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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUDY GONZALEZ,

Plaintiff,

vs.

XTREME MANUFACTURING, LLC; and
DOES 1-100, inclusive,

Defendants.

Case No. 1:20-cv-01704-JLT-SKO

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR ATTORNEYS' FEES,
LITIGATION EXPENSES, AND SERVICE
PAYMENT**

Date: March 10, 2023

Time: 9:00 a.m.

Dept.: Courtroom 4, Seventh Floor

Judge: United States District Judge
Jennifer L. Thurston

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1 **I. INTRODUCTION.**

2 In conjunction with seeking final approval of the Joint Stipulation of Class and
3 Representative Action Settlement Agreement (“Settlement” or “SA”)¹, preliminarily approved on
4 October 25, 2022, Plaintiff Rudy Gonzalez (“Gonzalez” or “Plaintiff”) hereby moves the Court for
5 an award of attorneys’ fees in the amount of \$96,666.67, one third of the Gross Settlement Amount
6 (“GSA”) secured on behalf of the Class, \$12,897.03 in actual Litigation Expenses (less than the
7 \$14,000 initially estimated), and a Service Payment of \$5,000, 1.72% of the GSA. The fees, costs,
8 and service award should be approved and awarded as the amounts sought are consistent with both
9 applicable precedent and recent awards in similar wage and hour class action settlements, and fall
10 well within the range of reasonableness under the facts and circumstances of this case. Further, ***not***
11 ***one of the 218 Class Members has opted out or objected to the requested awards since receiving***
12 ***the court-approved Class Notice.***

13 The attorneys’ fee award should be approved under the common fund methodology because it
14 serves to spread the attorneys’ fees equally among all the beneficiaries of the GSA, mimics the legal
15 marketplace had Class Members each individually retained Class Counsel on a contingency basis, and
16 encourages competent counsel to take on complex contingency cases such as this and to seek early
17 settlement and avoid unnecessarily prolonging litigation. Further, the sought fee is appropriate
18 because Class Counsel have, through this litigation (1) obtained a significant monetary benefit for the
19 Class (i.e., the \$290,000 GSA, which is slated to provide a cognizable average payment of \$733.65 to
20 each Participating Class Member (2) worked diligently and efficiently despite considerable risks faced
21 in prosecuting this litigation; and (3) carried the financial burden of representing Plaintiff and the
22 Class on a contingency basis. The requested reimbursement of \$12,897.03 in litigation expenses,
23 which is less than estimated at the time of preliminary approval and thus increases the portion of the
24 Settlement to be distributed to Class Members, is also reasonable and appropriate.

25 ///

26 _____
27 ¹ All capitalized terms shall have the same meanings given those terms in the Parties’ Joint Stipulation of Class and
28 Representative Action Settlement Agreement (“Settlement Agreement”, “Settlement”, or “SA”), a copy which is attached
as **Exhibit 1** to the Declaration of Jenny D. Baysinger in Support of Plaintiff’s Motion for Attorneys’ Fees, Litigation
Expenses, and Service Payment (“JDB Dec.”).

1 Finally, the \$5,000 service payment to Gonzalez is appropriate because Plaintiff helped
2 procure substantial monetary and non-monetary relief for the Class, assumed the considerable
3 financial and reputational risk attendant to serving as the class representative, devoted significant time
4 and had an impactful effect assisting with the prosecution of this case, and is providing a broader
5 release than Class Members and thus giving up cognizably more than they are. Further, the requested
6 Service Payment is only 1.72% of the GSA and is within the range is only of those granted by courts
7 in similar settlements and, again, *not a single Class Member has objected to it to date.*

8 **II. SUMMARY OF THE CASE.**

9 **A. Brief Overview of the Litigation**

10 On December 4, 2020, Gonzalez filed the initial Class Action Complaint in this court,
11 asserting claims on a class-wide basis for failure to pay minimum wage, failure to pay overtime,
12 failure to provide meal periods, failure to provide rest periods, failure to reimburse business expenses,
13 failure to pay wages at separation, failure to furnish accurate wage statements, and unfair business
14 practices. Dkt. 1. On February 22, 2021, Gonzalez filed a First Amended Class Action Complaint
15 (“FAC”) adding a claim to assess and collect civil penalties pursuant to the PAGA and individual
16 claims for failure to timely provide personnel and payroll records. Dkt. 9.

17 The Parties exchanged required initial disclosures in April 2021 and Plaintiff propounded
18 formal written discovery (including Requests for Production and Interrogatories) in April 2021. JDB
19 Dec. ¶¶ 7-8. Shortly after formal discovery was propounded by Plaintiff, the Parties began discussing
20 the prospect of mediation, ultimately deciding to table formal discovery in favor of informal pre-
21 mediation information exchange. JDB Dec. ¶¶ 10, 12, 13-15.

22 **B. The Settlement Is The Product Of A Full Day Mediation and Protracted Negotiations**

23 Negotiating the terms of the Settlement and finalizing details necessitated the parties
24 participating in mediation with experienced class action mediator Louis Marlin, Esq., engaging in
25 two (2) months of additional negotiations—both with the assistance of Marlin and independently—to
26 reach an agreement, and engaging for an additional four (4) months regarding the nuances of a long-
27 form Settlement Agreement. JDB Dec. ¶¶ 17-19, 21-22. The Settlement was finally executed June
28 28, 2022. JDB Dec. ¶ 22, Exh. 1.

Pursuant to the Settlement, Defendant will pay \$290,000 (“GSA”) to resolve the claims of Participating Class Members. The GSA does not include Employer-side Taxes, which will be separately paid by Defendants. After deducting the costs of the Settlement Administrator (\$5,500), the PAGA Payment (\$10,000), Service Payment to Gonzalez (\$5,000), and fees and litigation expenses of Class Counsel (\$96,666.67 in fees and \$12,897.03 in costs), \$159,936.30 will be distributed to Participating Class Members. SA ¶¶ 21, 45; Admin. Dec. ¶ 44. This amount is greater than the net settlement amount estimated at the time of preliminary approval.

C. The Court Granted Preliminary Approval of the Settlement.

On October 25, 2022, this Court granted preliminary approval of the Settlement. Order Granting Plaintiff’s Motion for Preliminary Approval of Class Settlement (“PAO”). (Dkt. No. 31). Having reviewed Plaintiff’s Motion for Preliminary Approval and the substantive terms of the Settlement, the Court (1) found the Class appropriate for preliminary and conditional certification under Federal Rules of Civil Procedure Rules 23(a) and 23(b), subject to further review at the final fairness hearing, (2) found the notice and manner of notice proposed by Plaintiff—after specific modifications—meets the requirements of Rules 23(c)(2)(B), 23(e) and due process; (3) found no evidence of collusion between the parties and that the SA “appears to have been the product of serious, informed, non-collusive negotiations; (4) found the proposed Settlement to preliminarily appear fair, reasonable, and adequate; (5) preliminarily approved the PAGA allocation and noted the full settlement fund is sufficiently large to such that “the purposes of the PAGA to address the alleged labor violations are fulfilled by the proposed agreement”; and (6) set a final approval hearing for March 10, 2023. PAO (Dkt. 31) 9:4-14:18; 29:21-28; 18:18-21; 14:20-24:19; 26:4-8.

D. Distribution of the Notice.

On December 5, 2022, the Notice of Settlement of Class and Representative Action (“Class Notice”), revised in compliance with the PAO, was mailed to each Class Member via First Class mail. Declaration of Evelin Reyes Regarding Notice and Settlement Administration (“Admin. Dec.”), February 3, 2022, ¶ 8, Exh. A (Dkt. 35-2). Twenty-eight (28) Class Notices were initially returned as undeliverable; twenty-six (26) were re-mailed and none of the re-mailed notices has been returned a second time to date. *Id.* ¶¶ 8-9. In accordance with the Court’s instructions, the Class Notice informs

Class Members about the terms of the Settlement, including the fact that Plaintiff would request: (1) an award of attorney's fees of \$96,666.67 to be paid from the GSA, (2) reimbursement of up to \$14,000 in litigation expenses, and (3) a Service Payment of \$5,000 to Plaintiff. See Class Notice, attached as **Exhibit A** to Admin. Dec. The initial Notice Period expired January 19, 2023—the Notice Period for re-mailed notices expired February 8, 2023. *Id.* ¶ 13. To date, not a single Class Member has expressed any concern regarding the requested fees, litigation expenses or Service Payment. ***In fact, to date, not one of the 218 Class Members to whom Notice was sent has objected in any way, to any degree, to the terms of the Settlement including Class Counsel's requested award of fees and litigation expenses or Plaintiff's requested Service Payment.*** The overwhelmingly positive reaction of the Class is a clear indication of its approval of the Settlement and the fees, litigation expenses, and Service Payment sought in conjunction therewith.

III. LAW AND ARGUMENT

In diversity actions, such as the instant case, federal courts are bound to apply state law in evaluating the right to attorneys' fees and the appropriate method of calculating them. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Under California law, Plaintiff Gonzalez is entitled to payment of reasonable attorneys' fees and costs in connection with the settlement of this wage and hour class action. Cal. Lab. Code §§ 218.5, 226(e)(1), and 2699(g); Fed. R. Civ. P. 23(h); *Earley v. Superior Court*, 79 Cal.App.4th 1420, 1427 (2000). The percentage-of-fund method of calculation is appropriate in the context of a class action settlement, such as this, that results in an established monetary fund for the benefit of all class members. *Laffitte v. Robert Half Int'l., Inc.*, 1 Cal.5th 480, 503-506 (2016). While California law governs the analysis, this Court has an independent obligation to review requested fees and costs to be deducted from a common fund and to evaluate them for objective fairness and reasonableness. *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994). Here, Plaintiff seeks an attorneys' fee award of \$96,666.67, which is equal to one-third of the "common fund" created by the GSA; this is in line with the "30-50% commonly being awarded in cases in which the common fund is relatively small." *Miller v. CEVA Logistics USA, Inc.*, 2015 WL 4730176 *8 (E.D. Cal. 2015), citing Rubenstein, Conte and Newberg, NEWBERG ON CLASS ACTIONS (4th Ed. 2002) § 14.6.

1 **A. The Common Fund Methodology In Class Action Settlements.**

2 “[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than
3 himself or his client is entitled to reasonable attorneys’ fees from the fund as a whole.” *Boeing Co. v.*
4 *Van Gemert*, 444 U.S. 472, 478 (1980). The California Supreme Court clarified its stance on common
5 fund cases, ruling –

6 “We join the overwhelming majority of federal and state courts in holding that when class
7 action litigation established a monetary fund for the benefit of the class members, and the trial
8 court in its equitable powers awards class counsel a fee out of that fund, the court may
9 determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
created.”

10 *Laffitte*, 1 Cal.5th 503. Explaining its ruling, the Court further held that “[t]he recognized advantages
11 of the percentage method – including relative ease of calculation, alignment of incentives between
12 counsel and the class, a better approximation of market conditions in a contingency case, and the
13 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
14 litigation – convince us the percentage method is a valuable tool that should not be denied by our trial
15 courts.” *Id.* (internal citations omitted); see also *Vizcaino*, 290 F.3d 1047. Based on this rationale, the
16 California Supreme Court in *Laffite* affirmed a fee award representing one-third of a \$19,000,000 fund
17 and rejected objections of putative class members to such despite a multiplier above 2.0 being applied
18 to the lodestar to reach the requested fee award. *Laffitte*, 1 Cal.5th 487, 506.

19 In general, common fund fee awards between 30 and 50 percent of the total fund are routinely
20 afforded. See NEWBERG ON CLASS ACTIONS at § 14:6; see *Miller*, 2015 WL 4730176 *8 (surveying
21 cases and attendant percentage fee awards). Review of California cases “reveals that courts usually
22 award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a
23 common fund under \$10 million.” *Cicero v. DirecTV, Inc.*, 2010 WL 2991486 *6 (C.D. Cal. 2010).
24 As reiterated by the Ninth Circuit, district courts are obligated to apply California law in awarding
25 attorneys’ fees in diversity jurisdiction cases such as this one. *Farmers Ins. Exch. v. Law Offices of*
26 *Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1236 (9th Cir. 2001) (“Because this case is based on diversity
27 jurisdiction, we are obligated to apply California state law regarding attorneys’ fees.”); *Chambers v.*

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1 *Whirlpool Corp.*, 2016 WL 5922456 *10 (C.D. Cal. 2016) (“[i]n diversity actions, the Ninth Circuit
2 applies state law to determine the right to fees and the method for calculating fees”).

3 Here, Class Counsel has created an ascertainable fund, the GSA of \$290,000, which will
4 substantially benefit the Class and from which reasonable attorneys’ fees can (and should) be easily
5 calculated and awarded. As such, and pursuant to entrenched precedent, Plaintiff respectfully
6 requests the Court apply *Laffitte* and award 1/3 of the GSA, or \$96,666.67, in attorneys’ fees to Class
7 Counsel. As discussed below, Plaintiff and his counsel assumed all of the risks by prosecuting this
8 case on a contingency basis. Moreover, in prosecuting this action diligently and efficiently, Class
9 Counsel created an ascertainable fund from which reasonable attorneys’ fees can be easily calculated
10 and awarded. JDB Dec. ¶ 78; SA ¶¶ 43, 45. The Settlement creates a GSA of \$290,000 that will
11 substantially benefit the 218 Participating Class Members; each Participating Class Member will
12 receive an average of \$733.65. Admin. Dec. ¶¶ 12. The highest distribution in resolution of Class
13 Claims is estimated to be a substantial \$2,227.55. *Ibid*.

14 **B. An Award of Attorneys’ Fees to Class Counsel of one-third of the GSA is Reasonable and**
15 **Should Be Approved.**

16 The requested one-third fee award, or \$96,666.67, should be approved because: (1) it is
17 consistent with recent Federal and California court awards in similar wage and hour class settlements;
18 (2) the Class’ response to the requested award has been entirely positive; (3) it is reasonable in light of
19 the substantial monetary benefits conferred on the Class; (4) it achieves the dual purposes of a
20 common fund award by spreading the litigation costs among those who benefited from the settlement
21 while rewarding and encouraging competent counsel to handle complex, contingency, class action
22 cases like this; and (5) the lodestar cross-check, while not required, nevertheless confirms the
23 reasonableness of the requested fees as the fees requested *are less* than the lodestar and thus
24 undeniably within the “normal range” of 3-4 in lengthy and complex class action litigation. *Carlin v.*
25 *DairyAmerica, Inc.* 380 F.Supp.3d 998, 1022-1023 (E.D. Cal. 2019) (recognizing a negative lodestar
26 multiplier “strongly supports” the reasonableness of a fee request). *Miller*, 2015 WL 4730176 * 9
27 (recognizing the normal range and approving a multiplier of 1.56); *Laffitte*, 1 Cal.5th 504 (unless

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the imputed multiplier is “far outside the normal range” there is no reason to reexamine the choice of a percentage).

The Ninth Circuit recognizes that 25% of the gross settlement amount is the benchmark for attorneys’ fees awarded under the percentage method, with 20-30% as the usual range in common fund cases where recovery is between \$50 and \$200 million. *Vizcaino*, 290 F.3d 1047. Cases with relatively small common funds (i.e. less than \$10 million) tend to have fees above the 25% benchmark in California, with 30-50% commonly awarded in cases under such circumstances. See NEWBERG ON CLASS ACTIONS at § 14:6; *Miller*, 2015 WL 4730176 * 9, citing *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1127 (C.D. Cal. 2008). Review of relevant California cases “reveals that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.” *Cicero*, 2010 WL 2991486 *6. These smaller class actions frequently involve fee awards in the range of one-third because they do not implicate megafunds where a smaller percentage recovery is more appropriate. See *Vandervort v. Balboa Capital Corp.* 8 F.Supp.3d 1200, 1209-10 (C.D. Cal. 2014).²

In smaller wage-hour class actions like this one, California Federal courts routinely award attorneys’ fees of percentages equal to or greater than that sought by Plaintiff in this action.³ When viewed in the light of the foregoing authorities, the reasonableness of Plaintiff’s requested fee award of \$96,666.67, one-third of the GSA, is clear.

² “Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 n.11 (2008) (quoting *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000); see also *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. 2009) (“fee awards in class actions average around one-third of the recovery”) (quoting NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2007)).

³ See, e.g., *Wren v. RGIS Inventory Specialists* 2011 WL 1230826 *29 (N.D. Cal. 2011) (approving fee award that constituted 42% of the common fund in wage and hour class and collective action); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804 *8-*12 (C.D. Cal. 2014) (awarding one-third of settlement in wage and hour case on behalf of real estate review appraisers); *Birch v. Office Depot, Inc.*, 2007 WL 9776717 *13 (S.D. Cal. 2007) (awarding a 40% fee on a \$16,000,000 wage and hour class action settlement); *Stuart v. Radioshack Corp.*, 2010 WL 3155645 at *5-*7 (N.D. Cal. 2010) (awarding one-third of \$4.5 million settlement fund as fees in class case alleging failure to reimburse employees for expenses); *Quezada v. Con-Way Freight, Inc.*, 2017 WL 6949286 *1 (N.D. Cal. 2017) (awarding one-third of \$2 million settlement fund as fees in class case alleging failure to pay wages for all hours worked); *Singer v. Becton Dickinson and Co.*, 2010 WL 2196104 *8 (S.D. 2010) (approving fee award of 1/3 of the common fund; award was similar to awards in three other cited wage and hour class action cases where fees ranged from 30% to 40%); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2012) (citing five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30% to 33%); *Cicero*, 2010 WL 2991486, at *6 (noting that fees of one-third are common in wage and hour settlements below \$10 million, citing cases).

1 **1. The Overwhelmingly Positive Reaction of the Class Supports Approval.**

2 It is well settled that positive reactions by class members underscore the propriety of settlement
 3 terms. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1152-53
 4 (2000). Thus, the absence of disapproval constitutes strong evidence in support of the reasonableness
 5 of the requested attorneys' fee and cost award. See *In re Heritage Bond Litig.*, 2005 WL 1594403 * 21
 6 (C.D. Cal. 2005). Here, after having received the Class Notice, ***not one of the 218 Class Members***
 7 ***objected to the requested attorneys' fees award.*** Admin. Dec. ¶¶ 13-16. This fact further underscores
 8 the reasonableness of Gonzalez's attorneys' fee request.

9 **2. An Award of one-third of the GSA Is Reasonable in Light of the Substantial**
 10 **Benefits Obtained for the Class and the Risks Faced by Class Counsel.**

11 In addition to equity and market considerations, courts also look to the following to assess the
 12 reasonableness of a common fund award: (1) the results achieved; (2) the riskiness of prosecuting the
 13 litigation; (3) the skill and high quality of work by counsel; and (4) the financial burden carried by
 14 Class Counsel in prosecuting the case on a contingency basis. *Serrano v. Priest*, 20 Cal.3d 25, 49
 15 (1977); *Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19, 26 (2000); see also *Vizcaino*, 290 F.3d 1048-
 16 50 (internal quotation and citation omitted). All of these factors justify Plaintiff's fee request.

17 **a. The fee request is justified by the positive results achieved.**

18 The ultimate reasonableness of the fee "is determined primarily by reference to the level of
 19 success achieved by the plaintiff." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).
 20 Here, Class Counsel achieved an excellent result and obtained significant monetary relief for the Class.
 21 Participating Class Members (i.e., Class Members who do not exclude themselves) will receive a share
 22 of the Net Settlement Amount of \$159,936.30; an expected average distribution of over \$700. SA ¶
 23 46(a); Admin. Dec. ¶ 12; JDB Dec. ¶¶ 44, 60, 69. This recovery represents substantial monetary relief
 24 for the Class given the complexity of the issues, the risk and uncertainty inherent in class action
 25 litigation, and the myriad factual and legal defenses advanced by Defendants. JDB Dec. ¶¶ 27-43, 45-
 26 55. Under the circumstances a fee award of one-third of the GSA is reasonable and appropriate.

27 ///

28 ///

b. The risks associated with this litigation justify the fee request.

Class Counsel undertook considerable risk in litigating this case, not just because it was done on a wholly contingency basis, but also because complex, representative wage-and-hour litigation is an ever-emerging area under the law. As such, judicial decisions could potentially detrimentally impact some claims asserted on behalf of the Class if the matter proceeded through litigation. This is a common occurrence in the ever-changing landscape of California wage and hour litigation and compounds the risks inherent in representation on a contingency basis.

Despite the narrow and distinct transgressions of the California Labor Code allegedly committed by Defendants, recovery is far from guaranteed and could only occur after years of costly litigation rife with risk. Defendants asserted numerous defenses and planned to employ a multipronged attack aimed at circumscribing both the scope of the Class and the available damages. Primarily, Defendants intended to argue 1) off-the-clock claims should not be certified, 2) Xtreme has an express written policy requiring employees to accurately record time worked and providing that each will be compensated for all time worked, 3) Xtreme's express written meal/rest break policies are compliant and Class Members regularly averred in writing that they were given the opportunity for all required meal/rest breaks, 4) any underpayments were inadvertent, based on a good faith mistake of law, and thus insufficient to justify imposition of waiting time penalties and/or that the waiting time penalty was so disproportionate to the actual unpaid/underpaid wages as to offend the Constitution, 5) that it acted in good faith and thus waiting time penalties are not authorized, and 6) that its wage statements did not result in actual injury and/or that they are distinguishable from the wage statements found violative in *McKenzie v. Fed. Express Corp.*, 765 F.Supp.2d 1222 (C.D. Cal. 2011) and thus do not engender any liability for statutory penalties under 226(e) or civil penalties pursuant to the PAGA. JDB Dec. at ¶¶ 45-55.

Success on any one of these challenges would, in a best case scenario for Class Members, substantially limit Defendants' exposure. It is possible class-wide relief might be precluded entirely. Success by Gonzalez on any of these issues was not a foregone conclusion at any time and Defendant was expected to try to defeat the UCL claim entirely and thus eliminate an entire year of potential damages. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 845 (9th Cir. 2020) (dismissing claims for

1 restitution that overlap with claims for damages in every way except statute of limitations);
 2 *Franckowiak v. Scenario Cockram USA, Inc.*, 2020 WL 9071697 * 3 (C.D. Cal. 2020) (applying
 3 *Sonner* in employee's claim to recover wages) . Nevertheless, Class Counsel persevered at great risk
 4 (while foregoing other profitable work) on a contingency basis, and brought this case to beneficial
 5 resolution for the Class, recovering 30% of the realistic recovery and an average of \$733.65 per Class
 6 Members (an additional \$. JDB Dec. ¶¶ 41-44, 54. Class Counsel undertaking these numerous
 7 litigation risks, particularly in light of the success attained, further justifies the fee award sought.

8 **c. The skill of class counsel and the quality of their work justifies the fee**
 9 **request.**

10 Class counsel has demonstrated substantial skill, diligence, and high quality of work in
 11 achieving the proposed Settlement, creating an GSA of \$290,000; \$280,000 solely for alleged damages
 12 to the Class. The Settlement, and the cognizable monetary benefit it conveys to the Class, was obtained
 13 efficiently and effectively without wasted effort or years of needless, costly litigation. As a result of
 14 the skill and effort of Class Counsel, who have significant experience representing plaintiffs in wage
 15 and hour class, collective, and representative actions, Gonzalez was well-positioned to reach a
 16 favorable settlement for the Class, which itself required significant expertise, engaging in written
 17 discovery, employment of a damages expert, a full-day mediation and protracted, at times contentious,
 18 negotiations to achieve. JDB Dec. ¶¶ 11-13, 15-23, 26.

19 **d. The contingent nature of the fee and financial burden carried by Class**
 20 **Counsel justifies the fee request.**

21 A law firm that prosecutes class action cases does not get paid in every case. Sometimes, it gets
 22 nothing or is awarded fees equal to only a small percentage of the amount actually incurred. Where
 23 plaintiffs' counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the firm
 24 regularly undertakes. As the California Supreme Court explains:

25 “[A] contingent fee must be higher than a fee for the same legal services paid as they are
 26 performed. The contingent fee compensates the lawyer not only for the legal services he
 27 renders but for the loan of those services. The implicit interest rate on such a loan is higher
 28 because the risk of default (the loss of the case, which cancels the debt of the client to the
 lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not
 being paid and provides legal services is not receiving the fair market value of his work if he is

1 paid only for the second of these functions. If he is paid no more, competent counsel will be
2 reluctant to accept fee award cases.”

3 *Ketchum v. Moses*, 24 Cal.4th 1122, 1132-33 (2001) (internal citation and quotation omitted).

4 Accordingly, courts recognize that “[i]t is an established practice in the private legal market to reward
5 attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates
6 for winning contingency cases.” *Fischel v. Equitable Life Assurance Soc’y of U.S.*, 307 F.3d 997, 1008
7 (9th Cir. 2002).

8 In this case, Class Counsel worked diligently on this case since April 2021 and, in effect, loaned
9 their legal services to the entire Class since that time. Class Counsel prosecuted this case wholly on a
10 contingency basis, at cognizable risk of never receiving any compensation due to the inherently
11 uncertain nature of class action litigation in general, the ever-changing environment of California wage
12 and hour law, and also due to the numerous factual and legal defenses of Defendants and their
13 aggressive litigation tactics. Class Counsel took a tremendous risk by taking on this case, and
14 persevered to attain the Settlement on behalf of the Class. To date Class Counsel has spent \$12,897.03
15 in out-of-pocket costs and expended 252.90 hours of attorney time, with additional work remaining,
16 without receiving any compensation at all. JDB Dec. ¶¶ 78-82, 84; Exh. 3. Meanwhile, all of this
17 entailed passing on other lucrative cases. *Id.* ¶ 77.

18 **3. The Requested Fee Award Fairly Spreads the Litigation Costs Among the Class** 19 **Members Who Will Benefit From It.**

20 The percentage-of-the-fund approach is an appropriate method for awarding attorneys’ fees here
21 because it allows Plaintiff and Class Counsel to create “a fund from which others will benefit [and] to
22 require those other beneficiaries to bear their fair share of the litigation costs.” *Nw. Energetic Servs.,*
23 *LLC v. Cal. Franchise Tax Bd.*, 159 Cal.App.4th 841, 878 (2008) (citing *Serrano*, 20 Cal. 3d at 35).
24 This approach ensures all 612 Participating Class Members, who have indicated a willingness and
25 intention to accept the benefits from the common fund GSA, also accept their fair *pro rata*
26 responsibility to contribute towards the attorneys’ fees and costs that created the fund in the first place.
27 *Earley*, 79 Cal.App.4th 1436. In other words, “[t]hose who benefit from the creation of the fund should
28 share the wealth with the lawyers whose skill and effort helped create it.” *In re Wash. Pub. Power*

1 *Supply Sys. Sec. Litig.*, 19 F.3d at 1300. Accordingly, the percentage-of-the-fund approach is
2 appropriate here and supports Class Counsel’s request for an award of a percentage of the common
3 fund (i.e., 1/3 of the \$290,000 GSA).

4 In addition to spreading the litigation costs among all the beneficiaries, awards of common fund
5 fees are essential to furthering the important societal goal of attracting competent counsel “who will be
6 more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the
7 fund if [attorneys are] assured that [they] will be promptly and directly compensated should [their]
8 efforts be successful” to handle these often-complex contingency cases. *Melendres v. City of L.A.*, 45
9 Cal.App.3d 267, 273 (1975). “Given the unique reliance of our legal system on private litigants to
10 enforce substantive provisions of law through class and derivative actions, attorneys providing these
11 essential enforcement services must be provided incentives roughly comparable to those negotiated in
12 the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for
13 defendants to increase injurious behavior.” *Lealao*, 82 Cal.App.4th at 47. Without such incentives,
14 meritorious class actions such as this might not be brought and the private enforcement of important
15 statutory rights would be undermined.

16 California courts further recognize “the amount of attorney fees typically negotiated in
17 comparable litigation should be considered in the assessment of a reasonable fee in representative
18 actions in which a fee agreement is impossible.” *Lealao*, 82 Cal.App.4th at 47. By doing so, courts
19 can ensure that the awarded fee approximates the legal marketplace by being comparable to what
20 clients and counsel would have likely negotiated at the outset of the matter. Notably, the typical
21 contingency fee contract ranges from 20 to 40 percent of the total recovery—leaving Class Counsel’s
22 requested attorneys’ fee here in the middle of the spectrum. *Chavez*, 162 Cal.App.4th at 64-65.

23 Here, the requested fee award constitutes a fair charge in light of the substantial monetary relief
24 obtained for the Class. Because each Class Member will receive a share of the GSA, equity requires
25 that each also contribute a *pro rata* share to the attorneys’ fees that netted them this positive result.
26 Moreover, the requested fee, i.e., one-third of the common fund, is equal to or less than 1) typical fees
27 awarded in small wage and hour class actions like this one, 2) most contingency fee retainer
28 agreements, and 3) the fee that Class Counsel would have expected if they had negotiated individual

1 retainer agreements with each Class Member. *Chavez*, 162 Cal.App.4th at 64-65; see also JDB Dec. ¶¶
 2 76, 79, fn. 3. The requested award ensures Class Counsel receives appropriate compensation for the
 3 actual benefit conferred on the Class, particularly where it would impossible *ex ante* to enter a fair fee
 4 arrangement with all individual Class Members.

5 **4. The Lodestar Cross-Check Further Confirms the Reasonableness of the Requested**
 6 **Fee Award.**

7 California law affords trial courts discretion to award fees as a percentage of the common fund,
 8 with or without conducting a lodestar cross-check. *Laffitte*, 1 Cal.5th at 506 (“We further hold that trial
 9 courts have discretion to forgo a lodestar cross-check and use other means to evaluate the
 10 reasonableness of a requested percentage fee.”). Although not required, courts asked to approve fee
 11 awards on a common fund percentage basis may perform a “lodestar cross-check” as a means of
 12 determining whether the requested percentage is reasonable in relation to the amount and value of the
 13 time expended by counsel. See *Lealao*, 82 Cal.App.4th at 47-50. The goal under either the percentage
 14 or lodestar approach being the award of a reasonable fee to compensate counsel for their efforts.
 15 *Laffitte*, 1 Cal.5th at 504. It is only where the lodestar cross-check imputes a multiplier that is “far
 16 outside the normal range” that a trial court has any reason to reexamine its percentage choice. *Ibid*.
 17 Such is not the case here as Class Counsel is requesting *less* than their lodestar.

18 This cross-check starts with the basic lodestar calculation but may then “evaluate the lodestar as
 19 a percentage of the recovery and adjust it accordingly if it can be determined that the lodestar is
 20 significantly different from the range of percentage fees freely negotiated in comparable litigation.”
 21 *Lealao*, 82 Cal.App.4th at 50. Under the first step of the cross-check, the “lodestar” figure is calculated
 22 by multiplying “the number of hours [the prevailing party] reasonably expended on the litigation [] by
 23 a reasonable hourly rate.” See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Press v. Lucky Stores,*
 24 *Inc.*, 34 Cal.3d 311, 322 (1983).

25 Class Counsel, to date, have expended over 250 hours to bring this settlement to the brink of
 26 finalization. These hours reflect time reasonably spent litigating this case, which Class Counsel sought
 27 to efficiently manage, staff, assign, and divide the work between the respective attorneys in Class
 28 Counsel’s office and to avoid duplication of effort. JDB Dec. ¶¶ 77-79, Exh. 3. Class Counsel will

1 also spend additional time responding to Class Member inquiries, attending the Final Approval
 2 Hearing, overseeing administration of the Settlement, and reporting to the Court. JDB Dec. ¶ 82. Class
 3 Counsel's customary hourly rate in plaintiff's employment class action cases ranges from \$508/hr (for
 4 an associate with 7 years' experience litigating plaintiffs' employment cases) to \$997/hr (for a senior
 5 partner with nearly 30 years of experience), are commensurate with the rates of practitioners with
 6 similar experience in plaintiffs' wage-and-hour class actions within the California legal market, and
 7 have also been approved by numerous federal and state courts across the state. JDB Dec. ¶ 79.^{4, 5}
 8 Applying the appropriate hourly rates to the number of hours worked yields a lodestar of
 9 \$193,215.60—the fee amount requested is just over half of this lodestar amount (\$96,548.93 less than
 10 the lodestar). *Id.* ¶ 81. Class Counsel's reasonable lodestar is supported by detailed and
 11 contemporaneous billing records maintained by Class Counsel. JDB Dec. ¶ 78, Exh. 3. Summaries of
 12 these billing records are attached to and described in Class Counsel's declaration for the Court's
 13 review. *Id.* ¶¶ 78-81, Exh. 3. Under the second step of the analysis, the reasonableness of the requested
 14 fee award is confirmed by the application of a multiplier. Here, a multiplier to Class Counsel's lodestar
 15 is unnecessary as the requested fee is markedly less than the lodestar. Because the lodestar cross-check
 16 confirms the common fund fee request is reasonable and appropriate, and in fact modest, it should be
 17 approved.

18 **C. Class Counsel's Litigation Expenses Are Reasonable and Compensable From the**
 19 **Common Fund.**

20 The Settlement allows Class Counsel to request reimbursement for the out-of-pocket expenses
 21 they incurred during this litigation in the reasonable amount of no more than \$14,000. SA ¶¶ 6, 45(b).
 22 Reimbursement of incurred expenses is appropriate for the same reason attorneys' fees should be paid

24 ⁴These rates are based upon the 2022-2023 Adjusted Laffey Matrix for the District of Columbia, a matrix that has been used
 25 by California district courts in determining reasonable hourly rates. *Chanel, Inc. v. Doan*, 2007 WL 781976 *6-7 (N.D. Cal.
 26 2007); *Garnes v. Barnhardt*, 2006 WL 249522 *7 (N.D. Cal. 2006); *Viveros v. Donahoe*, 2013 WL 1224848, *5-6 (C.D.
 27 Cal. 2013). Moreover, the prevailing rate is to be determined with respect to the forum in which the court sits, which in this
 28 case is the Northern California/Sacramento area. *Sirrod v. Dir., OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015). Similar and
 higher rates are commonly approved in the Northern California/Sacramento region. See e.g., *In re Magsafe Apple Power
 Adapter Litig.*, 2015 WL 428105 * 12 (N.D. Cal. 2015).

⁵ Calculating the lodestar using Class's Counsel's current rates is appropriate given the deferred nature of counsel's
 compensation. See *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd Cir. 1998) ("[C]urrent rates, rather than historical
 rates, should be applied in order to compensate for the delay in payment . . .") (citing *Missouri v. Jenkins*, 491 U.S. 274,
 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1305.

1 out of the fund: all beneficiaries should bear their fair share of the costs of the litigation, and these are
 2 normal costs that counsel traditionally bill their paying clients. See *Serrano*, 20 Cal. 3d at 35 (common
 3 fund doctrine permits class counsel to recover attorneys’ fees and costs from the fund as a whole);
 4 *Rider v. County of San Diego*, 11 Cal.App.4th 1410, 1423 n.6 (1992) (costs are recoverable from the
 5 common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the
 6 recovery of attorney fees”); *Earley*, 79 Cal.App.4th 1436; see also *Harris v. Marhoefer*, 24 F.3d 16, 19
 7 (9th Cir. 1994).

8 Class Counsel has actually incurred only \$12,897.03 in litigation expenses. JDB Dec. at ¶ 84,
 9 Exh. 3. Because Class Counsel have successfully managed their litigation expenses, the Class will
 10 directly benefit by having an additional \$1,102.97 included in the net settlement amount to be
 11 distributed to them—this fact further underscores the propriety of the Litigation Expense request. The
 12 expenses sought are routinely reimbursed litigation costs typically charged to fee-paying clients,
 13 including filing fees, process server fees, court reporter fees, postage, computerized legal research
 14 charges, travel expenses, expert fees, mediation expenses, etc. See also *Harris*, 24 F.3d at 19 (attorneys
 15 may recover reasonable expenses typically billed to paying clients in non-contingency cases). These
 16 costs were necessarily incurred and are reasonable in relation to the size and scope of the case, and the
 17 entire \$12,897.03 should be reimbursed. JDB Dec. ¶ 84.

18 **D. The Service Payment for Gonzalez Is Reasonable.**

19 The Court should also approve the \$5,000 Service Payment for Gonzalez because such is just,
 20 fair, and reasonable. Courts regularly approve incentive awards so that class representatives can “be
 21 compensated for the expense or risk they have incurred in conferring a benefit on other members of the
 22 class.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1394 (2010) (quoting *Clark v.*
 23 *Am. Residential Servs. LLC*, 175 Cal.App.4th 785, 806 (2009)); see also *Bell v. Farmers Ins. Exch.*, 115
 24 Cal.App.4th 715, 725-26 (2004) (upholding service payments to class representatives); *Munoz v. BCI*
 25 *Coca-Cola Bottling Co. of L.A.*, 186 Cal.App.4th 399, 412 (2010). In fact, the Ninth Circuit benchmark
 26 for such awards is \$5,000. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-948 (9th Cir.
 27 2015); *In re Yahoo Mail Litigation*, 2016 WL 4474612 * 11 (N.D. Cal. 2016).

1 In deciding whether to approve an incentive award, a court should consider: “(1) the risk to the
 2 class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal
 3 difficulty encountered by the class representative; (3) the amount of time and effort spent by the class
 4 representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed
 5 by the class representative as a result of the litigation.” *In re Cellphone Fee Termination Cases*, 186
 6 Cal.App.4th at 1394-95 (internal quotation marks omitted); see also *Van Vranken v. Atlantic Richfield*
 7 *Co.*, 901 F.Sup. 294, 299 (N.D. Cal. 1995) (applying similar factors to evaluate service payments).

8 All of the factors support the \$5,000 service payment requested here. The sought service
 9 payment is (a) in line with amounts commonly awarded by courts in similar wage and hour class
 10 actions;⁶ (b) less than 2% of the \$290,000 GSA, and (c) fair, reasonable and appropriate under the
 11 circumstances of this case. JDB Dec. ¶¶ 66-72. Plaintiff took on substantial risk in bringing this class
 12 action and exposed himself to negative notoriety and personal difficulties associated with serving as a
 13 named plaintiff in wage and hour litigation. First, Plaintiff bore the significant financial risk of
 14 Defendants’ costs in the event he lost at trial. Declaration of Rudy Gonzalez (“Gonzalez Dec.”) ¶¶ 12-
 15 13; JDB Dec. ¶¶ 67, 69, Exh. 2. This financial risk, in a complex employment class action involving
 16 more than 200 current and former employees, could easily total tens of thousands of dollars. The risks
 17 also included, but were not limited to, damage to his professional reputation in what is a relatively
 18 small employment market in the California central valley. Gonzalez Dec. ¶ 13; JDB Dec. Exh. 2. It is
 19 well established that plaintiffs in the employment context “face[] the risk that new employers would
 20 learn that they were class representatives in a lawsuit against their former employer and take adverse
 21 action against them. Moreover, each time they change jobs, they will risk retaliation in the hiring
 22 process.” *Asare v. Change Grp. of N.Y., Inc.*, 2013 WL 6144764 *15 (S.D.N.Y. 2013). Such is
 23 undoubtedly the case here where a Google search of Plaintiff’s name and “Xtreme” reveals—as the

24
 25 ⁶ See e.g. *Bond v. Ferguson Enterprises, Inc.*, 2011 WL 2648879 (E.D. Cal. June 30, 2011) (approving \$11,250 service
 26 award each to two class representatives in a meal break class action); *Vasquez*, 266 F.R.D. at 493 (approving service awards
 27 of \$10,000 each from a \$300,000 settlement in a wage and hour class action); *Castellanos v. Pepsi Bottling Group, Inc.*,
 28 No. RG07332684 (Alameda Cnty. Super. Ct., March 11, 2010 (approving incentive award of \$12,500 in a wage and how-
 class action); *Louie v. Kaiser Found. Health Plan, Inc.*, 2008 WL 4473183 *2 (S.D. Cal. 2008) (approving “\$25,000
 incentive award for each Class Representative” in wage an hour settlement); *Garner v. State Farm Mut. Auto. Ins. Co.*,
 2010 WL 1687832, at *17 n.8 (N.D. Cal. 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved
 incentive awards of \$20,000 or more where, as here, the class representative has demonstrated a strong commitment to the
 class”).

1 **very first result**—that he engaged in employment-related litigation against his former employer,
 2 information readily available to any prospective employer. JDB Dec. ¶¶ 68-69, Exh. 2. Plaintiff, who
 3 worked diligently with Class Counsel throughout this entire litigation, including taking numerous calls,
 4 assisting Class Counsel in preparing initial disclosures, personally attending and actively participating
 5 in the full-day remote mediation via Zoom, providing information, documents, and consultation, and
 6 providing input during the protracted settlement negotiations, should be rewarded for taking the
 7 initiative to pursue these claims on behalf of her coworkers, and for his role in reaching a substantial
 8 settlement providing for valuable monetary relief to the Class. Gonzalez has devoted approximately
 9 forty (40) hours of time to actively participating in the litigation of this case and should be compensated
 10 accordingly. Gonzalez Dec. ¶¶ 10-11. Plaintiff's commitment is further underscored by the fact that,
 11 had the Settlement not been reached, his participation may well have been required for several more
 12 years. Additionally, Gonzalez has affirmatively given up *all potential claims* he may have had against
 13 Xtreme—specifically including pled individual claims worth \$1,500. Gonzalez Dec. ¶ 15; JDB Dec. ¶
 14 71. Moreover, by actively pursuing this action, Plaintiff has furthered the twin California public policy
 15 goals of enforcing the Labor Code and making appropriate use of the class action device. See *Sav-on*
 16 *Drug Stores, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 340 (2004).

17 The reasonableness of the requested Service Payment is further confirmed by the fact that **not a**
 18 **single Class Member has objected to it.** All of the aforementioned factors support approval of the
 19 \$5,000 Service Payment to Gonzalez.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Court should grant the instant motion and award Class Counsel
 22 attorneys' fees in the amount of \$96,666.67, litigation expenses of \$12,897.03, and award \$5,000 to
 23 Gonzalez for his service as Class Representative.

24 **DATED: February 9, 2023**

MAYALL HURLEY P.C.

25 By /s/ Jenny D. Baysinger

26 JENNY D. BAYSINGER

27 ROBERT J. WASSERMAN

28 Attorneys for Plaintiff and the Class