

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 23-cv-03056-CYC

JEFFREY LITTLE, individually and on behalf of all similarly situated persons,

Plaintiff,

v.

WENDY'S INTERNATIONAL, LLC,

Defendant.

**UNOPPOSED¹ MOTION FOR ATTORNEY'S FEES AND EXPENSES PURSUANT TO
FED. R. CIV. P. 23(h)**

INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h), Class Counsel requests 40% of the settlement fund, or \$1,580,000.00, for attorney's fees and expenses. The proposed notice notifies the Class of this request. *See* Doc. 54-1, Court-Approved Notice § 7. For the reasons below, this request should be preliminarily approved and the Settlement Class should be notified.

ARGUMENT

1. Legal Standard

The Tenth Circuit has expressed “a preference for the percentage of the fund method.” *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994). Under the percentage of the fund method, the fee award is based on a percentage of the total economic benefit obtained for the class. *See, e.g., Anderson v. Merit Energy Co.*, No. 07–cv–00916–LTB–BNB, 2009 WL 3378526 at *2 (D. Colo. Oct. 20, 2009) (citing *Brown v. Phillip Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.1988)). In

¹ The Parties have conferred, and Defendant does not oppose this Motion.

awarding these fees, the Court’s discretion is guided by the “*Johnson* factors.” *Gottlieb*, 43 F.3d at 482 n.4 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). Not all of the *Johnson* factors are equal. Further, “rarely are all of the *Johnson* factors applicable,” *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) (quoting *Brown*, 838 F.2d at 45), so “not all of them need [to] be considered” in every case, *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998). The “most critical factor . . . is the degree of success obtained.” *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quotations omitted).

2. Application of the *Johnson* Factors

a. Time and Labor Required

“[T]he complexity of the legal issues involved . . . justifies the time spent” by Class Counsel. *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2014 WL 4670886, at *2 (D. Colo. Sept. 18, 2014). As this Court knows, this case has been intensively litigated for over four years, *see Little*, 2024 WL 4455858, at *1–3, and is the result of two day-long mediations, as well as continued negotiations following the second mediation. *See* Doc. 47-5, Hood Dec. ¶ 13. As a result, Class Counsel expects to log at least 745 hours on this case. *See infra* at 6.

b. The Requisite Skill to Perform the Legal Service Properly and the Novelty and Difficulty of the Questions Presented

Class counsel are experienced litigators. *See* Docs. 47-5, 47-6, Class Counsel Decs. This case raised numerous legal issues. *See generally e.g.*, Doc. 1-2, Operative Complaint; Doc. 1-6, Class Cert. Order; *Little*, 2024 WL 4455858. In addition to the complex procedural issues litigated on class certification and removal, the substantive legal issues in this case “are governed by highly technical state and federal wage statutes and regulations.” *Shaw v. Interthinx, Inc.*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *6 (D. Colo. April 25, 2015).

c. Preclusion of Other Employment and Time Limitations

“There is an inherent preclusion of other work in litigating a complex case . . . on a contingency fee basis.” *Id.* It is just “common sense” that billing the significant hours required by this matter forced the attorneys to forgo other work. *In re Crocs*, 2014 WL 4670886, at *3 (“Although Plaintiffs’ Counsel does not provide specific examples of work they were forced to decline during the pendency of this action, common sense indicates that the nearly 3900 hours spent litigating this case came at the expense of time that could have been devoted to other matters.”).

d. The Customary Fee for Similar Work and Attorney’s Fees Awarded in Similar Cases

Class Counsel’s requested fees of 40% of the common fund is in line with the customary fee awarded to class counsel in a common fund settlement in this Circuit. “An award of forty percent (40%) of the settlement value is well within the range of acceptable fee awards in common fund cases.” *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. civ-12-1319-D, 2015 WL 2254606, at *3 (W.D. Okla. May 13, 2015)), vacated on other grounds, 888 F.3d 455 (10th Cir. 2017). “Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis.” *Cimarron Pipeline Constr., Inc. v. Nat’l Council on Compensation Ins.*, Nos. civ 89–822–T & 1186–T, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993). Moreover, similar awards have been made in this District. *See, e.g., Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018) (approving 37% in fees and expenses which was “well within the normal range for a contingent fee award”); *Whittington v. Taco Bell of Am., Inc.*, No. 10-cv-01884-KMT-MEH, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (awarding 39% of settlement fund for attorneys’ fees).

e. The Contingency Nature of Class Counsel’s Representation and the “Undesirability” of the Case

Plaintiffs’ counsel took this case on a contingency basis and advanced all expenses in the litigation. *See* Doc. 47-5, Hood Dec. ¶ 9. Substantial fee awards are appropriate in cases such as this, where class counsel must “advance large amounts of time, money, and other resources to determine if any recovery might be had”—something “[m]ost attorneys” cannot do. *Shaw*, 2015 WL 1867861, at *7; *see also In re Thornburg Mortg. Inc. Sec. Litig.*, 912 F.Supp.2d 1178, 1256 (D.N.M. 2012) (“[s]uch a large investment of money [and time] place[s] incredible burdens upon . . . law practices” (alteration in original, quotations omitted)). Accordingly, “[a] contingent fee, and the potential for a relatively high fee, is designed to reward counsel for taking the risk of prosecuting a case without payment during the litigation, and the risk that the litigation may be unsuccessful.” *In re Qwest*, 625 F. Supp. 2d at 1151.

Absent possibility and precedent for such an award, there is a risk that cases like this one, with transient plaintiffs who work in lower-wage positions, would never see the inside of a court room. *See Shaw*, 2015 WL 1867861, at *7 (“contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation . . . and transfer a significant portion of the risk of loss to the attorneys taking a case.... Access to the courts would be difficult to achieve without compensating attorneys for that risk.” (citations and quotations omitted)).

f. Potential Damages Involved and the Results Obtained

“[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” *Farrar*, 506 U.S. at 114 (quotations omitted); *see also Brown*, 838 F.2d at 456 (“[T]he amount involved and the results obtained . . . may be given greater weight when . . . the recovery was highly contingent and . . . the efforts of counsel were instrumental in realizing

recovery on behalf of the class.”). As discussed above, the recovery for each class member is significant given the nature of the claims. *See supra* at 5-7. This is particularly true given the uncertainty of continued litigation. *Id.*

g. The Experience, Reputation and Abilities of Class Counsel

All Class Counsel have significant litigation experience, including experience in complex wage and hour class actions like this one. *See generally* Docs. 47-5, 47-6, Class Counsel Decs.

h. Nature and Length of the Professional Relationship with the Client

Courts recognize that representing a plaintiff class means that attorneys may be forgoing repeat business. Thus, substantial awards are justified when, as with the Class in this case, “the likelihood that many class members will be seeking additional representation from Class Counsel is slim.” *Shaw*, 2015 WL 1867861, at *7. This is particularly true because “wage claims . . . do not lend themselves to continuous, long-term attorney-client relationships.” *Id.*

Class Counsel entered into a contingency agreement with the named Plaintiff. *See* Doc. 47-5, Hood Dec. ¶ 9; *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1114 (D. Kan. 2018) (“counsel have indicated that many plaintiffs in this case agreed to contingent-fee arrangements that allowed for fees of at least 40 percent of any recovery”). As for the Class, it has been notified of the fee request and have the opportunity to object. *See* Doc. 54-1, Court-Approved Notice § 7.

3. A Lodestar Crosscheck Also Demonstrates that Class Counsel’s Request Is Reasonable

“Courts using the percentage method will often crosscheck the requested award with the lodestar amount.” *Shaw*, 2015 WL 1867861, at *8. However, the Court in the exercise of its discretion and in light of the facts of the case may choose to rely entirely on the percentage method. *See Uselton*, 9 F.3d at 853 (distinguishing common fund cases where the percentage method is permissible rather than the lodestar method and approving fee award without considering the

lodestar); *see also CompSource Oklahoma v. BNY Mellon, N.A.*, No. civ 08-469-KEW, 2012 WL 6864701, at *8 (E.D. Okla. Oct. 25, 2012) (“A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.”).

Class Counsel’s requested fee award in this action is equal to the lodestar with a 2.75 multiplier. This is in the range of normal; Courts in this district award multipliers between 2.5 and 4.6. *See Mishkin v. Zynex, Inc.*, No. 09-cv-00780-REB-KLM, 2012 WL 4069295, at *2 (D. Colo. Sep. 14, 2012) (collecting District of Colorado cases approving multipliers ranging from 2.5 to 4.6); *Rothe v. Battelle Mem’l Inst.*, No. 1:18-CV-03179-RBJ, 2021 WL 2588873 (D. Colo. June 24, 2021) (3.61 multiplier).

4. Class Counsel’s Hours and Rates Are Reasonable

Class Counsel expect to log at least 745 attorney hours at the following hourly rates:

<u>Attorney Name</u>	<u>Hours Worked</u>	<u>Hourly Rate</u>
Brian Gonzales	310	\$800
Alexander Hood	435	\$750

See Doc. 47-5, Hood Dec. ¶ 14; Doc. 47-6, Gonzales Dec. ¶ 7. Given the length and complexity of this litigation, the hours spent were reasonable. Moreover, the hourly rates are also reasonable given the education and experience of Class Counsel. *See generally* Doc. 47-5, Hood Dec. ¶¶ 2-9, 15; Doc. 47-6, Gonzales Dec. ¶ 2-9.

5. The Multiplier is Reasonable

Class Counsel’s estimated lodestar is \$574,250.00. *Supra* at 16. The total fee request of \$1,580,000.00 compared to the lodestar creates a lodestar multiplier of 2.75, which is well within the range of multipliers typically awarded by courts in this Circuit. *See Rothe*, 2021 WL 2588873

(3.61); *In re Crocs*, 2014 WL 4670886, at *6; *see also Mishkin*, 2012 WL 4069295, at *2 (collecting District of Colorado cases approving multipliers ranging from 2.5 to 4.6).

CONCLUSION

For the foregoing reasons, the Motion should be granted.

Respectfully submitted April 4, 2025

s/Alexander Hood
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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2025, a true and correct copy of the foregoing was served electronically on all counsel of record.

s/Alexander Hood
