

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

STEPHEN PHILLIPS, MARY  
TOURVILLE-PHILLIPS, SANDI  
BARNETT, GREGORY BENJAMIN,  
TYRUS DAVIS, and CHRISTOPHER  
BINGHAM, on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

CALIBER HOME LOANS, INC.

Defendant.

Case No.: 19-cv-02711-WMW-LIB

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

## I. INTRODUCTION.

Plaintiffs Stephen Phillips, Mary Tourville-Phillips, Sandi Barnett, Gregory Benjamin, Tyrus Davis and Christopher Bingham (“Plaintiffs” or “Settlement Class Representatives”) by and through undersigned counsel and pursuant to the Settlement Agreement and Release (ECF No. 82-1) (the “Settlement Agreement”) and this Court’s Preliminary Approval Order (ECF No. 87) (the “Preliminary Approval Order”), hereby respectfully request that the Court: (i) award Plaintiffs’ Counsel attorneys’ fees in an amount equal to 33.33% of the Gross Settlement Fund (defined below), or \$1,666,500.00; (ii) award Plaintiffs’ Counsel reimbursement of litigation costs of \$10,410.66; and (iii) award service awards in the amount of \$5,000 to each of the Settlement Class Representatives.

As detailed herein and in the accompanying Declaration of James L. Kauffman, Declaration of Randall K. Pulliam, and Declaration of Hassan A. Zavareei, Plaintiffs and Plaintiffs’ Counsel have adequately represented the Class, obtaining an excellent Settlement that provides for a common fund of \$5,000,000 for the benefit of Settlement Class Members (the “Gross Settlement Fund”), with no reverter and no claims process. This common fund represents 29.39% of the total amount of all Pay-to-Pay Fees paid by Settlement Class Members during the Class Period (\$17,010,702.94) that Plaintiffs allege were improperly collected by Defendant. As there is no claims process, each Settlement Class Member who does not opt out will automatically receive a payment. Unclaimed funds will be distributed *pro rata* 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.

In addition to the common fund, the Settlement includes important and valuable injunctive relief. As of January 21, 2020, following the filing of the Class Representatives' respective actions, Defendant ceased charging, or collecting, Pay-to-Pay Fees to any Settlement Class Member and to any borrower in the country. Moreover, as a result of this Settlement, Defendant agrees to refrain from the charging or collection of Pay-to-Pay Fees from borrowers for a period of at least two years after entry of the Final Approval Order.

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 the strengths and weaknesses of their clients' respective claims and defenses.

For their efforts, Plaintiffs' Counsel seek an award of attorneys' fees of 33.33% of the Gross Settlement Fund, or \$1,666,500.00, and reimbursement of out-of-pocket litigation costs of \$10,410.66. Additionally, Plaintiffs seek service awards of \$5,000 each for each of the named plaintiffs. These amounts are fair and reasonable based upon the relief achieved 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.

Pursuant to the Court’s Preliminary Approval Order, Email Notice (the “Notice”) was disseminated to Settlement Class Members, supplemented by Postcard Notice, a dedicated Settlement Website and call center. *See* Declaration of James Prutsman (“Prutsman Decl.”) at ¶¶ 3-10. The Notice advised Settlement Class Members that (i) Plaintiffs’ Counsel intended to apply to the Court for an award of attorney’s fees representing up to 33.33% of the Gross Settlement Fund; (ii) Plaintiffs’ Counsel would seek reimbursement of their actual out-of-pocket litigation costs and expenses; and (iii) Plaintiffs would seek service awards of \$5,000 for each Settlement Class Representative. *See id.* at Ex. A. As of the filing of this Memorandum, Plaintiffs’ Counsel have received no objections to their fee and expense requests, or service awards.

In sum, Plaintiffs’ Counsel respectfully submit that their request for an award of attorneys’ fees and reimbursement of expenses is fair and reasonable under the applicable legal standards. Consequently, this Court should grant Plaintiffs’ Motion for Award of Attorneys’ Fees, Reimbursement of Litigation Expenses, and Service Awards.

## **II. OVERVIEW OF THE LITIGATION.**

### **A. Summary of Plaintiffs’ Claims.**

The operative complaint (the “Third Amended Class Action Complaint” or “TAC”) in this action alleges, on behalf of Plaintiffs and all others similarly situated, that Caliber Home Loans, Inc. (“Caliber” or “Defendant”) breached its contract and violated the Fair Debt Collection Practices Act (“FDCPA”) and state debt collection statutes by assessing and collecting fees from borrowers that are not expressly authorized by the terms of their

mortgage agreements or permitted by applicable law (“Pay-to-Pay Fees”). ECF No. 71. Plaintiffs specifically allege that section 1692f(1) of the FDCPA, like the state statutes that are modeled on it, prohibits “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by agreement creating the debt or permitted by law.” 15 U.S.C. 1692f(1). Plaintiffs further allege that the fees breach Plaintiffs’ and Class members’ mortgage agreements.

**B. Procedural Posture.**

1. The Phillips Lawsuit

On September 19, 2019, Stephen Phillips and Mary Tourville-Phillips, individually and on behalf of a purported class, filed a lawsuit in Lake County District Court that was removed to the United States District Court for the District of Minnesota on October 14, 2019, and captioned *Phillips, et al. v. Caliber Home Loans, Inc.*, Case No. 0:19-cv-02711 (the “Phillips Lawsuit”).

The Plaintiffs Phillips brought three claims against Caliber in connection with its practice of collecting additional processing fees when borrowers paid their monthly mortgage by telephone, interactive voice response (“IVR”) or the internet (“Pay-to-Pay Fees”): (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, and (iii) unjust enrichment.

On November 6, 2019, Defendant filed a Motion to Dismiss with a supporting memorandum of law in the Phillips Lawsuit. ECF Nos. 19-20. On November 27, 2019, the

Plaintiffs Phillips filed an Amended Class Action Complaint in the Phillips Lawsuit, superseding their initial complaint and mooted Defendant's Motion to Dismiss the initial complaint. ECF No. 26. On December 11, 2019, Defendant filed a Motion to Dismiss the Amended Class Action Complaint with a supporting memorandum of law. ECF Nos. 27-28. In support of dismissal, Caliber argued that the claims in the Phillips Lawsuit (i) were barred by the voluntary payment doctrine, and (ii) should be dismissed for failure to sufficiently plead the existence and/or breach of a contract as Caliber was not a named party to the mortgage when originally made.

On January 10, 2020, the Plaintiffs Phillips filed their response in opposition to Caliber's motion. ECF No. 38. Therein, the Plaintiffs Phillips argued (i) voluntary payment is an affirmative defense and cannot be resolved on a motion to dismiss, (ii) the Plaintiffs Phillips pleaded facts that demonstrate a lack of full disclosure and knowledge, obviating application of the voluntary payment doctrine, (iii) as the assignee of the Plaintiffs Phillips' mortgage, Caliber stepped into the shoes of the lender, and as such, is bound by its terms, and may be held liable for breaches thereof, and (iv) the Plaintiffs Phillips' alternative pleading of unjust enrichment and contract claims is permissible. Defendant timely filed its reply on January 24, 2020.

On September 15, 2020, this Court entered an order denying Caliber's Motion to Dismiss the Plaintiffs Phillips' breach of contract claim and unjust enrichment claim, but granting Caliber's Motion to Dismiss the Plaintiffs Phillips' claim for breach of the implied covenant of good faith and fair dealing. ECF No. 48.

On September 29, 2020, Caliber filed its Answer. ECF No. 50. Thereafter, on November 12, 2020, the Plaintiffs Phillips filed a Stipulation to file a Second Amended Complaint, seeking leave to file an amended complaint to additionally allege that in engaging in the challenged practices, Caliber also violated the FDCPA, 15 U.S.C. § 1692, *et seq.* The Court entered an order that same day approving the Stipulation to file a Second Amended Complaint. In accord therewith, the Plaintiffs Phillips filed their Second Amended Complaint the following day, November 13, 2020. ECF Nos. 55-58.

On December 11, 2020, the parties filed a joint motion to vacate the scheduling order and stay all proceedings pending mediation, which the Court granted on December 14, 2020, staying the proceedings through February 8, 2021. ECF Nos. 62-64. On February 8, 2021, the parties filed a joint motion to continue the stay of proceedings pending mediation, which had been rescheduled to March 31, 2021. The parties' motion was granted by this Court on February 9, 2021. ECF Nos. 65-67.

## 2. The Barnett Lawsuit

On October 17, 2019, Sandi Barnett and Gregory Benjamin, individually and on behalf of a purported class, filed a lawsuit in the Southern District of Texas, captioned *Barnett, et al. v. Caliber Home Loans, Inc.*, Case No. 2:19-cv-309 (the "Barnett Lawsuit"). *See* ECF No. 82-2 (Barnett Lawsuit docket sheet). Plaintiffs Barnett and Benjamin alleged Caliber violated the Texas Debt Collection Act, Tex. Fin. Code § 392, and breached its contract by collecting Pay-to-Pay Fees.

On December 9, 2019, Defendant filed a Motion to Dismiss with a supporting

memorandum of law. In support of dismissal, Caliber argued that the claims in the Barnett Lawsuit (i) were barred by the voluntary payment doctrine and (ii) should be dismissed because Plaintiffs Barnett and Benjamin failed to allege Caliber was a debt collector within the meaning of the TDCA and/or that Pay-to-Pay fees are not expressly authorized by the subject instrument.

On January 17, 2020, Plaintiffs Barnett and Benjamin filed their response in opposition to Caliber's motion. Therein, Plaintiffs Barnett and Benjamin argued (i) voluntary payment is an affirmative defense and cannot be resolved on a motion to dismiss, (ii) Plaintiffs Barnett and Benjamin sufficiently pleaded Caliber's Pay-to-Pay fees are not expressly authorized by the loan agreement, nor otherwise legally chargeable, (iii) collection of unauthorized Pay-to-Pay fees is unfair and/or unconscionable, and (iv) Caliber's collection of Pay-to-Pay fees violated an express term of Plaintiff Benjamin's mortgage. Defendant timely filed its reply on January 23, 2020.

On September 10, 2020, the court entered an order in the Barnett Lawsuit denying Caliber's motion to dismiss the TDCA claim, but granting Caliber's motion to dismiss the breach of contract claim.

On September 24, 2020, Caliber filed its Answer. On November 25, 2020, Caliber filed a motion to transfer venue or, in the alternative, to stay pursuant to the first-to-file rule. Therein, Caliber argued that the court should transfer the Barnett Lawsuit to the District of Minnesota, or, in the alternative, stay the Barnett Lawsuit as a subsequently filed case involving substantially similar issues.

On December 11, 2020, the parties filed a joint motion to vacate the scheduling order and stay all proceedings pending mediation, which the Court granted on December 12, 2020, staying the proceedings through February 8, 2021. On February 8, 2021, the parties filed a joint motion to continue the stay of proceedings pending mediation, which had been rescheduled to March 31, 2021. The court granted the parties' joint motion on February 9, 2021.

3. The Davis Lawsuit

On April 15, 2020, Plaintiffs Tyrus Davis and Christopher Bingham, individually and on behalf of a purported class, filed a lawsuit in the United States District Court for the Middle District of North Carolina captioned *Davis, et al. v. Caliber Home Loans, Inc.*, Case No. 1:20-cv-00338 (the "Davis Lawsuit"). *See* ECF No. 82-3 (Davis Lawsuit docket sheet). Plaintiff Davis alleged Caliber violated three North Carolina statutes, the North Carolina Debt Collection Act, N.C. Gen. Stat. § 75-55(2), the North Carolina Mortgage Debt Collection and Servicing Act, § 45-91(4), and the North Carolina Unfair and Deceptive Trade Practices Act, § 75-1.1, by collecting Pay-to-Pay Fees. Plaintiff Bingham alleged that Caliber violated the Maryland Consumer Debt Collection Act, Md. Code, Com. L. § 14-202(8), by collecting Pay-to-Pay Fees.

On May 29, 2020, Defendant filed a Motion to Dismiss with a supporting memorandum of law, to which Plaintiffs Davis and Bingham timely filed a response in opposition. On November 25, 2020, Caliber filed a motion to transfer venue or, in the alternative, to stay pursuant to the first-to-file rule. On December 15, 2020, the parties filed

a joint motion to vacate the scheduling order and stay all proceedings pending mediation, which the Court granted on December 12, 2020, staying the proceedings through February 8, 2021. On February 8, 2021, the parties filed a joint motion to continue the stay of proceedings pending mediation, which had been rescheduled to March 31, 2021. The court granted the parties' joint motion on February 9, 2021.

4. Mediation and a proposed Global Settlement of the Lawsuits

On March 31, 2021, the parties participated in a full day mediation session conducted by Jill Sperber. ECF No. 82-1 at ¶ 13. With the assistance of the mediator, the parties reached mutually agreeable terms of a global settlement. *Id.* at ¶ 14.

On April 9, 2021, notices of settlement were filed in the Phillips Lawsuit, the Barnett Lawsuit, and the Davis Lawsuit (collectively referred to as the "Related Cases"). ECF No. 70; *see also* ECF No. 82-2 and 82-3. Each notice advised that a global settlement had been reached and as part of the Settlement, the Plaintiffs Phillips would be adding Plaintiffs Davis, Bingham, Barnett, and Benjamin as named plaintiffs to the Phillips Lawsuit.

On April 16, 2021, the Plaintiffs Phillips filed a Third Amended Complaint, which added Plaintiffs Davis, Bingham, Barnett, and Benjamin to the Phillips Lawsuit as named plaintiffs. ECF No. 71. Finally, on May 7, 2021, the parties executed the Settlement Agreement, which memorializes the terms and conditions of the proposed Settlement and embodies all relevant exhibits thereto.

On May 14, 2021, Plaintiffs and Defendant jointly moved for preliminary approval of the Settlement. ECF Nos. 80 and 81. On July 19, 2021, the Court entered its Preliminary

Approval Order, preliminarily approving the settlement as fair, reasonable, and adequate; provisionally certifying the proposed Settlement Class; approving the form and method of notice to the Settlement Class; and scheduling a final approval hearing.

### **III. THE SETTLEMENT AND PLAN OF ALLOCATION.**

#### **A. Settlement Benefits.**

Under the proposed Settlement, Defendant shall establish a cash settlement fund of \$5,000,000.00 for the benefit of Settlement Class Members. ECF No. 82-1 at § II(S). In accord with Section II, paragraph EE of the Settlement Agreement, the Settlement Class shall include:

All persons who (1) were borrowers on residential mortgage loans on properties in the United States whose loans were serviced by Caliber, and (2) paid a fee to Caliber for making a loan payment by telephone, IVR, or the internet, from January 1, 2013 to January 21, 2020.

*Id.* at § II(EE).

Unless a Settlement Class Member submits a valid and timely Request for Exclusion, he or she is entitled to receive monetary benefits from the Net Settlement Fund on a pro rata basis, based upon the amount of Pay-to-Pay Fees paid by each Settlement Class Member during the Class Period. *Id.* at § IV(B). Co-borrowers on a single class account shall be entitled to a single total Settlement Payment per account. Settlement Class Members who receive a Settlement Payment shall be solely responsible for distributing or allocating such payment between or among all co-account holders. *Id.*

Settlement Payments shall be made via MasterCard gift cards, paper checks, and digital payment methods. *Id.* Settlement Class Members may select a payment option;

however, in the event that no payment option is set, the Settlement Class Member will receive his, her, or their payment in the form of a MasterCard gift card. The MasterCard gift card can be used in stores or online for purchases and will have no fees associated with domestic transactions. In addition, when Settlement Class Members are mailed the MasterCard, they will be provided instructions on how to visit the Settlement Website and elect that the balance on the MasterCard be paid to them via check or a digital payment option. *Id.*

Based on records obtained from Defendant, the sum of all Pay-to-Pay Fees paid by Settlement Class Members during the Class Period is \$17,010,702.94. *See* ECF No. 82-1 at § II(R). The Settlement Fund of \$5,000,000 represents approximately 29.39% of that sum. *Id.* at § II(S).

No funds from the Settlement will revert to Defendant. For any unclaimed money or uncashed checks remaining in the Net Settlement Fund after 180 days from the date of issuance of the initial checks, a second distribution will be made to Settlement Class Members that cashed their initial checks if economically feasible. *Id.* at § IV(B). If any funds remain in the Net Settlement Fund, after payment of all approved and/or awarded attorney's fees and costs, expenses, and service awards and the initial and secondary distribution, then said funds will be disbursed to the Habitat for Humanity as a *cy pres* award. *Id.*

In addition, the Settlement provides significant non-monetary benefits. As of January 21, 2020, as a result of this litigation, Caliber has ceased charging or collecting

Pay-to-Pay Fees to any Settlement Class Member and to any borrower in the country. *Id.* at § IV(C). Moreover, as part of this Settlement, Caliber has agreed to refrain from charging or collecting Pay-to-Pay Fees from borrowers for a period of at least two years after entry of the Final Approval Order. *Id.*

In exchange for the consideration from the Defendant, the action will be dismissed with prejudice upon final approval of the Settlement, and the Settlement Class Members will thereby release all claims against Caliber and the Released Entities through the date that the Court enters the Preliminary Approval Order, relating to the charging, collection, or attempted collection of Pay-to-Pay Fees. *Id.* at § V.

**B. Notice.**

In accord with Section VI of the Settlement Agreement, notice of the Settlement was made to Settlement Class Members by (i) emailing the Email Notice to those Settlement Class Members for whom an email address is available in Defendant's records and was made available as part of the Settlement Class Member List, (ii) mailing, by first-class US mail, the Postcard Notice to those Settlement Class Members for whom an email address is not available in Defendant's records and for whom Email Notices are returned undeliverable, and (iii) mailing, by first-class US mail, the Long Form Notice to those Settlement Class Members requesting a copy thereof. To the extent it was reasonably able to locate a more current mailing address using skip tracing, the Administrator re-mailed returned Notices to the particular Settlement Class Member by first-class US mail. ECF No. 82-1 at § VI.

In addition to the foregoing, the Administrator also established a Settlement Website, which provides the following documents for viewing and downloading: (1) the Long Form Notice in downloadable PDF format in both English and Spanish; (2) the Long Form Notice in HTML format with a clickable table of contents, described as answers to frequently asked questions; (3) a contact information page with contact information for the Settlement Administrator, and addresses and telephone numbers for Plaintiffs' Counsel and Defendant's Counsel; (4) the Settlement Agreement; (5) the signed Preliminary Approval Order and publicly filed motion papers and declarations in support thereof; (6) the operative complaints in each of the Actions; and (6) when they become available, the Fee and Service Award Application, the motion for entry of the Final Approval Order, and any motion papers and declarations filed publicly in support thereof. ECF No. 82-1 at § VI; Prutsman Decl. at ¶ 6.

All costs and fees related to dissemination of the Notice, skip tracing, and creation and maintenance of the Settlement Website shall be considered administrative costs and paid from the Settlement Fund. ECF No. 82-1 at § II(B).

The Notices contained the following information: (1) a plain and concise description of the Action and the proposed Settlement, (2) the right of Settlement Class Members to request exclusion from the Settlement Class or to object to the Settlement, (3) specifics on the date, time and place of the Final Approval Hearing, and (4) information regarding Plaintiffs' Counsel's application for attorneys' fees and costs and Plaintiffs' request for the Class Representatives' service awards. *Id.* at § VI.

**C. Plaintiffs' Counsel's Applications for (i) Attorneys' Fees and Costs and (ii) Service Awards.**

In accord with the Settlement Agreement and as further discussed herein, Plaintiffs' Counsel are requesting an award of attorneys' fees equal to 33.33% of the Gross Settlement Fund to compensate them for all of the work already performed in this case, all of the work remaining to be performed in connection with this Settlement, and the risks undertaken in prosecuting this case. *Id.* at § IV(E). Plaintiffs' Counsel are also seeking reimbursement of reasonable out-of-pocket litigation expenses in the amount of \$10,410.66, as well as service awards for each Settlement Class Representative in the amount of \$5,000. The enforceability of the Settlement is not contingent on the Court's approval of Plaintiffs' Counsel's application for an award of attorneys' fees and costs or any service award granted by the Court. *Id.*

**IV. AS COMPENSATION FOR THEIR EFFORTS, PLAINTIFFS' COUNSEL SHOULD BE AWARDED A REASONABLE PERCENTAGE OF THE SETTLEMENT FUND AS ATTORNEYS' FEES AND COSTS.**

**A. A Reasonable Percentage of the Fund Recovered Is an Appropriate Basis on Which to Award Attorneys' Fees and Costs in this Common Fund Case.**

Plaintiffs' Counsel assumed significant risk in prosecuting this litigation entirely on a contingency fee basis. Bearing this risk and facing formidable obstacles and uncertainties involved in this complex litigation, Plaintiffs' Counsel's efforts resulted in securing a Settlement of \$5,000,000. As set forth above, this is an excellent outcome. As compensation for their efforts, Plaintiffs' Counsel are applying for a fee award on a percentage basis from the Settlement.

It has long been recognized that a person who maintains a suit that results in the creation of a benefit in which others have a common interest may obtain fees from that common benefit, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“A litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”); *see also Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). Furthermore, the Supreme Court has consistently held that the percentage of the recovery approach is an appropriate methodology for awarding fees to plaintiffs’ counsel in a common fund case. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) (“Under the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class”); *see also Sprague*, 307 U.S. at 164-65; *Central R.R. & Banking Co.*, 113 U.S. at 123.

The common fund doctrine “rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.” *Boeing Co.*, 444 U.S. at 478. One way to spread litigation costs proportionately among those who benefit from the lawsuit is to assess attorneys’ fees against the entire common fund. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257-58 (1975); *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970) (assessing fees against common fund spreads cost of representation proportionately among those benefitted).

Thus, a reasonable percentage of the Settlement Fund is an appropriate basis on

which to award Plaintiffs' Counsel a fee in this case. *See Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (noting that courts within the Eighth Circuit frequently award attorneys' fees between 25% and 36% of a common fund); *Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017) (affirming fee award of one-third of the gross settlement fund); *Koenig v. U.S. Bank N.A. (In re U.S. Bancorp Litig.)*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving award to class counsel of 36 percent of settlement fund); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement"); *Khoday v. Symantec Corp.*, No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at \*17 (D. Minn. Apr. 5, 2016), *report and recommendation adopted*, No. 11-CV-0180 (JRT/TNL), 2016 WL 1626836 (D. Minn. Apr. 22, 2016) (awarding attorney's fees in the amount of 33 1/3 of the settlement fund); *Nelson v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 71253, at \*4 (E.D. Ark. Aug. 12, 2009) (awarding attorneys' fees in the amount of one third of the total settlement fund); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (awarding 25% of the \$80 million settlement fund and stating "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also well established." (internal quotations omitted)).

**B. RELEVANT FACTORS JUSTIFYING THE REQUESTED FEE AWARD.**

In determining a "percentage of recovery" award in common fund class action cases, district courts in the Eighth Circuit commonly consider the following factors:

(1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee 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.

*See, e.g., In re Xcel*, 364 F. Supp. 2d at 993; *In re Monosodium Glutamate Antitrust Litigation*, 2003 U.S. Dist LEXIS 1969, at \*5 (D. Minn. 2003); *see also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719-720 (5th Cir. 1974). Because not all factors apply to every case, a court should use its discretion to tailor the considerations to the individual facts of the case before it. *Griffin v. Jim Jamison*, 188 F.3d 996, 997 (8th Cir. 1999) (“Nor is it necessary for district courts to examine exhaustively and explicitly, in every case, all of the factors that are relevant to the amount of a fee award.”); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) (“not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor.”). Accordingly, consideration of the applicable factors, as set forth below, strongly supports the requested fee award.

**1. Time and Labor Required and the Risk Assumed by Plaintiffs’ Counsel.**

Plaintiffs’ Counsel took this case on a fully contingent basis, investing time, effort and money with no guarantee of ever getting paid. Consideration of the efforts and time expended by Plaintiffs’ Counsel, the skill required to perform the legal services, and the risk assumed by Plaintiffs’ Counsel establish that the requested fee is reasonable and fair.

Since the inception of this litigation, Plaintiffs' Counsel have exerted substantial efforts to move this case along 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 voluminous documents; (5) opposing Defendant's motion to dismiss; (6) drafting discovery; (7) drafting Plaintiffs' mediation statement; (8) participating in a full-day mediation; and (9) successfully negotiating this Settlement. Even after the Settlement was reached between the parties, Plaintiffs' Counsel devoted significant hours to finalize the Settlement Agreement and all related settlement documents.

Collectively, Plaintiffs' Counsel have expended 1,026.1 hours of attorney time to litigate and resolve this dispute. All work performed by Plaintiffs' Counsel was necessary, performed without duplication, and successfully advanced this litigation toward Settlement. As such, the effort and time expended by Plaintiffs' Counsel in navigating the complex legal and factual issues presented in this litigation supports the requested fee. *Yarrington*, 697 F. Supp. 2d at 1063 (finding the efforts and time of counsel, among other factors, justified an award of attorneys' fee of 33 1/3% of the settlement fund).

Similarly, consideration of the contingent nature of the representation also weighs in favor of the requested fee. *Id.* at 1062 ("Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." (citation omitted)). Indeed, "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a class have devoted

substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.” *In re Xcel*, 364 F. Supp. 2d at 994. Bearing the full risk of no recovery at all, Plaintiffs’ Counsel proceeded knowing that there was a chance that Plaintiffs might not prevail and that, even if they 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. Thus, the contingent nature of the representation in this action further supports the fee award requested herein. *See In re Centurylink Sales Pracs. & Sec. Litig.*, No. CV 18-296 (MJD/KMM), 2021 WL 3080960, at \*9 (D. Minn. July 21, 2021) (recognizing “the risk of receiving little or no recovery is a major factor in awarding attorney fees.”).

## **2. The Result Achieved.**

Many courts consider the result achieved to be the most important factor in determining whether the fee requested is reasonable. *See In re Flight Transp. Corp. Sec. Litigation*, 685 F. Supp. 1092, 1095 (D. Minn. 1987) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). There is no question that in this case, Plaintiffs’ Counsel have achieved a very favorable result. The Class will benefit greatly from the \$5,000,000 Settlement negotiated by Plaintiffs’ Counsel, as well as the injunctive relief. Moreover, the Settlement Agreement provides for the highest level of participation that can be obtained because rather than a “claims made” process, Settlement Class Members will automatically receive a payment. This means that each Settlement Class Member will participate in the recovery unless he or she voluntarily and specifically excludes himself or herself from the Settlement. ECF No. 82-1 at § IV. Equally important, the Released Claims are specifically

tailored to practices concerning Pay-to-Pay Fees charged by Caliber and do not alter or affect any other rights or obligations of Settlement Class Members or Caliber with respect to Settlement Class Members' relationship with Caliber. *Id.* at § V.

Although success at trial could have potentially yielded a higher recovery, Class Members faced the risk of not being able to recover any potential judgment had litigation continued, as well as the risks of certifying the Class and maintaining certification throughout trial, and proving liability and damages in the face of vigorous opposition by Defendant. Accordingly, Plaintiffs' Counsel respectfully submit that, in light of the risks of continued litigation and considering the value of time and money and the probability of lengthy litigation in the absence of a settlement, the size and quality of the results obtained for the Settlement Class Members are excellent and support the requested fee award.

**3. The Novelty and Difficulty of the Legal and Factual Issues, the Significant Skill of Experienced Counsel, and the Customary Fee for Similar Work.**

“Most class actions are inherently complex and settlement avoids the costs, delays and multitudes of other problems associated with them.” *In re Telectronics Pacing Sys. Accufix Atrial “J” Leads Prods. Liab. Litig.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (citation omitted); *Marshall v. Green Giant Co.*, 942 F.2d 539, 549 (8th 1991) (“It goes without saying that class actions are very complex and represent a significant drain on the court in terms of time and management.”).

Plaintiffs' claims involve both state law debt collection statutes, and their federal counterpart, the FDCPA, heightening the complexity and intricacy of the legal and factual

issues involved in this case, which translates into considerable and material risk that Plaintiffs would not secure a recovery that would be greater than the amount of money recovered for the Class through the Settlement. In fact, there is a significant risk here that Plaintiffs' Counsel could prosecute this case for several more years (through full discovery, including expert discovery, class certification, summary judgment, trial and the inevitable appeals that would follow) and, in the end, recover less than the proposed Settlement, or nothing at all, for the Class. *See In re Ikon Office Solutions Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (noting where large sums of money are at issue, litigation is guaranteed to be long, drawn-out, and any plaintiff's verdict would be appealed by defendants, further extending litigation); *accord In re Aetna Inc. Sec. Litig.*, No 1219, 2001 U.S. Dist. LEXIS 68, \*22 (E.D. Pa. Jan. 4, 2001) ("The risk of delay could have deleterious effects on any future recovery").

Notwithstanding the complexity and difficulty of the issues involved in this case, Plaintiffs' Counsel was able to negotiate an excellent recovery for the Class. Plaintiffs' Counsel respectfully submit that the work they performed in this litigation reflects their skill and experience in complex class litigation. Additionally, as reflected in the accompanying declarations, Plaintiffs' Counsel are nationally recognized firms with extensive experience in the area of complex class litigation. *See* Declaration of James L. Kauffman ("Kaufman Decl.") at ¶¶ 2-8; Declaration of Randall K. Pulliam ("Pulliam Decl.") at Ex. A; and Declaration of Hassan A. Zavareei ("Zavareei Decl.") at ¶¶ 23-24. Accordingly, the quality and skill involved in the services performed by Plaintiffs' Counsel

support the requested fee.

Moreover, the requested fee is directly in line with fees awarded in similar, complex class litigation in the Eighth Circuit and to Plaintiffs' Counsel. *See e.g. Huyer*, 849 F.3d at 399 (noting that courts within the Eighth Circuit frequently award attorneys' fees between 25% and 36% of a common fund); *Caligiuri*, 855 F.3d at 868 (8th Cir. 2017) (affirming fee award of one-third of the gross settlement fund); *see also* Kaufman Decl. at ¶¶ 18-20; Pulliam Decl. at Ex. A; and Zavareei Decl. at ¶¶ 24, 27.

Thus, the requested fee in this litigation reasonably reflects the quality of the work performed and the results accomplished by Plaintiffs' Counsel.

**4. Time Limitations Imposed by Client or Circumstances, the Undesitability of the Case, and the Preclusion of Other Employment.**

The customary fee in a class action lawsuit is contingent. This is so because virtually no individual possesses a sufficiently large stake in such litigation to justify paying attorneys on an hourly basis. At the same time, class actions are notoriously lengthy and their outcomes hard to predict. Thus, consideration of the undesirability of the case and the fact that Plaintiffs' Counsel risked their time and effort with the possibility of no recovery at all, supports the fee request of one-third of the Gross Settlement Fund. *See, e.g., Larson v. Allina Health Sys.*, No. 17CV03835SRNTNL, 2020 WL 2611633, at \*2 (D. Minn. May 22, 2020) ("class counsel's fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public

interest.” (internal quotations omitted)). Moreover, had Plaintiffs’ Counsel not taken a role in this litigation, they would have been free to allocate their time and resources elsewhere.

**5. The Absence of Objections by Members of the Class to Fees Requested by Counsel.**

As set forth above, Plaintiffs’ Counsel have received no objection to their fee request as of this date.<sup>1</sup> Consequently, the lack of objections by Settlement Class members is further support of the reasonableness of the requested fee. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (“The fact that only a handful of class members objected to the settlement similarly weighs in [class counsel’s] favor.”); *In re Xcel*, 364 F. Supp. 2d at 1002 (“[S]ilence can be read as an endorsement of the results received and the services rendered by plaintiff’s counsel.”).<sup>2</sup>

**6. A Lodestar Crosscheck, Although not Required, Supports the Reasonableness of the Fee Request.**

When a court selects the percentage-of-the fund method to calculate a reasonable fee, the court may use the lodestar method as a “crosscheck” to ensure that the amount awarded is reasonable. *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at \*22 (E.D. Mo. June 30, 2005) ( “Although courts may use

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<sup>1</sup> To date, one objection has been received by Plaintiffs’ Counsel but that objection pertains only to the “portion of the settlement that requires [class members] to notify Caliber Home Loans of their wish to be paid by check instead of by a credit card . . . .” See ECF No. 93. Thus, it does not pertain to Plaintiffs’ Counsel’s fee request and will be addressed at the appropriate time set by the Court.

<sup>2</sup> The deadline for filing an objection is November 1, 2021. If any objections are received, then Plaintiffs’ Counsel shall address any such objection in a reply.

the lodestar to ‘cross check’ the reasonableness of the percentage awarded, there is no requirement to do so in this Circuit.” (citing *Xcel*, 2005 WL 840370 at \*12)).

When the lodestar is only being used to cross-check, the primary basis of the fee award remains the percentage fund; therefore, the court’s analysis “can be performed with a less exhaustive cataloging and review of counsel’s hours.” *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHX), 2008 WL 8150856, at \*9 n.35 (C.D. Cal. July 21, 2008); *In re Rite Aid Corp. Sec Litig.*, 396 F.3d 294, 306 (3d Cir.2005) (“The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.”); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (“Of course, where [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized .”); *cf. Nelson v. Wal-Mart Stores, Inc.*, No. 2:05CV000134WRW, 2009 WL 2486888, at \*2 (E.D. Ark. Aug. 12, 2009) (“A lodestar cross-check, which only takes into account the hours committed to date, results in a multiplier of 2.5, which is reasonable in light of other fee awards by courts in the Eighth Circuit.”).

Hours are generally “reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client.” *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (quoting *Davis v. County of Los Angeles*, No. 73-63-WPG, 1974 WL 180, at \*3 (C.D. Cal. June 5, 1974)). Plaintiffs’ Counsel have provided a narrative description of their work on this case as well as detailed the number of hours performed by each firm. *See* Kauffman Decl. at ¶ 10; Pulliam Decl. at ¶¶ 15-18

and Ex. B; Zavareei Decl. at ¶¶ 3-20. To date, Plaintiffs' Counsel has spent a total of 1,028.2 hours preparing, researching, briefing, litigating, settling, and administering this case and the issues therein. *See* Kauffman Decl. at ¶ 10; Pulliam Decl. at ¶ 19 and Ex. B; Zavareei Decl. at ¶ 25. Plaintiffs' Counsel's total lodestar is \$651,962.20. Because the settlement consolidates three separate actions, Plaintiffs' Counsel's lodestar reflects work performed in all three cases. 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 ¶ 11; Pulliam Decl. at ¶ 17; Zavareei Decl. at ¶ 28.

Moreover, the individual claims of Settlement Class members could not have been pursued except through the class action mechanism as the individual claims were too small and the individual parties' financial resources too limited to warrant the substantial out-of-pocket expenditures on attorneys' fees and costs to obtain legal representation.

Lastly, the requested fee award yields a reasonable multiplier of 2.56. *See* Pulliam Decl. at ¶¶ 23. As such, a lodestar crosscheck further demonstrates the reasonableness of the requested fee. *See Keil v. Lopez*, 862 F.3d 685, 702 (8th Cir. 2017) (finding multiplier of 2.7 was in line with comparable cases); *Huyer*, 849 F.3d at 400 (finding multiplier of 1.82 was "well within the range of multipliers awarded in this and other circuits."); *Allicks v. Omni Specialty Packaging, LLC*, No. 4:19-CV-1038-DGK, 2021 WL 2188956, at \*3 (W.D. Mo. May 28, 2021) (approving multiplier of 3.3); *Yarrington*, 697 F. Supp. 2d at 1065 (finding multiplier of 2.26 is fair and appropriate); *In re Xcel*, 364 F. Supp. 2d at 999

(approving multiplier of 4.7); *In re Charter Commc'ns*, 2005 WL 4045741, at \*22 (approving 5.61 multiplier).

**V. PLAINTIFFS' COUNSEL ARE ENTITLED TO BE REIMBURSED FOR THEIR REASONABLE LITIGATION EXPENSES.**

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses and costs from the fund. *See Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1315 (8th Cir. 1981). Plaintiffs' Counsel are seeking reimbursement of costs and expenses in an aggregate amount of \$10,410.66 for prosecuting this action on behalf of the Settlement Class. As set forth in the accompanying declarations, these expenses were incurred on an ongoing basis for such items as filing fees, travel costs, mediation, photocopying of documents, mail expenses, long distance telephone and facsimile expenses, and other incidental expenses directly related to the prosecution of this Action. *See* Kauffman Decl. at ¶ 23; Pulliam Decl. at ¶ 25 and Ex. B; Zavareei Decl. at ¶ 31 and Ex. A.

Accordingly, Plaintiffs' Counsel respectfully request reimbursement for these reasonable expenses in the amount of \$10,410.66.

**VI. THE CLASS REPRESENTATIVES ARE ENTITLED TO A SERVICE AWARD.**

“Service award payments are regularly made to compensate class representatives for their help to a class.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 U.S. Dist. LEXIS 27155, at \*6 (D. Minn. Feb. 27, 2013). Here, Plaintiffs have devoted time in the oversight of, and participation in, the litigation on behalf of the

Class. Specifically, Plaintiffs gathered and communicated information to Plaintiffs' Counsel, reviewed pleadings, and had general oversight over the case. *See* Pulliam Decl. at ¶ 26. Consequently, the requested service award of \$5,000 to each Class Representative is appropriate and should be approved. *See Caligiuri*, 855 F.3d at 867 (stating "courts in this circuit regularly grant service awards of \$10,000 or greater" and affirming service awards of \$10,000 each); *Khoday v. Symantec Corp.*, 2016 U.S. Dist. LEXIS 55543 (D. Minn. April 4, 2016) (approving service awards to the named plaintiffs in the amount of \$10,000 each); *Risch v. Natoli Eng'g Co., LLC*, No. 4:11CV1621 AGF, 2012 WL 4357953, at \*3 (E.D. Mo. Sept. 24, 2012) (approving an incentive award of \$5,000); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (awarding service awards of \$15,000 each from \$17,000,000 settlement).

## **VII. CONCLUSION.**

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter an order approving an award of attorneys' fees of \$1,666,500, reimbursement of litigation expenses in the amount of \$10,410.66, and a service award of \$5,000 for each Class Representative.

Dated: October 11, 2021

Respectfully submitted,

*/s/ Randall K. Pulliam*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

STEPHEN PHILLIPS, MARY  
TOURVILLE-PHILLIPS, SANDI  
BARNETT, GREGORY BENJAMIN,  
TYRUS DAVIS, and CHRISTOPHER  
BINGHAM, on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

CALIBER HOME LOANS, INC.

Defendant.

Case No.: 19-cv-02711-WMW-LIB

**CERTIFICATE OF COMPLIANCE**

I, Randall K. Pulliam, representing Plaintiffs Stephen Phillips, Mary TourvillePhillips, Sandi Barnett, Gregory Benjamin, and Tyrus Davis, hereby certify that Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorney's Fees, Litigation Costs, and Service Awards complies with LR 7.1(f) and (h).

I further certify that, in preparation of this response, I used Microsoft Word, Version 2109. I further certify that the above referenced memorandum contains 7,513 words, which was arrived at using the word-counting function of my word-processing software and was applied specifically to include all text, including headings, footnotes, and quotations.

I further certify that the above document is in a 13-point, proportional font and is double-spaced, except where permitted by the Local Rules.

Dated: October 11, 2021

Respectfully submitted,

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