature of putative
16 class member injuries. Both experts were deposed.

17 ***Settlement of Competing Class Action And Multiple Motions to Stay These***
18 ***Proceedings.*** On March 25, 2020, Vincent Morris filed suit against PHH in the federal court in
19 the Southern District of Florida, challenging PHH's collection of Convenience Fees under
20 Florida law (filed here at Doc. 67). On May 12, 2020, Class Counsel in this case participated in
21 a mediation with PHH Defendants' Counsel and the attorneys for Mr. Morris. Following that
22 mediation, and a subsequent mediation with Morris counsel, it became clear the Morris counsel
23 were going to agree to the PHH Defendants' demand to amend the notes and deeds of trust of all
24 class members to expressly authorize the collection of Convenience Fees. Class Counsel refused
25 to agree to this injunctive relief against members of the, at that time, putative classes. Instead, on
26 July 27, 2020, Class Counsel moved to intervene in the *Morris* action to oppose preliminary
27 approval of the settlement, which was broadened in settlement to include borrowers in the state
28

1 of California. On August 21, 2020, Mr. Torliatt filed a motion with this Court for an order under
2 the All Writs Act (Doc. 66), seeking an order directing PHH Defendants to stay proceedings in
3 *Morris*, and a Motion to Appoint Interim Class Counsel here under Rule 23(g) (Doc. 68).

4 On August 28, 2020, PHH Defendants filed a motion in this case to Stay Class Related
5 proceedings pending the *Morris* settlement (Doc. 72). PHH Defendants also opposed Plaintiff's
6 motions to appoint interim counsel, and for an order under the All Writs Act (Doc. 75, 76).

7 On October 2, 2020, following oral argument, the Court entered an order granting
8 Plaintiff's Motion to Appoint Interim Class Counsel Under Rule 23(g), denying Plaintiff's
9 Motion for Order Under the All Writs Act, and denying PHH Defendants' Motion to Stay Class
10 Related Proceedings (Doc. 93).

11 On June 7, 2021, PHH Defendants filed another Motion to Stay, seeking to stay all
12 proceedings pending the United States Court of Appeals for the Ninth Circuit's resolution of the
13 appeal in *Amy Thomas-Lawson, et al. v. Carrington Mortgage Services, LLC*, Case No. 21-55459
14 (9th Cir. 2021) (Doc. 111), which Plaintiff timely opposed (Doc. 113). That motion was denied
15 (Doc. 118).

16 ***Plaintiff Moves For Class Certification And Summary Judgment.*** On June 30, 2021,
17 Plaintiff filed a Motion for Class Certification (Doc. 116 and 115-4 (unredacted)). PHH
18 Defendants opposed Plaintiff's Motion for Class Certification (Doc. 123 and 122-4
19 (unredacted)), and moved to exclude Plaintiff's expert, Patricia Forcier (Doc. 124).

20 On August 18, 2021, Plaintiff filed a Motion for Partial Summary Judgment, (Doc. 130
21 and 129-4 (unredacted)). On that same date, PHH filed a Motion for Summary Judgment on All
22 Claims (Doc. 131).

23 On August 31, 2021, Plaintiff opposed PHH Defendants' Motion to Exclude Expert
24 Patricia Forcier (Doc. 134), and filed a Reply in Further Support of Motion for Class
25 Certification. (Doc. 136 and 135-4 (unredacted)).

26 On September 1, 2021, Plaintiff filed an Opposition to PHH Defendants' Motion for
27 Summary Judgment on All Claims (Doc. 137), and PHH Defendants filed an Opposition to
28

1 Plaintiff's Motion for Partial Summary Judgment (Doc. 139). On September 15, 2021, the Parties
2 filed their respective reply briefs (Doc. 143, 145). On November 8, 2021, following oral
3 argument, this Court entered an order granting Plaintiff's Motion for Class Certification and
4 denying PHH Defendants' Motion to Exclude Expert Patricia Forcier (Doc. 152).

5 On November 17, 2021, the Parties participated in a Court-ordered mediation session
6 before Chief Magistrate Judge Joseph C. Spero, but were unable to resolve the case that day
7 considering that the PHH Defendants' motion for preliminary approval of their nationwide
8 settlement was still pending in the *Morris* action.

9 ***PHH Defendants' Rule 23(f) Petition to the 9th Circuit.*** On November 22, 2021, the
10 PHH Defendants filed a Petition for Permission to Appeal Class Certification Under Rule 23(f)
11 with the Ninth Circuit Court of Appeals, which Plaintiff opposed, and which was denied on
12 March 1, 2022 (Doc. 159).

13 ***Fifth Round of Mediation.*** Following the denial of PHH Defendants' Rule 23(f) petition,
14 on April 27, 2022, the Parties participated in a second Court-ordered mediation session, their
15 fifth mediation session over the course of this litigation, before Chief Magistrate Judge Spero.
16 By this point, the Parties recognized that both regulators and courts have reached different
17 conclusions on the merits of the claims presented, and that compromise was preferable to
18 continued litigation for all concerned. On the one hand, many federal district courts have held
19 that Convenience Fees do not violate the FDCPA or state analogs, such as the Rosenthal Act.
20 Additionally, the PHH Defendants interpret guidance from the Federal Trade Commission
21 ("FTC") as opining that Convenience Fees do not violate the FDCPA because any required
22 authorization and consent could be expressed in general terms in the loan documents or granted
23 orally in a side agreement entered into at the time of the payment transaction. On the other hand,
24 many other federal district courts have held that Convenience Fees do violate the FDCPA or state
25 analogs if neither the underlying loan documents nor state statutes expressly authorize
26 Convenience Fees. And in 2017, the Consumer Financial Protection Bureau ("CFPB") issued
27 guidance stating its position that that the assessment of Convenience Fees could violate the
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1 FDCPA in certain circumstances. One federal appellate court has weighed in on the dispute, with
2 the Fourth Circuit recently concluding that the Convenience Fees of a different servicer violated
3 Maryland’s analog to the FDCPA and Rosenthal Act. As a result of the settlement conference
4 and further negotiations, and based upon their own respective independent investigations and
5 evaluations of the facts and law relating to all of the matters alleged in the pleadings, the Parties
6 entered into a “Proposed Settlement Term Sheet” on May 9, 2022, subject to approval by upper
7 management or the board of the PHH Defendants. After obtaining such approval, the Parties filed
8 a Joint Notice Concerning Settlement on May 16, 2022, notifying the Court that the Parties had
9 reached a settlement and expected to file a motion for preliminary approval on or about June 25,
10 2022 (Doc. 162). Thereafter, the Parties worked cooperatively to draft the Settlement Agreement
11 and exhibits thereto, which are now before the Court for final approval.

12 This Court granted Preliminary Approval to the Settlement on July 20, 2022 (Doc. 168).

13 **II. ARGUMENT**

14 **A. Legal Standard For Attorneys’ Fee Awards**

15 The Settlement Agreement provides for the payment of attorneys’ fees and expenses from
16 the Settlement Fund. Having reached a common fund settlement, Plaintiff’s Counsel is entitled
17 to seek an award of fees and expenses from the Settlement Fund. *See Vizcaino v. Microsoft Corp.*,
18 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d
19 1301 (9th Cir. 1990).

20 Where a settlement involves a common fund, courts typically award attorneys’ fees based
21 on a percentage of the total settlement. *See State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir.
22 1990). Indeed, the percentage method is the preferred approach in such cases. *Vizcaino*, 290 F.3d
23 at 1050 (noting “the primary basis of the fee award remains the percentage method”). *See also*,
24 *e.g., In re ECOTality, Inc. Secs. Litig.*, No. 13-cv-03791-SC, 2015 WL 5117618, at *3 (N.D. Cal.
25 Aug. 28, 2015) (finding percentage approach to be the “typical method of calculating class fund
26 fees”); *Taylor v. Meadowbrook Meat Co., Inc.*, No. 3:15-CV-00132-LB, 2016 WL 4916955, at
27 *5 (N.D. Cal. Sept. 15, 2016) (“Where the settlement involves a common fund, courts typically
28

1 award attorney's fees based on a percentage of the total settlement.”).

2 When using the percentage approach, the Ninth Circuit has adopted a benchmark of 25%
3 of the total settlement, but that amount may be “adjusted upward or downward to account for any
4 unusual circumstances involved in [the] case.” *Campbell v. Best Buy Stores*, No. LA CV12-7794
5 JAK (JEMx), 2016 WL 6662719, at *7 (C.D. Cal. Apr. 5, 2016). The court may, but is not
6 required to use a lodestar cross-check to confirm the reasonableness of the fee. *Id.*; *Laffitte v.*
7 *Robert Half Internat. Inc.*, 1 Cal. 5th 480, 506, 376 P.3d 672, 688 (2016).

8 When considering whether an adjustment from the benchmark is appropriate, courts in
9 the Ninth Circuit consider the following factors: “(1) the results achieved; (2) the risk undertaken
10 by class counsel in pursuing the case; (3) whether the settlement generated benefits beyond a
11 cash payment; (4) the market rate for similar representations; and (5) the nature of the
12 representation, including whether it was executed on a contingency basis.” *Taylor v. Shippers*
13 *Transport Express, Inc.*, No. CV1302092BROPLAX, 2015 WL 12658458, at *14 (C.D. Cal.
14 May 14, 2015). *Waldbuesser v. Northrop Grumman Corp.*, No. CV 06-6213-AB (JCX), 2017
15 WL 9614818, at *2 (C.D. Cal. Oct. 24, 2017) (citing *In re Quintus Sec. Litig.*, 148 F. Supp. 2d
16 967, 973–74 (N.D. Cal. 2001), among others); *Marshall v. Northrop Grumman Corp.*, No. 16-
17 CV-6794 AB (JCX), 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020), *appeal dismissed*, No.
18 20-56096, 2021 WL 1546069 (9th Cir. Feb. 16, 2021). Each of the applicable factors supports
19 the requested award.²

20 Courts in the Ninth Circuit “have routinely awarded fees of one-third of the common fund
21 or higher after considering the particular facts and circumstances of each case.” *Beaver v.*
22 *Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *9–10 (S.D. Cal. Sept. 28,
23 2017). In fact, “in most common fund cases, the award exceeds [the] benchmark.” *Id.*, citing *In*
24 *re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008); *Taylor*, 2015 WL
25 12658458, at *17 (33% fee was reasonable given the result, the risk, and counsel's time
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27 ² The Settlement Class’s reaction to the Settlement is not yet known as the deadline for objections
28 has not yet occurred. If any objections are filed, Class Counsel will respond to them in accordance
with the Court’s schedule.

1 investment); *Campbell*, 2016 WL 6662719, at *10 (approving a fee of one-third of the common
2 fund); *Millan v. Cascade Water Services*, No. 112CV01821AWIEPG, 2016 WL 3077710, at *11-
3 12 (E.D. Cal. May 31, 2016) (approving an award of 33% of the common fund); *Barbosa v.*
4 *Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (awarding one-third of the
5 settlement fund). The Ninth Circuit has affirmed awards of one-third of a common fund. *See In*
6 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming an award of one-
7 third of total recovery); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)
8 (affirming an award of one-third of a \$12 million common fund).

9 The undersigned was appointed class counsel in two other convenience fee settlements
10 in California where the district court awarded attorney’s fees of one-third of the common fund.
11 *See* Kauffman Decl. ¶ 7; *Elbert v. Roundpoint*, Case No. 3:20-cv-250-MMC, DE 98 (N.D. Cal.
12 Apr. 18, 2022); *Fernandez v. Rushmore*, Case No. 8:21-cv-00621-DOC, DE 42 (C.D. Cal. Feb.
13 14, 2022). Both Judge Chesney and Carter awarded one-third of the common fund because of the
14 significant relief obtained in each case, albeit lower than the result for the class obtained here.
15 *See id.*; *Elbert* (35% recovery and two-years injunctive relief); *Fernandez* (29.39% recovery and
16 two-year injunctive relief).

17 All of the relevant factors support the requested fee award here.

18 ***The Results Achieved.*** Courts in this jurisdiction and elsewhere “have consistently
19 recognized that the result achieved is a major factor to be considered in making a fee award.
20 *Marshall v. Northrop*, 2020 WL 5668935, at *2 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436,
21 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983)) (“the most critical factor is the degree of success
22 obtained”); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 WL 1594403, at *19 (C.D.
23 Cal. June 10, 2005) (a “significant factor”); *Deaver v. Compass Bank*, No. 13-222, 2015 WL
24 8526982, at *11 (N.D. Cal. Dec. 11, 2015) (“the most critical factor”).

25 Class Counsel’s work in this case led to an excellent result for the Settlement Class. The
26 Settlement Fund represents a recovery of approximately 42% of class wide damages. Kauffman
27 Decl. ¶ 24. On top of that amount, the Settlement provides injunctive relief for borrowers whose
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1 loans are subject to the Rosenthal Act, namely that PHH Defendants will not charge Convenience
2 Fees for a period of two years from the Final Settlement Date, a benefit which Plaintiff values at
3 approximately \$4.88 million. Stipulation of Settlement and Release (Doc 164-3) ¶ 11.1.7;
4 Kauffman Decl. ¶ 26.

5 The Settlement represents a recovery that exceeds recoveries in most other Convenience
6 Fee cases. *See, e.g., Fernandez v. Rushmore*, 8:21-cv-00621-DOC (C.D. Cal.) (plaintiff
7 recovered 29.93% of class damages; fees of one-third approved); *Phillips v. Caliber Homes*
8 *Loans Inc.*, 19-cv-2711 (D. Minn.) (plaintiff recovered 29% of class damages; fees of one third
9 approved); *Elbert v. Roundpoint*, Case No. 3:20-cv-250-MMC, DE 98 (N.D. Cal. Apr. 18, 2022)
10 (plaintiff recovered 35% of class damages; fees of one-third approved). The recovery was
11 obtained expeditiously, and no funds will revert to PHH Defendants.

12 In addition, the Settlement provides for the highest level of participation that can be
13 obtained because rather than a “claims made” process, Settlement Class Members will
14 automatically receive a payment. This means that each Settlement Class Member will participate
15 in the recovery unless he or she voluntarily and specifically excludes himself or herself from the
16 Settlement. And the practice changes agreed to as part of the Settlement provide millions of
17 dollars in valuable benefits to Settlement Class Members.

18 ***The Effort Expended By Class Counsel.*** As detailed in the Kauffman and Lowther
19 Declarations, from the inception of this case, Class Counsel has expended time and resources to
20 move this case along as expeditiously as possible, often in the face of obstacles that threatened
21 to terminate the litigation, and leave the Class with nothing. As detailed in Section I(A), *supra*,
22 Class Counsel’s work included drafting the complaints, successfully opposing two motions to
23 dismiss, engaging in extensive discovery, including experts, appearing in a class action pending
24 in Florida that threatened to release the unique California claims asserted by the Class here,
25 successfully moving for class certification, moving for summary judgment, participating in five
26 mediations, and negotiating, drafting, and finalizing the Settlement Agreement and associated
27 paperwork. Kauffman Decl. ¶ 13; Lowther Decl. ¶ 11.

1 Collectively, as of the date of the Preliminary Approval motion, Class Counsel had
2 expended 2,756 hours to litigate and resolve this dispute. Kauffman Decl. ¶ 11; Lowther Decl. ¶
3 22. While the hours expended by Class Counsel were substantial, they were necessary and reflect
4 the challenging nature of the lawsuit, the needs of the litigation, the technical nature of the
5 discovery involved, and PHH Defendants' relentless attempts to release Settlement Class
6 Members' claims on terms vastly inferior to those here and to stall this litigation while litigation
7 that would potentially undercut those claims played out in other courts.

8 ***Counsel's Experience and Skill.*** Class Counsel are among a handful of law firms
9 litigating cases involving Convenience Fees across the country and are in the forefront of that
10 litigation. *See* Kauffman Decl. ¶ 6; Lowther Decl. ¶ 6. The litigation of cases like these involving
11 challenges to mortgage payment fees is a specialized field as it requires an understanding of the
12 terms of form mortgages and statutory provisions and regulations governing mortgage
13 agreements. Both firms also have years of experience litigating class actions, including consumer
14 financial class actions, ERISA, and securities cases. Kauffman Decl. ¶ 13; Lowther Decl. ¶ 4.

15 Mr. Kauffman has over fifteen years of complex class action experience, and has served
16 as class and appellate counsel in a wide variety of cases involving consumer protection, securities
17 fraud, and ERISA. Kauffman Decl. ¶ 4. Mr. Kauffman is or has been counsel in more than 10
18 cases challenging convenience fees in courts across the country, several of which have now
19 settled on a class-wide basis. *Id.* ¶¶ 7, 8.

20 Mr. Lowther of Carney, Bates & Pulliam PLLC has over eight years of experience and is
21 a dedicated professional with demonstrated commitments to his clients. *See* Lowther Decl. at ¶¶
22 3-6. As reflected in Mr. Lowther's declaration and CBP's firm resume (Doc. 164-1), Mr. Lowther
23 and other CBP attorneys have served as lead or co-lead counsel in a variety of class actions and
24 other complex litigation and have achieved significant recoveries for their clients, including
25 *Phillips v. Caliber Home Loans, Inc.*, Case No.: 19-cv-02711-WMW-LIB (D. Minn.) (class
26 action involving similar claims regarding Convenience Fees that recently received preliminary
27 approval of a \$5 million settlement); *Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp.*,

1 1:16-cv-00789-TWP-MPB (S.D. Ind.) (TCPA class action that resulted in a \$17 million
2 settlement); *Ebarle, et al. v. LifeLock, Inc.*, Case No. 3:15-cv-00258 (N.D. Cal.) (serving as Co-
3 Lead Counsel in class action that secured an \$81 million settlement). *See* Lowther Decl. ¶¶ 4-5.

4 The work Class Counsel performed and the results they achieved in this litigation reflect
5 their skill and experience in this field and in complex class litigation. Kauffman Decl. ¶ 27;
6 Lowther Decl. ¶ 6.

7 ***The Complexity of the Issues And The Risk Involved.*** Class Counsel's work in this case
8 involved a number of complex and difficult legal and factual issues, with uncertain outcomes,
9 due in part to the unsettled nature of the law regarding Convenience Fees and the existence of
10 competing litigation. *See, e.g., Lish v. Amerihome Mortg. Co., LLC*, No. 220CV07147JFWJPRX,
11 2020 WL 6688597, at *2 (C.D. Cal. Nov. 10, 2020) (granting motion to dismiss in case
12 challenging Convenience Fees, finding that plaintiff failed to state a claim for violation of
13 California debt collection law); *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No.
14 220CV07301ODWEX, 2021 WL 1253578, at *3 (C.D. Cal. Apr. 5, 2021) (granting motion to
15 dismiss similar convenience fee claims brought under FDCPA and California law).

16 The risk in this litigation was high. The dispositive issue here is a straightforward question
17 of law: whether Convenience Fees are prohibited by California debt collection statutes. Fact
18 discovery, while pertinent to class certification and some secondary issues, would not have
19 informed the Parties on this dispositive question, and thus, the risk could not be assessed early in
20 the litigation. Indeed, the law on Settlement Class Members' claims is still uncertain, and courts
21 in this Circuit continue to diverge on the applicability of the Rosenthal Act to Convenience Fees.
22 Compare *Thomas-Lawson v. Carrington Mortg. Servs.*, 2021 WL 1253578 (dismissing claims),
23 with *Corona v. PNC Fin. Servs. Group, Inc.*, No. 2:20-cv-06521-MCS, 2021 WL 1218258, *2-
24 8 (C.D. Cal. Mar. 16, 2021) (allowing claims to proceed). While Plaintiff believes his claims
25 would have ultimately been successful, there was no guarantee of recovery. And Class Counsel
26 litigated this case on a contingent basis, with no guarantee of payment.

27 Success here was far from certain. Apart from the uncertainty inherent in all litigation,
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1 there was the additional uncertainty posed by the proposed settlement in the *Morris* action that,
2 if granted, would release the claims of the vast majority of Settlement Class Members here. In
3 light of these significant risks, Class Counsel’s achievement recovery of 42% of Settlement Class
4 Members’ damages and injunctive relief is a tremendous result that supports the fee award. *See*
5 *Vizcaino*, 290 F.3d at 1050 (recognizing risk as a relevant circumstance for awarding fee above
6 25% benchmark). And the fact that the Settlement Class will be compensated quickly, without
7 further protracted litigation or appeals, supports the appropriateness of the requested fee.

8 ***Comparison With Counsel’s Lodestar Supports the Fee Requested.*** If the Court elects
9 to award a fee based on a percentage of the common fund, it is not required to conduct a lodestar
10 cross-check. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017); *Yamada*
11 *v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) (“[A] cross-check is entirely
12 discretionary”). Indeed, “[i]n a common fund case, a lodestar method does not necessarily
13 achieve the stated purposes of proportionality, predictability and protection of the class and can
14 encouraged unjustified work and protracting the litigation.” *Bolton v. U.S. Nursing Corp.*, No. C
15 12-4466 LB, 2013 WL 5700403, at *5 (N.D. Cal. Oct. 18, 2013) (citing *In re Activision Securities*
16 *Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989)).

17 Nonetheless, should the Court elect to use a lodestar cross-check, Class Counsel’s fees
18 are reasonable under that approach. The two firms’ combined attorneys’ fees total \$1,626,093.50,
19 resulting in a modest lodestar multiplier of approximately 1.37, when the litigation expenses are
20 backed out of the aggregate fee award requested (Doc. 164 at ¶ 24). Given the results achieved,
21 and the efficiency with which they were achieved, the fee is appropriate.

22 As attested to in Class Counsel’s declarations, Class Counsel’s rates are reasonable.
23 Lowther Decl. ¶¶ 24-26; Kauffman Decl. ¶¶ 17, 27. The rates charged by Class Counsel are in
24 line with rates submitted in connection with fee applications in other recent matters approved by
25 the relevant courts. Kauffman Decl. ¶ 17; Lowther Decl. ¶ 27.

26 Courts in other cases over the past several years have also approved similar fees charged
27 by other firms. *See Silveira v. M&T Bank*, Case No. 2:19-cv-06958-ODW-KS, 2021 WL
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1 4776065 (C.D. Cal. Oct. 12, 2021) (approving as reasonable hourly rates ranging from \$465 to
2 \$914) (the hourly rates can be found at Dkt. No. 37-2, ¶ 20); *Jimenez v. Allstate Ins. Co.*, No.
3 LACV1008486JAKFFMX, 2021 WL 4316961, at *11 (C.D. Cal. Sept. 16, 2021) (approving
4 hourly rates of \$375 to \$900); *Durham v. Sachs Elec. Co.*, No. 18-CV-04506-BLF, 2022 WL
5 2307202, at *8 (N.D. Cal. June 27, 2022) (approving hourly rates of \$875); *In re Optical Disk*
6 *Drive Prod. Antitrust Litig.*, No. 3:10-md-2143-RS, 2016 WL 7364803, at *8 (N.D. Cal. Dec.
7 19, 2016) (approving hourly rates of \$205 to \$950); *Civil Rights Educ. and Enforcement Ctr. v.*
8 *Ashford Hospitality Trust, Inc.*, No. 15-cv-00216-DMR, 2016 WL 1177950 (N.D. Cal. Mar. 22,
9 2016) (finding that requested hourly rates of \$900, \$750, \$550, \$500, \$430, and \$360 for
10 attorneys and \$225 for paralegals were “in line with the market rates charged by attorneys and
11 paralegals of similar experience, skill, and expertise practicing in the Northern District of
12 California”); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274,
13 at *5 (N.D. Cal. May 21, 2015) (approving hourly rates of \$475 to \$975); *Prison Legal News v.*
14 *Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2012) (finding that the district court did not abuse
15 its discretion by awarding hourly rates between \$425, \$700, and \$875).

16 Class Counsel’s current rates are also appropriate given the deferred and contingent
17 nature of counsel’s compensation. See *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd
18 Cir. 1998) (“[C]urrent rates, rather than historical rates, should be applied in order to compensate
19 for the delay in payment” (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *In re*
20 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) (“The district court
21 has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys’
22 current rates to all hours billed during the course of litigation; or (2) by using the attorneys’
23 historical rates and adding a prime rate enhancement.”).

24 Courts in this Circuit routinely apply multipliers when using the lodestar approach. See,
25 e.g., *Vizcaino*, 290 F.3d at 1051-52 (approving of 3.65 multiplier and citing multipliers as high
26 as 19.6); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 610 (N.D. Cal. 2015) (listing multipliers as high as
27 5.2 among “the range of acceptable lodestar multipliers”); *Dyer v. Wells Fargo Bank, N.A.*, 303
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1 F.R.D. 326, 334 (N.D. Cal. 2014) (“A 2.83 multiplier falls within the Ninth Circuit’s
2 presumptively acceptable range of 1.0–4.0.”). Multipliers are particularly appropriate in cases
3 where the legal issues are uncertain, and thus the risk is high. *Rodriguez v. Marshalls of CA, LLC*,
4 No. EDCV181716MWFSPX, 2020 WL 7753300, at *10 (C.D. Cal. July 31, 2020) (granting
5 multiplier where risks to the litigation made an unfavorable outcome uncertain). Multipliers are
6 also used to reward efficient and successful resolution of cases, which serves policy goals of
7 settlement and avoiding wasteful litigation. *In re Bank of Am. Credit Prot. Mktg. & Sales Pract.*
8 *Litig.*, No. 11-MD-2269 TEH, 2013 WL 174056, at *1 (N.D. Cal. Jan. 16, 2013) (“The multiplier
9 of approximately 1.6 is justified by the risk Counsel undertook and the results they achieved for
10 the Class in an efficient manner”).

11 Here, Class Counsel’s requested fee award of \$2,310,000 effectively produces a 1.37
12 multiplier. This low number is reasonable, particularly in light of the risks taken on and the fact
13 that such an excellent result was achieved.

14 **B. Class Counsel’s Expenses Were Reasonably Incurred In Furtherance Of**
15 **The Prosecution Of The Claims**

16 The Settlement terms and well-settled precedent support Class Counsel’s entitlement to
17 recovery of out-of-pocket costs reasonably incurred in investigating, prosecuting, and settling the
18 claims in this case. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (finding an attorney is
19 entitled to “recover as part of the award of attorney’s fees those out-of-pocket expenses that
20 would normally be charged to a fee paying client” (internal quotation marks omitted)); *In re*
21 *Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (“Reasonable costs
22 and expenses incurred by an attorney who creates or preserves a common fund are reimbursed
23 proportionately by those class members who benefit by the settlement.” (citing Herbert B.
24 Newberg, *Attorney Fee Awards* (1986) § 2.19: “Costs Reimbursement in Common Fund Fee
25 Determinations,” at 69 and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970)).

26 Here, Class Counsel have incurred \$78,938.07 in unreimbursed out-of-pocket expenses
27 over the course of this Litigation and are seeking an aggregate award of fees and expenses of
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1 33% of the Settlement Fund.³ These expenses are itemized in the Lowther and Kauffman
 2 Declarations, and include filing fees, mediation fees, expert witness fees, transcript fees, and
 3 other customary litigation expenses and were reasonably incurred in furtherance of the
 4 investigation, prosecution, and settlement of this Action. Lowther Decl., ¶ 29; Kauffman Decl. ¶
 5 29.

6 **C. The Class Representative’s Service Award Should Be Approved**

7 Finally, the Court should approve a \$10,000 Service Award to Mr. Torliatt in recognition
 8 of his contributions on behalf of the Settlement Class. In deciding whether to approve such an
 9 award, courts consider: “(1) the risk to the class representative in commencing suit, both financial
 10 and otherwise; (2) the notoriety and personal difficulty encountered by the class representative;
 11 (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation
 12 and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of
 13 the litigation.” *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).
 14 Further, as a matter of public policy, representative service awards are necessary to encourage
 15 consumers to take on the reputational risk to formally challenge unfair business practices. *See,*
 16 *e.g., Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (upholding award of
 17 service awards to class representatives as they “compensate class representatives for work done
 18 on behalf of the class, to make up for financial or reputational risk undertaken in bringing the
 19 action, and, sometimes, to recognize their willingness to act as a private attorney general”);
 20 *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 WL 4755371, at *5 (N.D.
 21 Cal. Oct. 4, 2012) (finding service award justified for plaintiffs “lending their names to this case,
 22 and thus subjecting themselves to public attention”); *Miletak v. Allstate Ins. Co.*, No. C 06-03778
 23 JW, 2012 WL 12924933, at *2 (N.D. Cal. July 12, 2012) (same); *In re CenturyLink Sales Pracs.*
 24 *& Sec. Litig.*, No. CV 17-2832, 2020 WL 7133805, at *13 (D. Minn. Dec. 4, 2020) (awarding
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26 ³ To support an award of costs, plaintiff should file an itemized list of their expenses by category,
 27 listing the total amount advanced for each category, allowing the Court to assess whether the
 28 expenses are reasonable. *See Wren v. RGIS Inventory Specialists*, No. 06-cv-05778-JCS, 2011
 WL 1230826, at *30 (C.D. Cal. Apr. 1, 2011).

1 service award because “Class Representatives participated and willingly took on the
2 responsibility of prosecuting the case and publicly lending their names to this lawsuit, opening
3 themselves up to scrutiny and attention from both the public and media”).

4 Mr. Torliatt took on a substantial risk by bringing claims against the servicer of his home
5 mortgage, and undertook reputational risk, as his association with these lawsuits is publicly
6 available. Kauffman Decl. ¶ 31. Mr. Torliatt also worked with Class Counsel to provide
7 information regarding his experiences and claims to enable him to join this case and represent a
8 class throughout the litigation. *Id.* Mr. Torliatt conducted searches of his personal records and
9 shared sensitive information, including bank records and mortgage documents, and thousands of
10 pages of documents. *Id.* Mr. Torliatt prepared for and sat for a deposition, and conferred with
11 counsel regarding settlement. And he remained actively involved in the litigation after the
12 Settlement was reached. *Id.* Without his involvement, there would be no settlement. *Id.*

13 These personal risks and sacrifices, substantial time invested into the matter, and critical
14 contributions to the outstanding results obtained for the Settlement Class, all support approval of
15 a \$10,000 Service Award. Service awards of \$10,000 are well within the range of reasonableness.
16 *See Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB, 2013 WL 5700403, at *6 (N.D. Cal. Oct.
17 18, 2013) (approving \$10,000 incentive award); *See Garner v. State Farm Mut. Auto. Ins. Co.*,
18 No. CV 08 1365 CW (EMC), 2010 WL 1687832, *17 (N.D. Cal. Apr. 22, 2010) (approving a
19 \$20,000 award where plaintiff “made herself available for deposition on two separate occasions,
20 wherein she was subjected to questioning regarding her personal financial affairs and other
21 sensitive subjects,” met with counsel and attended hearing); *Dyer v. Wells Fargo Bank, N.A.*, 303
22 F.R.D. 326, 336 (N.D. Cal. 2014) (approving \$10,000 service award based on time significant
23 time expended by class representatives, and fact that they were deposed).

24 Consistent with these cases, and in recognition of the time, effort, and substantial personal
25 risk taken on behalf of the Settlement Class, Mr. Torliatt requests that the Court award the
26 requested Service Award.

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III. CONCLUSION

For all of these reasons, Plaintiff respectfully requests that the Court enter the Order attached as Exhibit 1 to Plaintiff's Motion for Final Approval, filed herewith (i) approving his request for a Service Award of \$10,000, and (ii) awarding Class Counsel attorneys' fees and expenses of 33% of the Settlement Fund, or \$2,310,000.

Dated: October 19, 2022

Respectfully submitted,

/s/ James L. Kauffman

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2022, I caused a copy of the foregoing to be electronically filed with the Clerk of Court using CM/ECF, which will send electronic notification to the parties and registered attorneys of record that the document has been filed and is available for viewing and downloading.

/s/ James L. Kauffman

JAMES L. KAUFFMAN