

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

ANDREW BEISSEL, an individual, J&B
ENTERPRISES, INC., a Colorado
Corporation, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WESTERN FLYER EXPRESS, LLC,

Defendant.

Case No. CIV-21-903-R

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS
AND SERVICE AWARD**

COME NOW, Plaintiffs Andrew Beissel and J&B Enterprises, Inc. ("Plaintiffs"),
by and through their undersigned counsel, move this Court for an Order:

1. Awarding Class Counsel reasonable attorneys' fees in the amount of \$1,633,170.00;
2. Awarding Class Counsel out-of-pocket costs in the amount of \$5,871.55; and
3. Awarding Plaintiffs Andrew Beissel and his company, J&B Enterprises, Inc., a service award in the amount of \$25,000.00.

Plaintiff brings this Motion pursuant to Federal Rule of Civil Procedure 23(h) and 29 U.S.C. § 216(b) of the Fair Labor Standards Act. This motion is based on the accompanying memorandum of law; the accompanying Declaration of Carolyn H. Cottrell and the exhibits attached thereto; the accompanying Declaration of Robert Boulter; the

accompanying Declaration of Andrew Beissel; any oral argument as may be heard by the Court; and all other records, pleadings, and papers on file in this action. Pursuant to the terms of the Settlement, Defendant Western Flyer Express, LLC (“WFX”) does not oppose this Motion.

A proposed order will be submitted for the Court’s consideration in advance of the Final Approval and Fairness Hearing.

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MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs and Class Counsel have achieved an excellent settlement for the Drivers in this action. The Amended Joint Stipulation of Settlement and Release of Class and Collective Action¹ (“Settlement”) provides plenteous recoveries for the Oklahoma Class Members and FLSA Collective Members, who hauled products throughout the United States, including in Oklahoma, for Defendant Western Flyer Express, LLC (“WFX”).² The Settlement resolves the claims of approximately 2,728 Drivers for a total non-reversionary settlement amount of \$4,900,000.00. Plaintiffs and Class Counsel now seek reasonable attorneys’ fees and costs and a service award for their considerable time, efforts, and risks incurred in achieving this result.

The average net award is approximately \$1,143 per person. 957 class members will receive net individual awards exceeding \$1,000, 261 class members will receive net awards exceeding \$3,000, and 70 class members will receive net awards exceeding \$5,000.³ Not surprisingly, the reaction of the class members has been favorable. The Settlement offers the class members significant advantages over the continued prosecution of their case

¹ The Settlement is attached as Exhibit 2 to the Stipulation and Joint Motion to Amend Preliminary Approval Order and to Continue Final Approval Hearing. ECF No. 87-2.

² The Oklahoma Class Members and FLSA Collective Members are collectively referred to as “class members.”

³ The average recovery and individual recovery amounts reported herein are based on the amounts reported to the class members in the class notice process. These amounts assumed that Class Counsel would be awarded \$100,000 for reimbursement of out-of-pocket costs under the Settlement. However, Class Counsel’s final costs are considerably less than \$100,000. Accordingly, the final amounts that will be paid to class members will be slightly higher than those reported in the notice and reported herein.

against WFX: members of the Class will automatically receive a check, do not need to submit a claim form, and will avoid the risks inherent in the continued litigation of this case, in which WFX asserts various defenses to its liability.

Class Counsel seeks as their reasonable attorneys' fees one-third (1/3) of the Gross Settlement Amount plus the reimbursement of actual out-of-pocket costs. These amounts will compensate Class Counsel for all work already performed in this case by the law firms of Schneider Wallace Cottrell Konecky ("SWCK") and the Law Offices of Robert S. Boulter ("RB") and for all of the work remaining to be performed in this case, including ensuring that the Settlement is fairly administered and implemented.

Class Counsel's request is appropriate given their efforts in bringing and prosecuting this action and successfully negotiating a class-wide settlement that provides critical relief for thousands of Drivers across the country. Moreover, Class Counsel's request is strongly supported by the fact that the Class: (a) has received written notice of the Settlement; (b) has overwhelmingly supported the Settlement; and (c) has submitted no objections to the requests for attorneys' fees and costs and the service award. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court award reasonable attorneys' fees in the amount of \$1,633,170.00, out-of-pocket costs in the amount of \$5,871.55, and a service award in the amount of \$25,000.00 to Plaintiffs Andrew Beissel and his company, J&B Enterprises, Inc.

II. SUMMARY OF WORK PERFORMED

Plaintiffs filed a class-action complaint against WFX in the Northern District of Oklahoma on December 7, 2020. ECF No. 2. Plaintiffs alleged that WFX misled and

fraudulently induced its drivers into hauling products for WFX by, among other things, misrepresenting the income the drivers would earn and failing to disclose key information about WFX's driver program. *Id.* Based on these allegations, Plaintiffs alleged claims under the Oklahoma Consumer Protection Act, 15 Okla. St. §§ 751, *et seq.* ("OCPA") and Oklahoma Deceptive Trade Practices Act, 78 Okla. St. §§ 52, *et seq.* ("ODTPA"), in addition to other related common law claims. *Id.*

Prior to filing its Answer to Plaintiffs' allegations, WFX brought a motion to dismiss and a motion to transfer venue. ECF Nos. 24, 25. These motions were opposed and fully briefed. ECF Nos. 26, 27. On September 14, 2021, the Court granted WFX's motion to transfer, and the matter was transferred to this Court. ECF No. 31, 32. Once venued here, on October 1, 2021, the Court granted WFX's motion to dismiss as to Plaintiffs' claim under the ODTPA (without dismissing the other claims) and provided Plaintiffs leave to amend. ECF No. 36.

Plaintiffs filed an amended complaint on October 15, 2021, asserting the same causes of action, but adding additional allegations in support of the claims. ECF No. 37. WFX again moved to dismiss Plaintiff's claim under the ODTPA. ECF No. 41. The matter was opposed and fully briefed. ECF Nos. 50-56. On December 14, 2021, the Court again granted WFX's motion to dismiss the ODTPA claim. ECF No. 57. Following the Court's exclusion of the ODTPA claims, WFX filed its Answer containing general and specific denials of Plaintiffs' allegations. ECF No. 59.

Shortly thereafter, the Parties began to discuss the possibility of settlement. ECF No. 64. The Parties agreed to exchange a wide variety of mediation-related discovery to

better understand the relative strengths and weaknesses of the claims and defenses at issue, and scheduled a mediation for July 19, 2022 to take place before Michael Russell, an experienced and well-respected mediator. ECF No. 71.

During this time, Class Counsel extensively analyzed the mediation discovery and continued its independent investigation into the claims at issue, including a comprehensive analysis of WFX's recruiting materials. Cottrell Decl., ¶ 12. Class Counsel further investigated whether other potential claims were viable and should be asserted. *Id.* After a full day of mediation on July 19, 2022, the Parties reached a tentative settlement on July 19, 2022. *Id.* at ¶ 13. In reaching the agreement to settle, Plaintiffs and Class Counsel relied on the substantial discovery provided by WFX and their own independent investigations and evaluated the strengths and weaknesses of the claims pleaded in the then-operative First Amended Complaint, as well as claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.* and other statutes. *Id.* at ¶ 14. Plaintiffs and Class Counsel assessed the risks and likelihood of success on both certification and merits issues pertaining to each claim and recognized that the settlement proposal provided a strong result. *Id.*

As the Parties negotiated and drafted the long-form settlement agreement, however, there were disputes on many key terms. *Id.* at ¶ 15. Between July 19, 2022 and December 14, 2022, the Parties committed time and effort virtually every week to achieve a mutually agreeable long-form settlement agreement, inclusive of meeting, conferring, negotiating, and exchanging drafts of the agreement throughout the process. *Id.* The Parties executed the full Settlement on December 14, 2022. *Id.* at ¶ 16.

Pursuant to the Settlement and the Parties' discussions during mediation, Class Counsel drafted a comprehensive Second Amended Complaint that added claims for misclassification and violation of federal statutes prohibiting trafficking, debt servitude, peonage and involuntary servitude under 18 U.S.C. §§ 1581, *et seq.* Plaintiffs filed the Second Amended Complaint on December 16, 2022. ECF No. 79.

Plaintiffs filed the Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement on January 8, 2023. ECF No. 81. This detailed motion provided an extensive analysis of the proposed Settlement. The Court granted preliminary approval of the Settlement on January 18, 2023. *See* ECF No. 83. Following the Court's preliminary approval order, WFX provided class list information to the Court-appointed settlement administrator, CPT Group, Inc. ("CPT"). CPT then undertook calculations to determine the individual awards for each class member. Cottrell Decl., ¶ 19.

During this process, Class Counsel discerned that the number of class members, under the Class and Collective definitions in the original settlement, exceeded the number reported by Plaintiffs in the preliminary approval papers. *Id.* at ¶ 20. Plaintiffs reported that there were approximately 2,760 class members based on information and data used by the Parties at the July 2022 mediation. *See* ECF Nos. 81, 87. After preliminary approval, Plaintiffs learned that this figure encompassed class members up to March 11, 2021, when WFX represents it made certain changes to its written agreements with class members. *See* ECF No. 87. Under the original settlement agreement, however, that the Class and Collective definitions extended through July 19, 2022. *See* ECF Nos. 81-2, 87.

Accordingly, the Parties met and conferred and reached an agreement under which

the Class and Collective definitions were redefined to run from December 7, 2017 to March 11, 2021. *See* ECF Nos. 87. The Parties then executed the amended settlement agreement to implement these changes. Cottrell Decl., ¶ 21. The Parties filed the Stipulation to Amend, which sought to amend the preliminary approval order as to the time period of the Class and Collective definitions and Released Claims and attached the Settlement (as amended) in clean and redline formats. ECF No. 87. The Court granted the Stipulation to Amend on May 19, 2023. *See* ECF No. 88.

The Parties then worked with CPT to implement the Court-approved notice process. WFX provided updated class list information to CPT on June 2, 2023. Cottrell Decl., ¶ 23. CPT sent the Notice of Proposed Class Action Settlement and Hearing Date for Final Court Approval and Class Form (“Class Notice”) to all class members on August 8, 2023.⁴ *Id.* CPT also established a toll-free call center to address questions from class members and a settlement website that provided copies of the long-form Settlement and related case documents.⁵ *Id.* Class Counsel worked with CPT Group to administer and oversee each stage of this process. *Id.* After the Class Notice was issued, Class Counsel fielded numerous inquiries from class members relating to the Settlement. *Id.* The deadline for class members to submit disputes, requests for exclusion, or objections was October 7, 2023.

Class Counsel then prepared the final approval papers, including the instant motion and all supporting declarations. Class Counsel will appear at the Final Approval and Fairness Hearing on November 3, 2023. Thereafter, Class Counsel will work with CPT to

⁴ There are 2,728 class members in the final tally. *Id.* at ¶¶ 5, 7.

⁵ The URL is <https://www.cptgroupcaseinfo.com/westernflyersettlement>.

ensure that the Settlement is fairly administered and implemented, inclusive of ensuring that class members receive their payments and that any residual funds are dispersed in accordance with the Settlement.

III. TERMS OF SETTLEMENT WITH RESPECT TO FEES AND COSTS AND SERVICE AWARD

The Settlement provides that, subject to Court approval, Class Counsel is entitled to receive 33.33% of the Gross Settlement Amount as attorneys' fees. *See* ECF No. 87-2, pp. 12-13, ¶ IV.1. Thus, from the Gross Settlement Amount of \$4,900,000.00, Class Counsel seeks \$1,633,170.00 in reasonable attorneys' fees. The Settlement also provides that Class Counsel is to be reimbursed for their out-of-pocket costs in an amount not to exceed \$100,000. *Id.* In this Motion, Class Counsel seeks a modest \$5,871.55 as reimbursement for their out-of-pocket costs.

The Settlement further provides that Plaintiffs may seek a service award not to exceed \$25,000 for their work in prosecuting this action. *Id.* at p. 11, ¶ III.2. With this Motion, Plaintiffs seek an incentive award of \$25,000 for their time, effort, and risks incurred on behalf of the class members.

Pursuant to the Settlement, WFX does not object to Class Counsel's request for fees and costs, nor to Plaintiffs' request for the service award. *Id.* at p. 11-13, ¶¶ III.2, IV.1.

IV. LEGAL ARGUMENT

A. Tenth Circuit Precedent Supports an Award of Attorneys' Fees and Costs

Under the common fund doctrine, "a litigant or 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.” *In re Miniscribe Corp.*, 309 F.3d 1234, 1241 (10th Cir. 2002) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Parties to a class action may negotiate not only the settlement of the action itself, but also payment of attorneys’ fees. *See Evans v. Jeff D.*, 475 U.S. 717, 734–35, 738 n.30 (1986). A negotiated fee is preferred because it prevents attorneys’ fees from becoming “a second major litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (“Ideally, of course, litigants will settle the amount of a fee.”).

There are two primary methods for determining attorney-fee awards in common-fund class-action cases: the percentage-of-the-fund method and the lodestar approach. The Tenth Circuit recognizes the propriety of the percentage-of-the fund method when awarding fees (*see Gottlieb v. Barry*, 43 F.3d 474, 484 (10th Cir. 1994)) and indeed “favors the percentage of the fund approach because it ‘is less subjective than the lodestar plus multiplier approach,’ matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis, as in this case.”⁶

Lucken Family Ltd. P’ship v. Ultra Res., Inc., No. 09–cv–01543–REB-KMT, 2010 WL

⁶ The Tenth Circuit’s preference for the percentage-of-the-fund method in determining attorneys’ fees in common fund cases and its customary application of that method in class and collective wage and hour actions is not changed by the Tenth Circuit’s opinion in *Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII-A, L.P.*, 861 F. 3d 1182, 1185 (10th Cir. 2017). *Chieftain’s* application of Oklahoma state law to adjudication of fee requests is limited to common fund actions in which the court has federal jurisdiction based on the diversity of the parties, and it does not apply where, as here, the Court has federal question jurisdiction over the action under 28 U.S.C. § 1331 over claims brought pursuant to the FLSA. Indeed, the Tenth Circuit in *Chieftain* explicitly reiterated the Tenth Circuit law for determining attorney-fee awards in common fund cases, noting its general “preference for the percentage-of-the fund approach” and that cases in which “the jurisdiction of the federal court was based on a federal question, not diversity” are “distinguishable” from the case at issue in *Chieftain*. *Id.* at 1186, 1188, and n.2.

5387559, at *2 (D. Colo. Dec. 22, 2010) (citing *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.1998)); *Childs v. Unified Life Ins. Co.*, No. 10-CV-23-PJC, 2011 WL 6016486, at *15 (N.D. Okla. Dec. 2, 2011) (“The preferred method of determining a reasonable attorney fee award in common fund cases is the percentage of fund analysis.”) (citing *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995) and *Gottlieb*, 43 F.3d at 482–83); *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at *8 (E.D. Okla. Oct. 25, 2012) (citing *Gottlieb*, 43 F. 3d 486); *Northumberland Cnty. Retirement Sys. v. GMX Resources, Inc.*, No. CIV-11-520-D, 2014 WL 12014020, at *2 (W.D. Okla. July 31, 2014) (collecting cases). The Tenth Circuit’s approach also “has been called a ‘hybrid’ approach, combining the percentage fee method with the specific factors traditionally used to calculate the lodestar.” *Gottlieb*, F.3d at 482–83; *see also Barbosa v. Nat’l Beef Packing Co., LLC*, No. CIV.A. 12-2311-KHV, 2015 WL 4920292, at *7 (D. Kan. Aug. 18, 2015).

B. The *Johnson* Factors Support Approval of the Fee Request

In determining what constitutes a reasonable attorney fee award, whichever method is used, district courts consider the following factors, first set forth in *Johnson v. Georgia HighwayExpress, Inc.*: (1) time and labor required; (2) novelty and difficulty of question presented by the case; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorneys due to acceptance of the case; (5) customary fee, (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or circumstances; (8) amount involved and results obtained; (9) experience, reputation and ability of the attorneys; (10) “undesirability” of the case; (11) nature and

length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d 714, 717–19; *Gottlieb*, 43 F.3d at 483; *Peterson v. Mortg. Sources, Corp.*, No. 08–2660–KHV, 2011 WL 3793963, at *9 (D. Kan. Aug. 25, 2011). These factors support approval of the percentage fee award that Plaintiffs request and are discussed below.

1. Time and Labor Required

Courts in this Circuit have approved attorney’s fees based solely on a percentage-of-the-fund approach without conducting a lodestar analysis (*see Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *2 (N.D. Okla. Dec. 4, 2006) (approving fee award of one-third of the final settlement)) and have noted that the majority of circuits recognize this approach as within the discretion of the trial courts. *See McKinley v. Mid-Continent Well Logging Serv., Inc.*, No. 5:14-cv-00649-M (W.D. Okla. Mar. 2, 2016) (approving fee award of 40% of the Gross Settlement Fund) (citing *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)).

Nonetheless, prosecuting this matter to a successful settlement for the benefit of the class members required Class Counsel to expend a significant amount of time, including substantial legal and factual research, briefing novel and complex issues, and months of settlement negotiations with the assistance of a highly experienced mediator. *See Cottrell Decl.*, ¶ 57. Over the nearly three years that this case was litigated, well over a dozen individuals were collectively required to expend over 615 hours to obtain this excellent outcome. *See id.* at ¶ 59; *Boulter Decl.*, ¶¶ 7-8. The time and labor expended supports the requested fee.

2. Novelty and Difficulty of Questions Presented by the Case, as well as the Skill Required to Perform the Legal Service Properly

Plaintiffs successfully negotiated the Settlement on behalf of a nationwide group of Drivers across two aggregate forms of claims: a national Oklahoma Class, for which Plaintiffs assert Oklahoma law claims grounded in consumer protection statutes and other laws (*e.g.*, OCPA, ODTPA, common-law fraud, common-law negligence *per se*), and an FLSA Collective under federal wage and hour laws. The claims pursued by these distinct groups were all permeated with their own sophisticated legal challenges, ranging from issues such as consumer standing, reliance and presumptions relating thereto, injury, employee vs. independent contractor classification, the presumption against extraterritorial application of state laws, pre-emption issues, Commerce Clause restraints, and countless other substantive and procedural issues. The record in this case – containing considerable motion practice and two amended complaints – leaves no doubt that the novelty and difficulty of the questions presented in this case were substantial, and exceptional skill was required by Class Counsel to prevail on virtually every one of these questions.

3. Customary Fee

“[A] contingent fee of one-third of the settlement amount in a class action is standard in this Court and other district courts in the Tenth Circuit.” *Cisneros v. Ep Wrap-It Insulation, LLC*, 2022 U.S. Dist. LEXIS 112804 (June 27, 2022 D.N.M.) (citing *Cisneros v. Ep Wrap-It Insulation, LLC*, 2021 WL 2953117 at *8 (D.N.M. July 14, 2021) (collecting cases). “[F]ees in the range of one-third of the common fund are frequently awarded in class action cases[.]” *Childs*, 2011 WL 6016486, at *15.

Other courts within the Tenth Circuit have similarly recognized that “[t]he

percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund created.” *Enter. Energy Corp. v. Columbia GasTransmission Corp.*, 137 F.R.D. 240, 249–50 (S.D. Ohio 1991); *Lucken*, 2010 WL 5387559 at *6 (“The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class.”); *Cimarron Pipeline Const., Inc. v. Nat’l Council on Comp. Ins.*, Nos. CIV 89–822–T, CIV 89–1186–T, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) (“Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis.”); *Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018) (award equal to 37% of gross settlement amount “well within the normal range for a contingent fee award”). Fees within this range are “presumptively reasonable.” *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, *11 (D. Colo. March 9, 2000).

Here, Class Counsel seeks one-third of the Gross Settlement Amount. As described above, this is well within the percentage range approved in similar cases and is, in fact, lower than many fee awards in this Circuit. *See, e.g., Lewis*, 2006 WL 3505851, at *2 (approving 1/3 award of \$1,699,202 for attorneys’ fees); *Whittington v. Taco Bell of Am., Inc.*, No. 10–cv–01884–KMT–MEH, 2013 WL 6022972, *6 (D. Colo. Nov. 13, 2013) (“Together the fees and costs amount to approximately 39% of the fund as a whole. This is within the normal range for a contingent fee award.”); *Ostrander v. Customer Eng’g Servs., LLC*, No. 15-cv-01476-PAB-MEH, 2019 U.S. Dist. LEXIS 27645, 2019 WL 764570 *6 (D. Colo. Feb. 21, 2019) (noting that attorneys’ fee awards can range up to 58 percent of the settlement fund). This factor strongly supports the requested fee.

4. Whether the Fee is Fixed or Contingent

Class Counsel agreed to represent Plaintiffs on a purely contingent basis. *See* Cottrell Decl., ¶ 82. Courts routinely recognize the importance of such arrangements, noting that many workers “cannot afford to retain counsel at fixed hourly rates ... yet they are willing to pay a portion of any recovery they may receive in return for successful representation.” *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). Thus, “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.” *In re Abrams*, 605 F.3d 238, 245–46 (4th Cir. 2010). “Access to the courts would be difficult to achieve without compensating attorneys for that risk.” *Id.*

In this case, Class Counsel would not have recovered any fees or out-of-pocket costs had they not obtained a settlement or prevailed at trial. Cottrell Decl., ¶¶ 81-82. This factor thus weighs strongly in favor of the requested fees and costs because Class Counsel assumed significant risk of nonpayment when they agreed to represent Plaintiffs on a contingency-fee basis. *See In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1143, 1151 (D. Colo. May 27, 2009).

By permitting clients to obtain attorneys without having to pay hourly fees, this system provides critical access to the courts for people who otherwise would not be able to find competent counsel to represent them. The risks Class Counsel undertook were real, and the resources that Class Counsel dedicated to this action meant that such resources were not available to other cases. Class Counsel’s contingency risk, together with the excellent result that has been achieved on behalf of the Class Members, support the

requested fees and costs.

5. Amount Involved and Results Obtained

The Gross Settlement Amount represents an extremely significant recovery on behalf of the class members in light of heavy risks. Without having to do anything more than deposit a check, class members share in a \$4,900,000.00 global settlement and will receive an average net recovery of approximately \$1,143 per person. 957 class members will receive net individual awards exceeding \$1,000, 261 class members will receive net awards exceeding \$3,000, and 70 class members will receive net awards exceeding \$5,000. Cottrell Decl., ¶ 30.

The equitable relief obtained in this case is also critical. As alleged in the complaints and reiterated in other pleadings, WFX's conduct toward class members threatened financial ruin for these individuals. This concern has been eliminated. Through the Settlement, WFX has released any right to pursue any known or unknown monetary claims against Class Participants for outstanding debts, reimbursements, chargebacks, deposits, or other amounts. ECF No. 87-2, p. 32, ¶ X.3. In other words, thousands of Drivers are now financially free from WFX. The amounts involved in this case and the excellent results obtained support the requested fee.

6. Experience, Reputation, and Ability of the Attorneys

As described in detail in Class Counsel's accompanying declaration, the undersigned counsel focus their practice on and have extensive experience in representing workers in wage and hour litigation nationwide, including class and collective action cases. *See* Cottrell Decl., ¶¶ 5-7, 63; Boulter Decl., ¶¶ 2-6. Class Counsel have extensive

experience in trucking actions and consumer class actions as well. Cottrell Decl., ¶ 63; Boulter Decl., ¶¶ 5-6.

Judge Gregory K. Frizzell of the United States District Court for the Northern District of Oklahoma recently praised the skill of Class Counsel as class action litigators in the trucking class action *Huddleston v. John Christner Trucking, LLC* (N.D. Okla., No. 4:17-cv-00549-GKF-CDL, October 31, 2022, ECF 285). At final approval, Judge Frizzell found that “Class Counsel have extensive experience, reputation, and ability that propelled the excellent result obtained for the Class Members” and that, prior to settlement, “Class Counsel successfully certified three groups of class members on distinct theories of liability, representing significant novelty and difficulty and requiring substantial skill.”

Class Counsel have shown their ability by professionally and diligently achieving the excellent result obtained for the class members in this case. The experience, reputation, and ability of Class Counsel support the requested fee award.

7. Undesirability of the Case

Class Counsel undertook significant risk in agreeing to represent Plaintiffs and the class members in this case. The risk assumed by Class Counsel is similar to that described by the court in *Qwest*, wherein class counsel was required “to advance large amounts of time, money, and other resources to determine if any recovery might be had” and the Court noted that “[a]t bottom, the risk to [Class Counsel] was financial ... [m]ost attorneys are unable or unwilling to take such a financial risk.” 625 F. Supp. 2d at 1152–53.

Large-scale wage and hour and consumer cases are complicated and time-consuming. Law firms undertaking these types of cases must have the proper experience

or the cases fail. The law firms must also be prepared and able to make tremendous investments of time, energy, and financial resources in order to appropriately pursue them, as is evident in this case. Class Counsel possesses particularized skill, experience, and ability to litigate these types of claims – claims that are otherwise undesirable to most other attorneys. This factor supports the requested fee.

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

The practice of representing employees and consumers is very different than the practice of defense firms, which have a steady book of corporate clientele (often with repeat business) and are guaranteed to be paid by the hour, win or lose. Typically, defense firms' clients require continuous legal services from their counsel. By contrast, it is unlikely that many class members will be seeking additional representation from Class Counsel after the conclusion of a lawsuit. The claims asserted in this case do not lend themselves to continuous, long-term attorney-client relationships. This factor thus weighs in favor of the requested fee award.

9. Awards in Similar Cases

As discussed above, Class Counsel's request for one-third of the Gross Settlement Amount is consistent with the norms of consumer and wage and hour class and collective litigation in this Circuit and across the country. Courts around the country have "routinely awarded one-third or more of the settlement fund as attorneys' fees in wage and hour cases." *See Henry v. Little Mint, Inc.*, No. 12-cv-3966, 2014 WL 2199427, *15 (S.D.N.Y. May 23, 2014) (noting that request for fees was "in line with decisions from across the country that have awarded one-third or more in wage and hour settlements" and citing

cases).

Class Counsel's request for one-third of the Gross Settlement Amount falls well within the range of reasonable allocations in the context of awards granted in other, similar cases. *See, e.g., Lopez v. T/J Inspection, Inc.*, No. 5:16-cv-00148, Dkt. No. 59 (W.D. Okla. Apr. 12, 2017) (approving fee award of one-third of the claimed portion of the Gross Settlement Fund in day rate inspection case); *Fenley v. Applied Consultants, Inc.*, No. 2:15-cv-00259 (W.D. Pa. June 16, 2016) (same); *Black v. Wise Intervention Servs., Inc.*, No. 2:15-cv-00453-MPK (W.D. Pa. Mar. 16, 2016) (approving fee award of 33.33% of the total settlement amount to class counsel in wage and hour settlement); *Niver v. Specialty Oilfield Sol., Ltd.*, No. 14-cv-1599 (W.D. Pa. Oct. 7, 2015) (same). District courts in this Circuit also routinely approve requests for fees in the amount of approximately one-third of the settlement fund. *See, e.g., Childs*, 2011 WL 6016486, at *15 ("fees in the range of one-third of the common fund are frequently awarded in class action cases"); *Lewis*, 2006 WL 3505851, at *2 (approving award of \$1,699,202, or one-third of total settlement, for attorney's fees); *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (approving attorney fee of one-third of total settlement amount); *Campbell v. C.R. England, Inc.*, No. 2:13-cv-00262, 2015 WL 5773709, at *8 (D. Utah Sept. 30, 2015) (same). Accordingly, the fees approved in similar cases further support the requested fee here.

10. The Response of the Settlement Class Supports the Requested Fee

While not typically a factor analyzed under *Johnson*, the response of the Class favors approval of the requested fee. Following the Court's preliminary approval of the

Settlement, notice of the Settlement was provided to the class members, and their reaction to the Settlement has been excellent.

Following conclusion of the notice period, no class members have opted out of the Settlement nor objected to the requested attorneys' fees and costs. Cottrell Decl., ¶ 40. This is a strong indication that the class members approve the Settlement and support the reasonableness of the requested fee award. *See, e.g., Andersen v. Merit Energy Co.*, Nos. 07-cv-00916-LTB-BNB, 07-cv-01025-REB-MJW, 2009 WL 3378526, at *4 (D. Colo. Oct. 20 2009) ("The absence of any [c]lass members' objection is an additional factor that supports this Court's approval of the requested attorneys' fees.") (citations omitted).

11. A Lodestar Cross-Check Supports the Requested Fee

Courts in this Circuit continue to hold that "[t]he preferred method of determining a reasonable attorney fee award in common fund cases is the percentage of fund analysis." *Childs*, 2011 WL 6016486, at *15. "In awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record." *Bruner v. Sprint/United Mgmt. Co.*, No. 07-2164-KHV, 2009 WL 2058762, at *5 (D. Kan. July 14, 2009). In addition, fees awarded "on a common-fund basis ... necessarily take[] into account risk and other factors that may justify an enhancement of the lodestar amount." *In re Williams Companies Erisa Litig.*, No. 02-CV-153TCJ(FHM), 2006 WL 5411268, at *1 (N.D. Okla. Mar. 14, 2006). Moreover, "the Court is not constrained by the lodestar amounts, and the Court [may] consider[] the overall reasonableness of the request in light

of the *Johnson* factors and other relevant considerations.” *Id.*

Here, a lodestar cross-check is given less weight because the fee award is part of a common-fund settlement and the *Johnson* factors strongly support Class Counsel’s requested fee. If, however, the Court wishes to conduct a lodestar cross-check, Class Counsel has attached a declaration that details the time worked on this case, with a description of the work performed and the reasons therefore, along with their hourly billing rates. Cottrell Decl., ¶¶ 65-76, Exh. 1; *see also* Boulter Decl., ¶ 7. Class Counsel spent over 615 hours prosecuting this matter, and its current lodestar is over approximately \$545,569, which does not account for all work Class Counsel will need to perform to bring this Settlement to a close. Cottrell Decl., ¶ 65; Boulter Decl., ¶ 7. This lodestar was calculated using Class Counsel’s standard hourly rates, which have been approved by courts around the country.⁷

“A multiplier of four or less is commonly accepted as reasonable.” *Been v. O.K. Indus.*, 2011 U.S. Dist. LEXIS 115151, 2011 WL 4478766, at *29 (E.D. Okla. Aug. 16, 2011) (citing a study “reporting [an] average multiplier of 3.89 in survey of 1,120 class action cases”). The requested attorneys’ fee award represents a multiplier of

⁷ *See, e.g., Etcheverry v. Franciscan Health System, et al.*, Case No. 3:19-cv-05261-RJB-MAT, ECF 85 (W.D. Wash., Oct. 19, 2021) (finding SWCK’s hourly rates for purposes of a lodestar cross-check “reasonable, and that the estimated hours expended are reasonable”); *Amaraut v. Sprint/United Mgmt. Co.*, 2021 WL 3419232, 2021 U.S. Dist. LEXIS 147176, at *18 (S.D. Cal. Aug. 5, 2021) (approving a one third fee award, and in August 2021, finding that “the fee award is further supported by a lodestar crosscheck, whereby it finds that the hourly rates of Schneider Wallace Cottrell Konecky LLP ... are reasonable, and that the estimated hours expended are reasonable.”); *Villafan v. Broadpectrum Downstream Services, Inc., et al.*, Case No. 3:18-cv-06741-LB, ECF 150 (N.D. Cal. April 9, 2021) (finding SWCK’s 2021 rates “[a]s to the lodestar cross-check, the billing rates are normal and customary (and thus reasonable) for lawyers of comparable experience doing similar work.”).

approximately 2.99 of Class Counsel's lodestar, and thus a lodestar cross-check confirms the requested fee is reasonable in this case. This is in accord with the holdings of district courts around the country: "Courts have generally held that lodestar multipliers between 2 and 4.5 demonstrate a reasonable attorneys' fee." *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756 (W.Va. 2009); *see also Keller v. TD Bank, N.A.*, No. 12-cv-5054, 2014 WL 5591033, at *16 (E.D. Pa. Nov. 4, 2014) (approving lodestar multiplier "slightly above 3" in \$6 million wage and hour lawsuit settlement); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (approving multiplier of 5.3 in \$14 million wage and hour settlement, and holding "[a] review of the case law indicates that while that figure is toward the high end of acceptable multipliers, it is not atypical for similar fee-award cases"); *Zeltser v. Merrill Lynch & Co.*, No. 13-cv-1531, 2014 WL 4816134, at *10 (S.D.N.Y. Sept. 23, 2014) (approving 5.1 multiplier in wage and hour settlement and noting "[w]hile this multiplier is near the higher end of the range of multipliers that courts have allowed, this should not result in penalizing Plaintiffs' counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial"); *Buccellato v. AT&T Operations, Inc.*, No. 10-cv-463, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (awarding multiplier of 4.3 in wage and hour class action).

Accordingly, to the extent the Court conducts a lodestar cross-check, Class Counsel's lodestar supports the requested fee.

E. Class Counsel's Costs Should be Approved

Class Counsel's current costs total a modest \$5,871.55. Cottrell Decl., ¶ 86, Exh. 2. These costs include reasonable out-of-pocket expenditures. "Under the common fund

doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses.” *In re Cardizem CD Antitrust Litig.*, 210 F.R.D. 508, 535 (E.D. Mich. 2003); *see also Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004) (finding expenses such as “(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express service, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, [and] (11) the cost of hiring a mediator” to be reasonable).

The expenses incurred in this litigation to date are set forth in the accompanying declaration. *See Cottrell Decl.*, Exh. 2. The expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as mediation fees, copying fees, delivery costs, and computerized legal research. All of these expenses were reasonable and necessary for the successful prosecution of this case, and pursuant to the terms of the Settlement, Defendant does not object to the request for costs.

C. Plaintiffs’ Requested Incentive Award Is Justified and Should Be Approved

The Settlement provides for an incentive award up to \$25,000 for Plaintiffs Andrew Beissel and his company, J&B Enterprises, Inc., for their considerable time, effort, and risks incurred in bringing and prosecuting this matter and, in addition, for their general release of all waivable claims against WFX. *See ECF No. 87-2*, pp. 11, 30-31, ¶¶ III.2, X.2. The requested service award is particularly warranted because (1) Plaintiffs went

above and beyond to provide extensive documents and information to Class Counsel, particularly at the pleadings and mediation states, and (2) Plaintiffs incurred significant and very real risks as to future trucking opportunities as Plaintiff Beissel continues to work as a truck driver and continues to use his company (J&B Enterprises, Inc.) in the trucking industry.

Courts routinely approve incentive awards to compensate named plaintiffs for “personal risk incurred or additional effort and expertise provided for the benefit of the class.” *UFCW Local 880-Retail Food Emp’rs Joint Pension Fund v. Newmont Min. Corp.*, 352 Fed. Appx. 232, 235 (10th Cir. 2009). It is particularly appropriate to compensate named representative plaintiffs with service awards when they have actively assisted plaintiffs’ counsel in their prosecution of the litigation for the benefit of a class. *Young v. Tri Cnty. Sec. Agency, Inc.*, No. 13-cv-5971, 2014 WL 1806881, at *1, 8 (E.D. Pa. May 7, 2014) (approving incentive award for named representative in action alleging violations of FLSA and state law where named plaintiff released all waivable claims arising out of employment and made significant contributions to the litigation).

Plaintiffs have been fully committed to pursuing the class and collective claims in this action against WFX for nearly three years. *See* Beissel Decl., ¶ 7. Mr. Beissel spent long hours during the complaint-drafting process completing interviews with Class Counsel and searching for and providing extensive documentation. *Id.* at ¶¶ 12-13. He again devoted significant time to the lawsuit at the mediation stage, providing a host of further documents and additional factual information. *Id.* at ¶¶ 14-17. He was actively involved in the settlement decision and reviewing the long-form agreements. *Id.* at ¶¶ 18-

19.

Moreover, Plaintiffs have also undertaken very real risks as to future trucking opportunities. Mr. Beissel is named as a plaintiff in both his personal name and his company name. This information may be discerned with a simple web search. Mr. Beissel continues to work as a driver and to use his company in this line of work. Plaintiffs have undertaken great risks as to future trucking and employment opportunities to make this Settlement a reality for thousands of class members. These are precisely the types of activities and risks courts have found to support reimbursement to class representatives.

Plaintiffs have actively and effectively fulfilled their obligations as the representatives for the Class and Collective. Unsurprisingly, no class member has objected to the requested incentive award. Furthermore, the proposed service award of \$25,000 for Plaintiff Beissel represents a mere fraction of a percentage – 0.51% – of the Gross Settlement Amount. Similar requests for incentive awards have been approved in this Circuit. *See, e.g., Suaverdez v. Circle K Stores*, Civil Action No. 1:20-cv-01035-RMR-NYW, 2021 U.S. Dist. LEXIS 206455, at *3 (D. Colo. Oct. 19, 2021) (approving \$30,000 requested service award); *Valverde v. Xclusive Staffing, Inc.*, No. 16-cv-00671-RM-NRN, 2020 U.S. Dist. LEXIS 127111, 2020 WL 4057585, at *2 (D. Colo. July 20, 2020) (approving \$20,000 service award for each of six plaintiffs); *Bagoue v. Developmental Pathways, Inc.*, No. 16-cv-01804-PAB-NRN, Docket No. 149 (Oct. 28, 2020) (approving a \$30,000 service award to the named plaintiff); *Gundrum v. Cleveland Integrity Services, Inc.*, Civil Action No. 4:17-cv-00055-TCK-JFJ, Dkt. No. 102 (Dec. 4, 2017) (approving service awards of \$20,000 each to two named plaintiffs).

Class Counsel respectfully submits that Plaintiff Beissel's active and lengthy participation in this litigation and the significant risks he has undertaken fully warrant the Court's approval of an incentive award in the amount of \$25,000.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) approve the requested award of attorneys' fees to Class Counsel in the amount of \$1,633,170.00; (2) approve the requested reimbursement of costs to Class Counsel in the amount of \$5,871.55; and (3) approve the service award to Plaintiffs in the amount of \$25,000.00.

Dated: October 13, 2023

Respectfully submitted,

/s/ David C. Leimbach

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*Attorneys for Plaintiff, the Class
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and attached documents with the Clerk of the Court for the for the United States District Court, Western District of Oklahoma, by using the Court's Case Management/Electronic Case Filing (CM/ECF) system, on October 13, 2023. Electronic service will be accomplished on all Parties via the CM/ECF system.

I hereby attest that authorization to file the attached declarations has been obtained from the signatories indicated by a conformed signature (/s/) within those documents.

Dated: October 13, 2023

/s/ David C. Leimbach
David C. Leimbach