IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

DASA INVESTMENTS, INC.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 6:18-cv-083-SPS
	)	
ENERVEST OPERATING, L.L.C.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-A, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIB, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIC, L.P.; ENERVEST, LTD.; and SM ENERGY COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S
MOTION FOR APPROVAL OF ATTORNEYS' FEES

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I. SUMMARY OF THE ARGUMENT

In connection with approval of the Settlement[1] in the above-captioned Litigation, Class Counsel respectfully move the Court for an award of attorneys' fees in the amount of $3,200,000. The requested award will be paid from the $8,000,000 Gross Settlement Fund, and it represents 40% of the Gross Settlement Fund (the "Fee Request"). This request is fair and reasonable and should, therefore, be approved.

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of $8 million to compensate the Settlement Class for past damages; (2) Future Benefits to owners of Oklahoma wells consisting of binding changes to the EnerVest Defendants' statutory interest payment policies in Oklahoma that have a present value of at least $7 million. The total value of the Settlement equals at least $15 million.[2] The $8 million cash payment alone constitute an outstanding recovery.[3]

Class Counsel are *not* requesting additional fees from the Future Benefits. However, the additional benefit conferred on owners of Oklahoma wells in the form of binding changes to the EnerVest Defendants' statutory interest payment practices and policies in Oklahoma is substantial as it guarantees at least another $7 million in benefits that, absent the Settlement, would have been retained by the EnerVest Defendants. Therefore, when analyzing the fairness of the requested fee, that analysis must determine the fee in the context of the total recovery—at least $15,000,000.00.

Federal Rule of Civil Procedure 23(h) requires the Court to assess the reasonableness of any fees "that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). Here, the Parties expressly agreed that all fees would be from a common fund as allowed under federal

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[1] All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated September 9, 2019 (the "Settlement Agreement"), attached as Exhibit 1 to Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (Doc. No. 66-1).

[2] *See* Affidavit of Barbara Ley ("Ley Affidavit"), attached to Final Approval Memorandum as Ex. 3, at ¶3.

[3] *See* Declaration of Patrick M. Ryan and Jason A. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl."), attached as Ex. 2 to Plaintiff's Motion for Final Approval, at ¶5.

common law. Thus, federal common law governs the reasonableness of this agreement and the requested fee.

Class Counsel's Fee Request of $3,200,000 is reasonable under federal common law. First, the Parties agreed that the Settlement Agreement shall be governed *solely* by federal law regarding the right to and reasonableness of attorney's fees and expenses. *See* Settlement Agreement at ¶¶7.1, 11.8. The Parties' contractual choice of law—the well-developed and consistent body of federal common law that applies to common fund class action settlements where no fee shifting occurs—should be given effect as written. This Court, and other federal courts in Oklahoma, have upheld identical or similar choice of law provisions. *See, e.g.*, *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 4-5); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 4-5); *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 5); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 4-5); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939); *Restatement 2d of Conflict of Laws*, § 187; 7B Wright, Miller, Kane & Marcus, *Federal Practice and Procedure* § 1803 (3d ed.) ("The court's authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."). Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the fund method in determining the award of attorneys' fees in common-fund cases. *See Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993).[4]

The Fee Request represents 21% of the Gross Settlement Fund and Future Benefits – *i.e.*, the total Settlement value. In light of the work performed by Class Counsel, the circumstances of this case, including the risks of further litigation, the Fee Request is fair, reasonable, and comports

[4] As a result, the Tenth Circuit's long line of federal common law fee jurisprudence in common fund class actions governs here. *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017) is not applicable because here, the Parties contractually agreed to a choice of law provision. *Chieftain v. EnerVest* dealt with the application of state law choice of law principles while the Parties here, unlike in *EnerVest*, contractually agreed that federal common law controls the right to, and reasonableness of, attorneys' fees. *See* Declaration of Steven S. Gensler ("Gensler Decl."), Doc. No. 88, ¶50.

with fee awards granted in similar cases and is fully appropriate under Tenth Circuit precedent. Gensler Decl. at ¶¶51-78.

Alternatively, should this Court determine that the express terms of the Settlement Agreement should be disregarded and that Oklahoma state law should control the right to and reasonableness of attorneys' fees, the Fee Request is still reasonable. Indeed, under Oklahoma state law, the only additional step required is the computation of the "time compensation factor" (*i.e.*, baseline lodestar) because Oklahoma has adopted and codified the *Johnson* factors plus one additional factor. Here, Class Counsel's fee request of $3.2 million is supported by their baseline lodestar of $1,221,310, with a multiplier of 2.62. As such, the fee request is imminently fair and reasonable under Oklahoma state law. *See* Gensler Decl. at ¶86-92.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of brevity, Class Counsel will not recite the background of this Litigation herein. Instead, Class Counsel respectfully refer the Court to the Final Approval Memorandum, Joint Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated fully herein.

III. ARGUMENT

Class Counsel respectfully move the Court for attorneys' fees of $3,200,000, which represents 40% of the Gross Settlement Fund and 21% of the total Settlement value. The ultimate standard for awarding a fee under either federal common law or Oklahoma state law is whether the fee is reasonable. *See* Gensler Decl. at ¶49, 53-55, 73-77, 85-92.

A. The Fee Request is Fair and Reasonable Under Federal Common Law.

The Fee Request is fair and reasonable and should be approved. Under Federal Rule of Civil Procedure 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *Brown*, 838 F.2d at 453. Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb*, 43 F.3d at 486. Here, the requested fees are authorized by an express agreement of the parties. Indeed, pursuant to the Settlement Agreement, federal common law governs both the right to, and reasonableness of, attorneys' fees. Settlement Agreement at ¶¶7.1, 11.8. Under this law, the Tenth Circuit has expressed a clear preference for the percentage of the fund method, the reasonableness of which is determined through application of the *Johnson*

factors. *Gottlieb*, 43 F.3d at 483. This methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454.

This Court has previously acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co.,* No. CIV-17-334-SPS (E.D. Okla. March 8, 2019) (Dkt. No. 120 at 5-6); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 5-6); *Cecil v. BP America Production*, No. 16-CV-410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260 at 6); *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 6); *Reirdon v. XTO Energy, Inc.,* No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 5); *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A. G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)).[5] Other Oklahoma federal district courts agree. *See, e.g.*, *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520 (W.D. Okla. July 31, 2014) ("The Court is not required to conduct a lodestar assessment of the hours versus a reasonable hourly rate. Nonetheless, even if such an assessment were made, the Court would reach the same conclusion that the requested fees are reasonable.") (Doc. No. 150 at n.1); *see also Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method.") (Doc. No. 52 at 5) (the "*Laredo* Fee Order"); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R, (W.D. Okla. Oct. 5, 2012) (Doc. No. 329).

1. The Parties Have Agreed Federal Common Law Controls the Right to, And Reasonableness Of, Attorneys' Fees

[5] The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method for determining attorneys' fees. Professors Gensler and Miller have repeatedly noted the Tenth Circuit's preference for the percentage of the fund method. *See, e.g., Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶37; Dkt. No. 64 at ¶27).

The Parties contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the right to and reasonableness of attorneys' fees:

> To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and its nationwide application, this Settlement Agreement shall be governed solely by federal law, both substantive and procedural, as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, case contribution award, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions.

Settlement Agreement at ¶11.8. The Parties clearly intended to remove any doubt regarding which body of law would apply to certification, notice and overall evaluation of the fairness and reasonableness of the Settlement and associated requests for fees and expenses. Such an agreement directly aligns with the principles of the Class Action Fairness Act ("CAFA"), which was passed with the intent to provide certainty, uniformity and confidence in the application of the class device to cases involving interstate commerce. *See, e.g.*, 28 U.S.C. §1711(a)-(b).

The Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and that courts typically honor the parties' choice. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) ("Absent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'") (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)). The Restatement expands on this freedom to contract:

> These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Restat. 2d of Conflict of Laws, § 187, cmt. e; *see also Williams v. Shearson Lehman Bros*., 1995 OK CIV APP 154, ¶¶14-17, 917 P.2d 998, 1002 (enforcing parties' contractual choice of law); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) (Parties

"enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity."). The Parties' contractual agreement should be enforced here. *See* Gensler Decl. at ¶50.

2. Class Counsel's Fee Request Is Reasonable

Under Tenth Circuit law, district courts have discretion to apply either the percentage of the fund method or the lodestar method, but the percentage of the fund method is clearly preferred. *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Laredo* Fee Order at 5. When determining attorneys' fees under this method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. Not all of the factors apply in every case, and some deserve more weight than others depending on the facts at issue. *Id.* at 456. Whether these factors are applied as a check on the reasonableness of the percentage awarded (federal common law), or in the lodestar context to determine an appropriate multiplier or enhancement factor, the result is the same—the requested fee of $3.2 million is reasonable.

The twelve *Johnson* factors are: (l) the time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Gottlieb*, 43 F.3d at 482 n.4.[6]

The *Johnson* factor that should be entitled to the most weight in this common fund case is the eighth factor—the amount involved in the case and the results obtained. *See Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."); FED. R. CIV. P. 23(h) adv. comm. note (explaining for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point").

[6] An additional factor under Oklahoma law is the risk of recovery. 12 O.S. §2023(G)(4)(e)(13). Even if the Court applied Oklahoma state law here, this factor easily is met.

Here, the results obtained strongly support the Fee Request. There are three critical components of this Settlement: (1) the Gross Settlement Fund of $8 million, which alone represents a significant recovery for the Class; and (2) material, binding changes to the EnerVest Defendants' statutory interest payment practices and policies in Oklahoma, which have a minimum present value of $7 million. Thus, the result obtained here through the Settlement bestows a total economic benefit of $15 million (the Total Settlement Value).

In valuing the result obtained for purposes of determining a reasonable fee to award under the Tenth Circuit's percentage of recovery method, it is well-established that the fee award should be based on the total economic benefit bestowed on the class. *See, e.g.*, *Fager v. Centurylink Comm'cns*, No. 14-cv-00870, 2015 U.S. Dist. LEXIS 190795, at *7-8 (D.N.M. June 25, 2015) (collecting cases), *aff'd by* 854 F.3d 1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert,* 444 U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member" obtained through the "entire judgment fund"). Thus, in making this assessment, "the court should take into account the value of any future relief under the settlement." *Feerer v. Amoco Prod. Co.*, No. 95-0012 JC/WWD, 1998 U.S. Dist. LEXIS 22248, at *42-43 (D.N.M. May 28, 1998) (finding fee award of $20,542,665, which represented 41.9% of $49,000,000 cash portion of settlement and "approximately 27.7% to 29.5% of the current value of the settlement" based upon the agreed-upon future changes to royalty payment calculations, which had a present value of $21,000,000 to $25,600,000) (collecting cases).[7]

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[7] *See also, e.g.*, *Principles of the Law of Aggregate Litigation*, §3.13(b) (American Law Institute, 2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, ***with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement***."); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991) (instructing that courts should consider, among other factors, "***any non-monetary benefits conferred upon the class by the settlement***" in determining reasonable attorneys' fees to be paid from common fund recovery); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (holding "where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts may include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees") (citing *Boeing*, 444 U.S. at 478-79)); *Chieftain Royalty Company v. QEP Energy Co.*, No. CIV-11-212-R, Doc. No. 182 (W.D. Okla. May 31, 2013) (awarding $46.5 million in attorneys' fees on a $155 million gross settlement fund, $40 million of which constituted future benefits); *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 U.S. Dist. LEXIS

Here, each of the three components of the Settlement represent significant, concrete monetary benefits to the Settlement Class. And, as Professor Gensler has aptly opined, unlike cases in which absent class members' recovery is contingent upon their submission of information or some sort of complicated claims process, here, these benefits are ***guaranteed*** and automatically bestowed upon the Settlement Class as a result of the Settlement:

> Importantly, this is a cash recovery that will be distributed to Class Members automatically. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits…The only thing Class Members need to do is not opt out and wait for their checks to be distributed after the Court grants final approval of the Settlement.

Gensler Decl. at ¶59,61. Accordingly, the "results obtained" factor strongly supports a fee award of $3.2 million to be paid from the immediate cash portion of the Settlement that represents 21% of the Total Settlement Value.[8]

100681, at *3-13 (D. Colo. Oct. 20, 2009) (finding, where settlement provided for up-front cash payment of $12,997,493.00 and future changes to royalty payment calculation methodology valued at approximately $10,400,00.00, the "Common Fund created" amounted to "approximately $23,397,493.00" and, thus, a fee award "in the amount of $5,900,000, which represent[ed] approximately 26% of the total economic benefit of the Class Settlement, net of litigation expenses, [which also represented 45% of the $12,997,493 initial cash payment]" was "warranted and reasonable" under Tenth Circuit law); *Droegemueller v. Petroleum Dev. Corp.*, No. 07-cv-1362-JLK-CBS, 2009 U.S. Dist. LEXIS 123875, at *11-12 (D. Colo. Apr. 7, 2009) (finding "results obtained" factor was measured by "total economic benefit for the Class," which included cash payment for past royalty underpayment claims and present value of changes to "method for calculating future royalties").

[8] The outstanding result obtained is in stark contrast to cases like *Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.3d 662, 670, where fees are based upon coupons or claims made settlements with no guaranteed common fund. *Hess* was a fee-shifting case where defendants contractually agreed to incur liability for the class' attorneys' fees, resulting in application of the lodestar method. *See id.* at 666. The concurring opinion even recognized there are other cases where **"*the attorney-fee award is based on a percentage of the plaintiffs' recovery*.**" *Id.* at 672, n.3. And, that case was an egregious outlier where the entire class got less than $46,000, but the lawyers were asking for over ***$14 million***—a result that could never pass muster under the "result obtained" factor. *See id.* at 673. On remand, the trial court, as instructed, subtracted the fees generated in the failed Florida litigation from the lodestar fee and "then reduced the lodestar by 70%" to arrive at an attorney fee in the amount of $983,616.75, together with expenses and postjudgment interest. *Hess v. Volkswagen of America, Inc.*, 2017 OK CIV APP 35, ¶2, 398 P.3d 27. Volkswagen appealed the trial court's award, arguing that "the new attorney fee award - an award which constitutes a mere 13.6% of the prior attorney fee award - is still too high," as it

The other *Johnson* factors also support the Fee Request. First, the time and labor involved supports the fee request. The time and labor Class Counsel and Plaintiff's Counsel have expended in the research, investigation, prosecution and resolution of this Litigation is set forth in detail in the following declarations, which are attached to the Motion and incorporated by reference: (1) Declaration of Patrick M. Ryan Filed on Behalf of Ryan Whaley ("RW Decl."); (2) the Declaration of Michael Burrage on behalf of Liaison Local Counsel Whitten Burrage ("Burrage Decl."); and (3) the Declaration of Patrick M. Ryan and Jason A. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl.") and exhibits thereto (attached to Final Approval Memorandum as Exhibit 2). These Declarations support the Fee Request.

In summary, these Declarations prove that for more than two years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted extensive discovery, reviewing several gigabytes of electronically produced data related to owner communications, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma owners. Class Counsel spent significant time working with experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy and complex negotiation and mediation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required several months of negotiations, including a formal mediation session, telephone conferences, briefing on substantive factual and legal issues and extensive consultation with experts to evaluate and analyze damages. Overall, Class Counsel and Plaintiff's Counsel dedicated at least 1,300 hours of attorney and professional time to this Litigation and reasonably anticipate dedicating approximately 300 additional hours through final approval and distribution.

"equals approximately '21.5 times as much money as . . . recovered for the entire class[.]'" *Id*. The Court of Civil Appeals affirmed the trial court's *downward* reduction of the lodestar by 70% given the low recovery obtained in the case, even though the fee awarded and affirmed still represented 21.5 times as much money as recovered for the entire class (Fees of $983,616.75 vs. Class Recovery of $45,780); *see also, e.g.*, *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.,* No. CJ-2010-38, 2015 WL 5794008, at *2 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding "recovery of 41% of damages within the statute of limitations period" to be "an outstanding benefit to the Settlement Class when compared against other royalty underpayment class action settlements approved by other Oklahoma district courts"). Given the amount involved in this Litigation and the Settlement achieved for the benefit of the Settlement Class, this highly significant factor strongly supports Class Counsel's Fee Request.

Second, the novelty and difficulty of the questions presented in this action supports the Fee Request. Class actions are known to be complex and vigorously contested. The Declarations prove that this certainly was the case here. The legal and factual issues litigated in this case involved complex and highly technical issues. The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. The successful prosecution and resolution of the Settlement Class' claims required Class Counsel to work with various experts to analyze complex data to support their legal theories and evaluate the amount of alleged damages. The fact that Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case. Joint Class Counsel Decl. at ¶55; Gensler Decl. at ¶82-83. Moreover, Defendants asserted a number of significant defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Gensler Decl. at ¶26-30. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, support the Fee Request. Joint Class Counsel Decl. at ¶¶15-17, 33; Gensler Decl. at ¶31,32.

The third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation and ability of the attorneys—supports the Fee Request. The Declarations prove that this Litigation called for Class Counsel's considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. *See* Joint Class Counsel Decl. at ¶55; Gensler Decl. at ¶¶21,53,76,78; *see also* RW Decl. at ¶¶2 - 4; Burrage Decl. at ¶¶2 - 4. The case required investigation and mastery of highly technical issues regarding statutory interest payments in Oklahoma. *See* Joint Class Counsel Decl. at ¶55. Class Counsel has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. *Id.* at ¶¶57-62. Class Counsel also are highly experienced in class action, commercial, mass tort, securities, and other complex litigation and has successfully prosecuted and settled numerous class actions, including oil and gas royalty underpayment class actions. *Id.* Class Counsel consist of some of the most experienced complex litigation attorneys in the country. *See, e.g.*, RW Decl. at ¶2.

Further, the Ryan Whaley law firm is a litigation, energy, and environmental law firm based in Oklahoma City with national, regional, and state clients. *See generally* RW Decl. The

firm has litigated class actions and complex commercial litigations in courts across the country. *Id.* at ¶2. With more than 50 years of experience in Oklahoma state and federal courts, Pat Ryan is best known for successful high-profile cases including his work as U.S. Attorney in the prosecution and conviction of Oklahoma City Bombing defendants Timothy McVeigh and Terry Nichols in Denver, and securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Dept. of Justice. *Id.* at ¶4.

The quality of representation by counsel on *both* sides of this Litigation was high. Defendants are represented by skilled class action defense attorneys who spared no effort in the defense of their client. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976). Simply put, without the experience, skill and determination displayed by *all* counsel involved, the Settlement would not have been reached. *See* Gensler Decl. at ¶¶21,22,78; Joint Class Counsel Decl. at ¶55,72; RW Decl. at ¶¶2-4; Burrage Decl. at ¶¶2-4. These factors strongly support the Fee Request.

The fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—support the Fee Request. The Declarations prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were precluded from working on other cases and pursuing otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶64; RW Decl. at ¶54; Burrage Decl. at ¶13. This case was filed in 2018 and it has required the devotion of substantial time, manpower, and resources from Class Counsel over that period. *Id*. Class Counsel have spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *Id*. Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. *Id*. The schedules of the courts, witnesses, and clients were accommodated on a regular basis by Class Counsel. *Id*. A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and works a significant hardship on them over the course of multiple years. *Id*. Class Counsel had to forego taking on numerous additional cases because of this litigation and the burden it placed on their time and resources. *Id*. Accordingly, these factors support the Fee Request.

The fifth *Johnson* factor—the customary fee and awards in similar cases—further supports the Fee Request. Class Counsel and DASA negotiated and agreed to prosecute this case based on

a 40% contingent fee. *See* DASA Decl. at ¶7; Joint Class Counsel Decl. at ¶48; RW Decl. at ¶6; Gensler Decl. at ¶69. This fee represents the market rate and is in the range of the "customary fee" in oil and gas class actions in Oklahoma state courts over the past 15 years. *See* Joint Class Counsel Decl. at ¶44; Gensler Decl. at ¶¶70,73; *see also, e.g.*, *Fitzgerald Farms,* 2015 WL 5794008, at *3 (collecting Oklahoma cases to find in "the royalty underpayment class action context, the customary fee is a 40% contingency fee" and awarding 40% fee of $119 million common fund).

Federal and state courts in Oklahoma, including this Court, have approved similar fee awards in similar cases. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105); *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124). Moreover, the Western District of Oklahoma approved a 40% fee and a 39% fee in similar royalty underpayment class cases. *Laredo* Fee Order ("Class Counsel's request of forty percent (40%) of the $6,651,997.95 Settlement Amount is within the acceptable range of attorneys' fees approved by Oklahoma Courts as being fair and reasonable in contingent fee class action litigation . . ."); *QEP* Fee Order at *6 (awarding a fee of $46.5 million, which represented approximately 39% of the cash portion of a $155 million settlement). The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See* Joint Class Counsel Decl. at ¶46; Gensler Decl. at ¶¶70,73 (collecting cases). And, comparable awards have been granted in other complex class actions across the country. Joint Class Counsel Decl. at ¶50. Given the outstanding cash recovery plus the substantial binding changes to the EnerVest Defendants' statutory interest policies in Oklahoma, the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval. *Id*.

Moreover, a 40% fee is consistent with the market rate for high quality legal services in royalty underpayment class actions like this. *See Laredo* Fee Order at 8 ("The market rate for Class Counsel's legal services also informs the determination of a reasonable percentage to be awarded from the common fund as attorneys' fees."); Gensler Decl. at ¶70, 72. This Court has held a contingency fee negotiated at arms' length at the outset of the litigation "reflect[s] the value the Class Representatives placed on the future success of [the] [a]ction." *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23; *see also Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this

litigation, reflecting the value Class Representative placed on the future success of this Litigation."); Gensler Decl. at ¶71. Here, Class Representatives agreed Class Counsel would represent them on a contingency fee basis, not to exceed 40%. *See* DASA Decl. at ¶7; RW Decl. at ¶6. And, their Declarations demonstrate their continued support of the fairness and reasonableness of the Fee Request. *See* DASA Decl. at ¶¶14-17. These factors support the Fee Request.

The sixth *Johnson* factor—the contingent nature of the fee—also supports the Fee Request. Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Joint Class Counsel Decl. at ¶45. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. Gensler Decl. at ¶71. As Professor Gensler aptly notes, the risk of no recovery in complex cases of this type is very real and is heightened when plaintiffs' counsel press to achieve the very best results for their clients and the class. *See id.* at ¶84; *see also* Joint Class Counsel Decl. at ¶45. Indeed, it is possible for counsel to expend thousands of hours litigating royalty underpayment actions, have a court deny class certification, and then receive no remuneration whatsoever despite their diligence and expertise.[9] Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates.

Further, Class Representatives negotiated and agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* DASA Decl. at ¶7; Joint Class Counsel Decl. at ¶45. This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25; *Laredo* Fee Order at 8. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶45; *see also Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶¶11 and 15-23, 77 P.3d 1042. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees

[9] *See, e.g.*, *Foster v. Apache*, 285 F.R.D. 632 (W.D. Okla. 2012); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012); *Morrison v. Anadarko Petroleum Co.*, 280 F.R.D. 621 (W.D. Okla. 2012); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646 (W.D. Okla. 2011).

in class actions. *See, e.g., Adkisson, et al. v. Koch Indus. Inc., et al.*, Case No. 106,452 (Okla. Ct. Civ. App. Aug. 7, 2009) (unpublished), at ¶¶12-22[10]; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294. Moreover, when the attorneys' compensation is contingent, Oklahoma law recognizes any attorneys' fee award must account for the risks inherent in such engagements by adjusting "upward the basic hourly rate" to allow for a "risk-litigation" premium. *See, e.g.*, *Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, ¶14 n.30, 977 P.2d 357 (citing *Brashier v. Farmers Ins. Co.*, 1996 OK 86, ¶11 n.22, 925 P.2d 20); *Oliver's Sports Ctr., Inc. v. Nat'l Std. Ins. Co.*, 1980 OK 120, ¶6, 615 P.2d 291. Accordingly, this factor strongly supports the Fee Request.

The tenth *Johnson* factor—the undesirability of the case—also supports the Fee Request. Compared to most civil litigation, this Litigation clearly fits the "undesirable" test. *See* Joint Class Counsel Decl. at ¶67; Gensler Decl. at ¶53. Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation for multiple years. *See* Joint Class Counsel Dec. at ¶67. Further, Defendants have proven themselves to be worthy adversaries. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming, and arduous undertaking. *See* Joint Class Counsel Decl. at ¶67. The investment by Class Counsel of their time, money, and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. *See e.g.*, *Finnell v. Jebco Seismic*, 2003 OK 35, ¶17 n.36, 67 P.3d 339 (noting this factor also entails consideration of the "risk of non-recovery"). And, this Litigation involved a number of uncertain legal and factual issues. *See* Joint Class Counsel Decl. at ¶53; Gensler Decl. at ¶30. Indeed, in another complex royalty class action, one Oklahoma state court explained:

> Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels.

Fitzgerald Farms, 2015 WL 5794008, at *8. The same principle holds true here. Class Counsel reviewed several gigabytes of electronically produced data, including statutory interest payments,

[10] The Oklahoma Supreme Court issued an Order denying *certiorari* in *Adkisson v. Koch Industries, Inc.*, No. 106,452, on February 4, 2010.

historical proceed payments, and suspended accounts for Oklahoma owners. Joint Class Counsel Decl. at ¶13. Moreover, Plaintiff's litigation efforts also included conducting research, accounting review and analysis, consultation by and with experts, settlement negotiations among counsel, damage modeling, and other investigations and preparation. *Id.* at ¶14. Class Counsel and Plaintiff's Counsel also advanced approximately $155,000 in litigation expenses. Joint Class Counsel Decl. at ¶67. And, Class Counsel and Plaintiff's Counsel expended at least 1,300 hours of time over the length of this action. Joint Class Counsel Decl. at ¶63. This factor also supports the Fee Request. *See* Joint Class Counsel Decl. at ¶63; Gensler Decl. at ¶¶81, 85.

The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Class Representative is a highly educated royalty owner. *See* DASA Decl. at ¶¶4,5. Mr. Hacker (on behalf of DASA) was and will remain very active in this litigation. DASA Decl. at ¶¶8-11,19. Class Representative negotiated a 40% fee when it agreed to be class representative in this litigation. *See* DASA Decl. at ¶7; Joint Class Counsel Decl. at ¶45; Gensler Decl. at ¶69. And, DASA supports the Fee Request. DASA Decl. at ¶17. Accordingly, this factor supports Class Counsel's fee request.[11] In summary, analysis of the *Johnson* factors under federal common law strongly demonstrates that the Fee Request should be approved.

B. The Fee Request Is Reasonable When Analyzed Using a Lodestar Cross-Check

The Tenth Circuit has repeatedly held that a lodestar cross check is not required. *See, e.g.*, *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1241 (D.N.M. 2016) ("The Tenth Circuit has made it clear that district courts need not calculate a lodestar when applying the percentage method. . . . [T]he Court will award a reasonable percentage of the fund as attorneys' fees without

[11] The foregoing twelve *Johnson* factors are also included in the statutory enhancement factors in Oklahoma and thus, are supported by the same evidence under Oklahoma state law should the Court choose to apply Oklahoma state law, as discussed in more detail below. *See* 12 O.S. §2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. As discussed above, this Litigation involved complex issues of law and fact that placed the ultimate outcome in doubt. There was no guarantee Plaintiff and the Class would prevail on their legal theories at class certification, summary judgment and/or trial. Indeed, Defendants deny all allegations of wrongdoing or liability and deny that the Litigation could have been properly maintained as a class action. *See* Settlement Agreement at ¶11.1. In the absence of the Settlement, the outcome of the complex issues in this case would remain uncertain until their ultimate resolution by the Court or a jury, thus placing substantial risk on both Parties. Accordingly, this factor supports the Fee Request.

a lodestar analysis or cross check.") (collecting cases); *see also Brown*, 838 F.2d at 456 (holding that "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"); *Uselton*, 9 F.3d at 853 (finding that *Brown* "recognized the propriety of awarding attorneys' fees in [common fund cases] on a percentage of the fund, rather than lodestar basis"); *Gottlieb*, 43 F.3d at 483 (while either the percentage of the fund or lodestar methodology may be permissible, "*Uselton* implies a preference for the percentage of the fund method"). Indeed, as discussed above, the lodestar method and lodestar cross-checks are a wasteful use of resources and are disfavored by the Tenth Circuit. *See, e.g.*, *Jewell*, 167 F.3d at 1242 ("The lodestar analysis, even when used as a cross check to determine a reasonable percentage award, has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage, namely 'incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar.' . . . The Court has expressly rejected the lodestar method because it is 'difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result.'"); *see also Gottlieb*, 43 F.3d at 487 (holding district court abused its discretion by replacing "the percentage fee method . . . with the lodestar plus multiplier method."); Gensler Decl. at ¶51. Nevertheless, if the Court desired to conduct a lodestar cross-check, it would further demonstrate the reasonableness of the Fee Request. The aggregate total lodestar amount submitted by Class Counsel and Plaintiffs' Counsel is $1,221,310.00. *See* Joint Class Counsel Decl. at ¶63; RW Decl. at ¶¶11-13; Burrage Decl. at ¶¶9-11; Gensler Decl. at ¶81. Thus, the requested $3.2 million fee represents an enhancement lodestar multiplier of 2.62. *Id.* This multiplier is well within the range of multipliers approved in the Tenth Circuit, and other circuits, when a lodestar cross-check is used. *See, e.g.*, *Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181-JLK, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6 (D. Colo. April 28, 2017) (finding that "[t]ypical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds" and collecting federal cases to support conclusion that "multiplier of 2.41 is within the range of those frequently awarded in common fund cases."); *Campbell v. C.R. Eng., Inc.*, No. 2:13-cv-00262, 2015 U.S. Dist. LEXIS 134235, at *20 n.5 (D. Utah Sept. 30, 2015) (finding "lodestar crosscheck calculation here results in multiplier of 2.9, which is within a reasonable range" of approved multipliers within the Tenth Circuit); *see*

also, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 & n.6 (9th Cir. 2002) (affirming district court's fee award based on 3.65 lodestar multiplier and listing nationwide class action settlements from 1996-2001 approving multipliers ranging up to 8.5).

C. Alternatively, Class Counsel's Fee Request Is Reasonable Under Oklahoma Law

Alternatively, should this Court determine that the express terms of the Settlement Agreement should be disregarded and that Oklahoma state law should control the right to and reasonableness of attorneys' fees, the Fee Request remains reasonable.

Following the enactment of Section 2023(G)(4)(e), Oklahoma district courts have applied a flexible scheme that is applied differently based on whether the case involves a common fund recovery or statutory fee-shifting. For example, in *Fitzgerald Farms,* Judge Parsley applied the Section 2023(G)(4)(e) factors in approving a 40% fee but held that, in common fund cases, the primary factor is the percentage of recovery. 2015 WL 5794008, at *2 ("[W]here, as here, the legal representation is undertaken on a contingent fee basis and that representation results in a common fund recovery for the benefit of a class, Oklahoma applies a percentage analysis."); *accord Cornett v. Samson Resources Co*., No.CJ-09-81 (Okla. Dist. Ct. Dewey Cty. Dec. 23, 2013) (Exh.8). Even more recently, in *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. Aug. 30, 2017)(Exh.9), Judge Kelly explained the lodestar method does not apply in contingent-fee common-fund cases, and approved a 40% award based on all of the Section 2023(G)(4)(e) factors, but primarily the percentage of recovery. *Id.* at 8 ("When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee.").

However, this Court does not have to decide what role a lodestar calculation should play in the fee analysis here because "doing so would only confirm that Class Counsel's fee request is fair and reasonable." Gensler Decl. at ¶81. If the Court determines a lodestar calculation should serve as a baseline subject to a contingency-fee common-fund multiplier, that process was set forth in *Burk*, where the Oklahoma Supreme Court adopted a two-step procedure for determining reasonable attorney's fees:

> The court will analyze first the type of work involved in the case and the number of hours expended by [the attorney] on various efforts. The court then will consider the proper hourly fee to be charged for this work. After arriving at a strictly hourly figure, the court then will consider what amount, if any, should be added to the petitioner's compensation, based particularly on the contingent nature of this litigation, the benefits conferred on plaintiff class, the service rendered to the public, the difficulty of the issues involved and petitioner's skill in dealing with them, and the other factors set forth by the Court of Appeals in Evans v. Sheraton Park Hotel, supra.

598 P.2d at 661. Thus, the Court concluded that "the proper procedure to be followed by trial courts in establishing a reasonable attorney fee in this type of case is to first determine hourly compensation on an hours times rate basis, and to that factor add an amount determined from the applicable factors set forth in *Evans, supra.*" *Id.*[12] The factors set forth in *Evans* are the now well-known "*Johnson* factors," discussed at length above. *See id.* As shown above, each of these factors are satisfied here. The only additional inquiry under Oklahoma state law is the determination of the time compensation factor, *i.e.*, baseline lodestar. Time records supporting this factor need not be contemporaneous and may be "reconstructed." *Spencer v. Oklahoma Gas & Elec. Co.,* 2007 OK 76 at ¶14, n.20, 171 P.3d 890, 895 (citing *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115 at ¶12, 598 P.2d 659 (Okla. 1979)); *see also Conti v. Republic Underwriters Ins. Co.,* 1989 OK 128 at ¶23, 782 P.2d 1357 (finding "recapitulation of [attorney's] hours, based upon notes included in his trial notes" satisfied *Burk*); *Usrey v. Wilson*, 2003 OK CIV APP 25, ¶6, 66 P.3d 1000, 1002 ("[N]othing in *Burk* or *Oliver's* prevents an attorney fee award based on a reconstruction of the time spent on a case based upon other records which verify the activity in the case, such as the court file or the attorney's copies of letters, pleadings, or file memoranda."); *Direct Traffic Control, Inc. v. Kidd*, 2013 OK CIV APP 103, ¶35, 313 P.3d 1015 (rejecting the argument that "time records submitted were inadequate because they were reconstructions rather than copies of time records actually billed" as unsupported by any

[12] The Oklahoma Supreme Court found "no conflict existing between the federal decisions" the Court relied on to adopt this two-step procedure and the factors to be considered "as guides in determining the reasonableness of a fee" under ORPC 1.5(a). *See id.* at 661-62 (quoting 1971 version of ORPC 1.5(a), now codified at 5 OKLA. STAT., CH.1, APP. 3-A, RULE 1.5(a)).

authority).[13] Oklahoma courts also have found affidavits submitted by attorneys attesting to the work they performed sufficient to support *Burk*'s time records consideration. *See, e.g.*, *JLEE Co., L.L.C. v. Reneau Seed Co.*, 2014 OK CIV APP 65, ¶¶6-9 332 P.3d 297 (finding five-page affidavit from attorney, outlining work performed and summarizing billing entries sufficient evidence under *Burk* to support fee award).[14]

In contingency-fee cases (like this one), where hourly billing invoices are not submitted to a paying client, Oklahoma courts often have found testimony based on the review of pertinent case files sufficient to meet *Burk*'s guidance. For example, the Oklahoma Supreme Court rejected the argument that a fee award was excessive because an attorney "did not submit detailed time records as appellant maintains were required by" *Burk* and *Oliver's Sports*, holding instead the "testimony of the expert witnesses" that the contingency agreement was "reasonable for this case" sufficiently supported the trial court's fee award. *See Root v. Kamo Elec. Co-op*, 1985 OK 8, ¶¶46-47, 699 P.2d 1083; *see also Unterkircher v. Adams*, 1985 OK 96, ¶¶3, 10-11, 714 P.2d 193 (finding attorneys' and expert witnesses' testimony that the contingency contract was reasonable in light of the *Burk* and ORPC 1.5(a) factors "ample evidence" to support the trial court's fee award); *Abel v. Tisdale*, 1983 OK 109, ¶¶6-8, 673 P.2d 836 (finding that "testimony of several practicing attorneys" supported time and labor factor under ORPC 1.5(a) and established reasonableness of one-third contingency-fee agreement); *Hamilton v. Telex Corp.*, 1981 OK 22, ¶¶23-27, 625 P.2d 106 (finding testimony of attorneys based on examination of "litigation file" and "time records" justified fee calculation). Thus, under Oklahoma law, the "proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors

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[13] Indeed, in *Burk*, the attorneys "did not keep time records of their work as the litigation progressed, but rather they had to reconstruct the number of hours spent in various legal endeavors...based upon review of their files and court files, [and estimate] that they had spent approximately 2500 hours on the case." 1979 OK 115 at ¶12.

[14] *See also, e.g.*, *City of Purcell v. Wilbanks*, 1998 OK CIV APP 170, ¶10, 968 P.2d 352 (affirming fee award under prevailing party statute where expert testified to "reasonableness of claimed fee" and attorney submitted a "letter narrative delineating his efforts on [party's] behalf through the course of litigation"); *Circle F Ranch Co. v. Strehlau*, 1989 OK CIV APP 39, ¶10, 776 P.2d 855 (affirming fee award under prevailing party statute because "trial court was furnished ample evidence to support the requested fee" where fee motion was "accompanied by a brief and a detailed affidavit setting forth the hours expended and the hourly rate" in accord with *Burk*).

which are applicable to each case." *Id.* at ¶21. "Exclusive imposition of an hourly rate ignores the required analysis of the several interacting factors mandated by *Burk*, *Oliver* and *Sneed*." *Unterkircher*, 1985 OK 96 at ¶10.[15]

Consistent with the foregoing Oklahoma precedent, Class Counsel and Plaintiff's Counsel are submitting attorney declarations that include the number of hours worked by each individual and their hourly rates. *See* Joint Class Counsel Decl. at ¶63; RW Decl. at ¶¶11-13; Burrage Decl. at ¶¶9-11. These records demonstrate Class Counsel and Plaintiff's Counsel will have at least 1,600 hours on this Litigation. *Id*. Moreover, Class Counsel have provided hourly rates for each attorney and staff member for the services performed for different types of legal work. *Id*. As required by *Burk*, these rates are "predicated on the standards within the local legal community." 1979 OK 115 at ¶20; *see also Finnell*, 2003 OK 35 at ¶17 ("An attorney seeking an award must submit to the trial court detailed time records and must offer evidence of the reasonable value of the services performed **based on the standards of the legal community in which the attorney practices**."). The legal community in which Class Counsel practices is a national complex litigation firm. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (explaining that, in the lodestar context, courts generally look to the current billing rates of the attorneys in "the relevant marketplace, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)); *see also* Gensler Decl. at ¶¶82-85.

1. Class Counsel's Hourly Rates are Reasonable

The use of an hourly rate in a contingent fee case is an inefficient endeavor in the context of commercial litigation and typically results in the gross understatement of hourly rates. This is so because most attorneys do not desire to advance costs and expenses and work by the hour with no guarantee of success without also negotiating a guaranteed multiple of that rate upon being successful. Further, as Class Counsel, our goal is always to achieve the best result possible for the

[15] *See also, e.g.*, *Spencer*, 2007 OK 76 at ¶19, n.27 ("The lodestar/compensatory/base fee is an amount reached by multiplying the time spent by the hourly rate charged by the attorney. It is the 'lodestar' to which additional fees are added based upon the factors enumerated in *Burk*[.]"); *Lindy Bros. Builders, Inc. of Phila., et al. v. Am. R&S San. Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) (cited in *Burk*, 1979 OK 115 at ¶6) ("It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.").

class under the circumstances at the time, and if possible, resolve all claims as quickly and efficiently as possible.

However, because some courts wish to apply a lodestar cross-check to determine the fairness of a percentage fee in a complex class action case, and in some cases it may be necessary to submit hourly rates to support a request for payment of attorneys' fees in a fee shifting scenario, Class Counsel have submitted their hourly rates. *See* Joint Class Counsel Decl. at ¶¶49, 50. The hourly rates submitted by Class Counsel are in line with rates approved in Oklahoma courts in complex litigation involving energy companies. For example, in 2015, Judge Lee R. West of the Western District of Oklahoma approved partner rates ranging from $850 - $1,150 per hour in a complex shareholder derivative action, *In re Sandridge Energy, Inc. S'holder Derivative Litig.*, No. CIV-13-102-W, 2015 U.S. Dist. LEXIS 180740 (W.D. Okla. Dec. 22, 2015). There, Judge West relied upon attorney declarations similar to the ones submitted by Class Counsel here to assess the time and labor expended by the lead counsel in the action. *See id.* at *10-11 & n.10 (citing counsel's declarations for amount of time expended in litigation). And, those declarations demonstrate that the lodestar submitted in the *Sandridge* matter was comprised of hourly rates billed two years ago for partners in national complex litigation firms (including one of Plaintiff's Counsel here (Whitten Burrage)) like Class Counsel here, that ranged from $850 per hour (Whitten Burrage (Doc. No. 328-2)) to $940 per hour (Kaplan Fox (Doc. No. 328-3)) to $1,150 per hour (Jackson Walker (Doc. No. 328-4)). The Tenth Circuit affirmed this order on November 17, 2017, over four months *after* the Tenth Circuit's opinion in *EnerVest*.

Moreover, a 2014 dataset collected by the *National Law Journal* regarding 2014 billing rates reported national *average* partner rates that ranged from $345 to $1,055 per hour and *average* associate rates that ranged from $135 to $678 per hour. *See* ALM Legal Intelligence, 2014 NLJ Billing Report (2014). And, based on Class Counsel's personal experience, the hourly rates submitted here are well below the actual market rate because no firm who works on an hourly basis would agree to work at these rates without also negotiating a guaranteed multiple of that rate upon being successful.

In sum, the collective data and evidence submitted demonstrates the reasonableness of the hourly rates submitted by Class Counsel here.

2. Taken Collectively, the Oklahoma Statutory Enhancement Factors Strongly Support Enhancement of Class Counsel's Base Lodestar By a Multiple of 2.62

As demonstrated above, when attorney compensation is not guaranteed—*i.e.*, the representation is based on a contingency-fee agreement—Oklahoma courts "must adjust the basic hourly rate...by assessing the likelihood of success at the outset of the representation." *Oliver's Sports*, 1980 OK 120 at ¶6.[16] The enhancement factors account for the fact that, especially in cases taken on a contingency-fee basis, an amount of reasonable attorneys' fees cannot appropriately be determined by inserting numbers "mechanically into a universally valid formula." *Robert L. Wheeler v. Scott*, 1989 OK 106 at ¶21 (777 P.2d 394).[17] Thus, the "proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors which are applicable to each case." *Id.* And, the total enhanced fee "must bear some reasonable relationship to the amount in controversy." *Finnell*, 2003 OK 35 at ¶17. Here, every "enhancement" factor supports an "incentive fee" in addition to Class Counsel's base lodestar, as detailed above. The analysis of the *Johnson* factors under federal common law set forth above applies equally under the Oklahoma statutory factors and is hereby incorporated.

The purpose of the multi-factored analysis set forth in *Burk* and its progeny is to ensure an award of ***reasonable*** attorneys' fees in circumstances where compensation "cannot fairly be awarded on the basis of time alone." *Oliver's Sports*, 1980 OK 120 at ¶6. Contingency fee agreements allow those "who could not otherwise afford to assert their claims to have their day in

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[16] *See also e.g., Morgan*, 1998 OK 130 at ¶14 n.30 ("Where, as here, the lawyer's compensation is contingent, the trial court must adjust upward the basic hourly rate by allowing a risk-litigation premium based on the likelihood of success at the outset of the representation." (citing *Brashier,* 1996 OK 86 at ¶11 (same), *overruled in part on other grounds by Barnes v. Okla. Farm Bureau Mut. Ins. Co.,* 2000 OK 55)); *Robert L. Wheeler, Inc.*, 1989 OK 106 at ¶13.

[17] *See also e.g.*, *Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754 ("Often contingent fee agreements are the only means possible for litigants to receive legal services – contingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their day in Court."); *Unterkircher*, 1985 OK 96 at ¶10 ("if time is the singular calculation, inexperience, inefficiency, and incompetence may be rewarded ***while skillful and expeditious disposition of litigation is penalized unfairly***" (emphasis added)); *Lindy*, 487 F.2d at 168 ("***No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended***." (internal citations omitted, emphasis added)).

Court[,]" *Sneed*, 1984 OK 22 at ¶3, and reward the "skillful and expeditious disposition of litigation[.]" *Unterkircher*, 1985 OK 96 at ¶10. Therefore, in recognition of the risk involved in funding litigation, especially complex litigation, under an agreement that does not guarantee *any* compensation whatsoever, Oklahoma law holds that fair and reasonable compensation in such cases necessarily entails an upward adjustment of any baseline lodestar. *Id.*; *see also, e.g.*, *Robert L. Wheeler*, 1989 OK 106 at ¶¶7, 13. Under these principles, the substantial evidence supporting each *Burk* factor here demonstrates the enhancement of Class Counsel's baseline lodestar by a factor of 2.62 is both fair and reasonable.

Whether viewed as a total dollar amount ("incentive fee") or as a percentage "multiplier" of the baseline hourly fee ("lodestar multiplier"), this enhancement falls well within the range of "incentive fees" frequently awarded by Oklahoma state courts in royalty underpayment class actions. *See, e.g.*, *Fitzgerald Farms*, 2015 WL 5794008, at *7-8 (awarding multiplier of 5 and finding the award to be "well-within the parameters of Oklahoma case law"); Gensler Decl. at ¶91,92. In *Fitzgerald Farms*, for example, the Oklahoma District Court of Beaver County found that, in "a large common fund case such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7." *Id.* at *8 (citing, *inter alia*, *Lobo v. BP* (Beaver Cty. 2005) (Ex. 1) (8.7 multiplier); *Brumley v. ConocoPhillips* (Texas Cty.) (Ex. 2) (3.85 multiplier); *Laverty v. Newfield* (Beaver Cty. 2007) (Ex. 3) (4.2 multiplier); *Bridensteine v. Kaiser Francis* (Texas Cty. 2004) (Ex. 4) (5.25 multiplier); *Simmons v. Anadarko Petro.* (Caddo Cty. 2008) (Ex. 5) (4.2 multiplier); *Mitchusson v. EXCO Res.* (Caddo Cty. 2012) (Ex. 6) (6.3 multiplier)).[18] Moreover, federal cases applying a "lodestar multiplier" to cross-check the reasonableness of a percentage-based fee award in common fund cases have found that "[t]ypical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds." *Cook*, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6; *see also e.g.*, *Campbell*, 2015 U.S. Dist. LEXIS 134235, at *20 n.5; *Vizcaino*, 290 F.3d at 1051-52 & n.6 (collecting federal cases awarding multipliers of up to 8.5); Gensler Decl. at ¶81.

[18] *See also e.g.*, *Continental Resources*, No. CJ-95-739 (Okla. Dist. Ct. Garfield Cty. Aug. 22, 2005) (Ex. 7) at ¶13 and n.3 (awarding a "total multiplier of the base hourly fees of approximately 3.6 under a lodestar approach" and stating, in "appropriate cases where Class Counsel have created a large common fund, such as in the present case, multipliers of even 5 to 10 have been awarded").

Further, after the addition of the enhancement factor, the total amount of the Fee Request bears a "reasonable relationship" to the amount in controversy. *See Arkoma Gas Co. v. Otis Eng'g Corp.*, 1993 OK 27, ¶6, 849 P.2d 392. Unlike outlier cases in which the class attorneys sought fees that *exceeded* the amount of monetary benefits the *entire class* received as a whole, *see, e.g.*, *Hess* 2014 OK 111, at ¶¶34-36, the total Fee Request here does not come close to exceeding the Gross Settlement Fund. Instead, the total Fee Request is 40% of the Gross Settlement Fund, consistent with the amount Class Counsel stated it would seek in the Notice. It is also less than the 50% contingency fee allowed under Oklahoma law. *See* 5 O.S. §7.

In sum, each of the Oklahoma statutory enhancement factors, individually and as a whole, support an enhancement of 2.62 of Class Counsel's baseline lodestar. Further, the total Fee Request clearly bears a "reasonable relationship" to the amount in controversy. As such, the requested enhancement should be granted.

V. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order granting approval of the Fee Request of $3,200,000.

DATED: February 21, 2020

Respectfully submitted,

s/Patrick M. Ryan

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

J. Kevin Hayes – khayes@hallestill.com
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s/Patrick M. Ryan
Patrick M. Ryan

Exhibit 1

IN THE DISTRICT COURT OF BEAVER COUNTY
STATE OF OKLAHOMA

LOBO EXPLORATION COMPANY, an Oklahoma Corporation, Plaintiff,	)	
vs.	)	Case No. CJ-97-72
BP AMERICA PRODUCTION COMPANY, a Delaware Corporation, Defendant.	)	Hon. Gerald Riffe

ORDER ON MOTION FOR ATTORNEY FEES, LITIGATION EXPENSES, AND CLASS REPRESENTATIVES FEE

This matter came on for hearing on the 14th day of November, 2005, on Class Representative's and Class Counsel's motion for attorney fees, litigation expenses and Class Representatives fee. All named parties were present and represented by counsel, and no opposing parties appeared. After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented, and being fully advised in the premises, **THE COURT FINDS AND ORDERS AS FOLLOWS**:

Attorneys' Fees: This court notes that the Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14, p. 207 indicates "In class actions involving monetary stakes, the natural conflict that arises between lawyers and class members necessarily draws the judge into the role of regulating and awarding attorney fees. Unless the judge protects the interests of absentee class members, those interests may go unrepresented."

Class Counsel requests fees of forty percent of the common fund. However, the Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.121, p. 211, for example,

indicates that some courts have established "bench marks" for attorneys' fees in common fund cases of between 25 and 30 percent of the common fund. Further, the Manual for Complex Litigation indicates that these percentages are set at even lesser amounts for "mega-cases"[1].

Newberg on Class Actions, Fourth Edition, § 14.6, p. 550, indicates a similar benchmark (20 to 33 percent) for "securities and antitrust suits, and some "caps" for percents on such mega-fund cases, or by awarding a declining percent of the common fund as the size of the same increases[2].

However, *Newberg* goes on in this same subsection to show that some studies and courts also have disregarded such declining percentage for large settlements as these discourage attorneys from taking risks for higher judgments/settlements since the same may give them little additional reward with great risk. Rather, these authorities suggest that a fixed percentage no matter the size of the common fund aligns the interests of the class and class counsel so that as the settlement/judgment amount increases, the attorneys' fees do so proportionately. This suggests that a system using such a fixed percent mimics the market, and is best for both the class and class counsel[3].

In sum, my analysis from these sources is that the award must be based upon the specific facts of the case[4]. Clearly, the settlement amount is to be considered within the facts of the particular case.

These sources and those in Oklahoma list the following factors to be considered by

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[1] Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.121, p. 211: "Accordingly, in "mega-cases" in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate. One court's survey of fee awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.93%."
[2] Id., p. 550. I note also that another equally valid study indicates these percentages to be "between 20% and 40% of the gross monetary settlement" see fn. 28, p. 558.
[3] Id., pp. 558-565.
[4] Id. p. 554.

the trial court in making this decision. First, in Oklahoma, the *Burk*[5] factors listed at pages 7-9 below are to be considered. Then, the *Manual for Complex Litigation* lists certain additional factors[6].

Based upon these factors this court will evaluate the requests of counsel in light of the facts of this particular case, to wit:

a. This case was filed on July 25, 1997, after approximately two years of discovery and research (via primarily an audit) initiated by class counsel. After initial discovery, a seven-day evidentiary trial was held in June, 1998, and the class was certified by the trial court on July 17, 1998. The Oklahoma Court of Civil Appeals affirmed this order in 1999 (*Lobo Exploration Co. v. Amoco Production Co.*, 1999 OK CIV APP 112, 991 P.2d 1048). Certiorari was denied by the Oklahoma Supreme Court, and then Certification to the U.S. Supreme Court was also denied.
b. From that time the attorney's have conducted extensive discovery: over 250,000 in total pages, prior to and after filing this case, of document discovery, over 100 gigabytes of electronic data, and over 50 depositions. Additionally, there have been many contested hearings pertaining to this discovery.
c. Notice has been mailed and published to approximately 13,000 class members, (after extensive motions, briefs and hearings pertaining to the same) and the class determined with a few[7] significant putative class members opting out of this class.
d. The parties have retained a number of experts; most of these submitted written reports, and these were subsequently deposed. There have been a number of motions filed pertaining to these experts, including *Daubert* motions and motions

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[5] *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.

[6] Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.12, p. 214. These are as follows:

a. The size of the fund and the number of persons who actually receive monetary benefits;
b. Any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation;
c. Any substantial objections to the settlement terms or fees requested by counsel for the class by class members (it is, however, a court's duty to scrutinize applications for fees, independently of any objection . . .;
d. The skill and efficiency of the attorneys; (*Newberg*, states this together with e, below, as "the amount of the benefit conferred upon the Class that could properly be attributed to Class Counsel"[6];
e. the complexity and duration of the litigation;
f. The risks of non-recovery and nonpayment;
g. The amount of time reasonably devoted to the case by counsel; even where fees are to be awarded on a percentage-of-fund basis, some judges cross-check the percentage by conducting a modified lodestar analysis; and
h. The awards in similar cases.

[7] That aggregate number is about 200, although many of these are various corporations and sub-corporations within the same unit.

in limine objecting to the testimony of some of these experts. This court ruled on a portion of these, including the denial of a portion of this testimony.

e. Additionally, there have been a number of motions filed, briefed and heard by this court including, choice of law, due process, motions for partial summary judgment (on a number of issues), and a motion to determine what contract terms are ambiguous.
f. This matter was set for pretrial where among other matters extensive motions in limine and jury instructions were to be argued (scheduled for two and a half weeks). Then the initial Phase I trial regarding liability was scheduled. (The estimated time of this trial was four weeks, and it was scheduled immediately following the pretrial hearing).
g. Thereafter, there was scheduled, should the Class have prevailed, an indefinite number of Phase II trails regarding possible individual defenses of BP against certain class members. This court's plan was that a few of the large class members would be tried to a jury, and the remainder by bench trails to this court.
h. Finally, there was scheduled a Phase III trial to determine damages, including punitive damages.
i. Each portion of these matters heard by this court was skillfully and hotly contested by counsel; including both extensive pre-hearing briefs, and then supplementary verbal arguments.
j. In accomplishing all of the above, to date Class counsel has expended significant sums of money (the "litigation expenses" requested were $621,760.69), plus just under 23,000 hours of billable time (the bill submitted for this calculated as the respective hourly rates for each of the respective attorneys aggregates approximately $6,900,000). This translates to great risks, skill and effort expended over a lengthy period of time by very tenacious counsel for the Class.
k. A settlement agreement has been executed by the parties, and approved by this court for $150 million. This amount has been deposited in a secure account where it is now drawing interest. If the legal fees are approved as requested, each class member should receive approximately 180 percent of the monies that it was allegedly overcharged by the defendant. Thus, this is an outstanding settlement[8].
l. The notice of settlement was mailed to all class members[9], and published in two places (The *Oil and Gas Journal* and the *Wall Street Journal*)[10].
m. Only five answers were filed, and, of these, only one of these was a valid objection[11]. Further, Samson Resources, one of the largest remaining class

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[8] In addition to the hotly contested eight year history of this case, prior to this offer the defendant offered $2,000,000 initially, and then $16,000,000 at the settlement conference.

[9] This aggregated over 13,000 class members.

[10] This notice specified the amounts of attorney's fee, court costs and class representative's fees that were requested.

[11] The first answer was an objection by Lawrence Pendley indicating that he did not receive notice including him in this class. Apparently his father initially owned the interest in question, and had died. This interest was transferred to his two sons, and only Lawrence Pendley's brother got a notice. The class included Lawrence as a successor to his father's interests along with his brother, and this was resolved.

Next, Rosemary Howard answered only with a change of address.

Thirdly, Vernon Lynn Scott filed an objection through counsel. However, his only interests were royalty interests. Thus, this court determined that he was not a member of the class.

Fourth, COG-EPCo 1992 Limited Partnership also filed a Motion to Clarify the language of the settlement

members, filed an affidavit in this matter urging this court to approve settlement and the fees requested by Class Counsel as reasonable and proper.

n. Finally Lobo Exploration Co., the Class representative executed a contingency fee agreement with Class Counsel allowing them an attorneys' fee of "(2) Forty (40 %) percent [of the common fund] after the filing and commencement of a lawsuit; and (3) Fifty (50%) percent after commencement of the trial of the lawsuit or after the filing of a motion for summary judgment." Class counsel agreed to limit themselves to the forty percent figure.

o. In addition to the facts above, Class Counsel presented as witnesses two attorneys who each have significant experience in representing the class in similar class action litigation, Robert Barnes and Terry Barker. They indicated as follows:

   i. Both attorneys indicated their extensive experience in similar class action litigation, and that there were few firms within this state who handle such litigation due both to the extreme risks and the amount of expertise involved.

   ii. The case at bar was very complex and difficult litigation with excellent defense counsel. Thus, plaintiff's counsel was equally skilled and tenacious.

   iii. This case was at an advanced stage when it settled. For example, the discovery completed was quite extensive on both the legal issues and the amount of damages. Further, the class had been certified and all appeals exhausted, all of Stage 1 discovery was completed, many motions had been filed, briefed, argued, and decisions made: these include after certification a number of summary judgment motions (I believe at least nine), choice of laws issue had been resolved, and the ambiguity of contract terms motion was completed.

   iv. Further, had this matter have gone to trial, the estimate is five to eight more years of litigation[12]. This would more than double the time required, expenses, and significantly increase the risks. For example should the class loose one or more of the issues, or a number of the larger class member – all of which is quite possible, then their recovery could be significantly reduced. Thus, while recovery could be lower or higher than the settlement[13], should this have proceeded to trial, the risks and expenses of said trial certainly militate in favor of this excellent settlement.

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agreement. This was withdrawn after discussions with BP and class counsel.

Finally, Rodney N. Erdey, filed a letter stating "I object to the attorney fees of 40%, due to the quick amicable resolution without trial on the merits." Mr. Erdey made no personal appearance at the Fairness Hearing, and he has done nothing else.

Clearly, this settlement has been anything but "quick [and] amicable". This along with his failure to do any more that file this letter force me to place little credence in this objection.

[12] My experience to date with time estimates of counsel is that they are generally short of the actual time required due both to the complexity of these matters and the contentious nature of this case.

[13] Clearly here this was presented in support of this settlement. It is also clear that the Class requested 2.77 billion dollars in damages, much of this from Unjust Enrichment and Punitive damages, neither of which were discussed in this settlement. Thus, they might also have recovered significantly more.

v. As noted above, this was an outstanding settlement. Further, it was accomplished in great part due to the tenacity and skill of class counsel. These attorneys should reap rewards for their diligence, skill and due to the risks involved[14].

vi. Finally, these attorneys indicated that the norm in such working-interest owner cases is an attorneys' fee of forty percent of the common fund, and in some fifty percent. In these cases the risks are greater than the royalty cases, as they are much more complex and difficult cases. Mr. Barnes here indicated that he had significant experience in such cases, and this indicated to him that these are much more complex than the royalty owner cases, with complex contracts that can be construed to reduce both liability and damages[15].

vii. Both also clearly differentiate these from the cases cited in both *Newberg* and the *Manuel for Complex Litigation* where attorneys' fee of 20-33 percent of the common fund was more the norm. They testified that the cases cited in both *Newberg* and the *Manuel for Complex Litigation* were securities fraud type cases which were much simpler, less risky, and less difficult cases which should not command nearly the attorney's fee as the current oil and gas working interests' owner cases. Further, these securities cases have been and can be subject to abuses. Clearly, they neither believed that that there was any such abuse here.

APPLICATION:

Newberg[16], the *Manuel for Complex Litigation*[17], and Oklahoma jurisprudence[18] approve of the common fund doctrine, and allow taking a percentage or contingency of the fund created in settlement of the case for the attorney's fees and costs for plaintiff's counsel. In class actions such as this, the percentage fee or contingency fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach rewards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method

[14] See footnote 7 above.
[15] Mr. Barker, who apparently had much less experience in this type case only indicated that the corporations v. corporations in such working interests cases garner less sympathy from juries and judges. Thus, the risks were much greater.
[16] *Newberg on Class Actions*, Fourth Edition, § 14.6.
[17] Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.121
[18] *Oklahoma Tax Commission v. Ricks,* 1994 OK 115, 885 P.2d 1336, 1339.

encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

However, this court must still determine what a reasonable and fair percentage is for both counsel and the Class.

This Court will use a bifurcated approach, considering first the basic guidelines established in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659[19], and also the additional factors from the *Manuel for Complex Litigation.*

1. In *Burk,* the Supreme Court enunciated twelve factors to be considered by the District Court in fixing fees under the lodestar approach. These factors, evaluated below, give this court a general indication that the requested forty percent of the common fund is reasonable.

    1) Time and labor required. Counsel has made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

    2) The novelty and difficulty of the question. The oil and gas accounting issues involved in this case have proved to be very complex. Further, as noted in the hearing much of what was done here "plowed new ground". Without question the issues in the litigation were novel, complex and difficult.

    3) The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources necessitated assembling a team of Class Counsel skilled in oil and gas litigation, as well as details of complex litigation. Counsel's qualifications, skills and experience are well known throughout

[19] The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort benefited only the City of Oklahoma City. The attorneys' fee awarded in that case amounted to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future.

the oil and gas legal community. Class Counsel are certainly highly skilled and capable counsel.

4) The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced Class Counsel's opportunity for employment in other matters.

5) The customary fee. These types of cases (oil and gas class action cases) are handled on a contingent fee basis. What is reasonable and normal is discussed below, but this is to be determined on a case by case basis, dependant upon the facts of this particular case.

6) Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representative as discussed above. They argue that this should also be applied to the entire Class.

7) Time limitations imposed by client or circumstances. Numerous time limitations were imposed on Class Counsel throughout the course of the proceedings. This Court and the appellate courts imposed time limitations through case scheduling over the last eight years that forced Class Counsel to perform services of great magnitude by certain dates. The schedules of the courts, witnesses and clients were also accommodated on a regular basis by Class Counsel. A case of the size and complexity existing here required the commitment of a large percentage of the total time and resources of the firms of Class Counsel and worked significant hardships on them over the course of this case. The circumstances of the case required the litigation to be vigorously pursued if an excellent recovery through settlement was to be achieved. Class Counsel, in fact, did vigorously prosecute the case and obtained excellent results for the Class.

8) The amount involved and the results obtained. There can be no doubt that, at the outset, Class Counsel had no assurance of any recovery. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. The Court considers this settlement to be an excellent result for the Class.

9) Experience, reputation and ability of counsel. Class Counsel's qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are excellent litigators.

10) The undesirability of the case. Compared to most civil, contingent litigation attracting counsel to represent plaintiffs, this litigation clearly fits the initially "undesirable" test. Not many law firms would be willing, or able, to risk investing the time and expenses necessary to prosecute this litigation. The Defendant was well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

11) Nature and length of the professional relationship with the client. Class Counsel has an on-going relationship with Lobo.

12) Awards in similar cases. This is one of the most critical factors. However, the discussions in both *Newberg* and the *Manuel for Complex Litigation* give this court better guidance on how to evaluate this factor. Thus, this Court incorporates said discussion set out below herein by reference in finding that the requested 40% fee is customary in these types of cases.

13) Multiplier as an additional factor: In 1980, the Oklahoma Supreme Court followed and modified *Burk, supra,* to further instruct District Courts that counsel fees cannot be fairly awarded on the basis of time alone, but other factors, particularly the litigation risk factor, must be considered. Thus, they added this thirteenth factor.

The general agreement in all jurisdictions is that the time and labor spent by the attorney in performing services for which compensation is sought is an important factor to be considered in setting a reasonable fee. However, it is also commonly agreed that the time element must be considered in connection with other factors. Fees cannot fairly be awarded on the basis of time alone. The use of time as the sole criterion is of dubious value because economy of time could cease to be a virtue; and inexperience, inefficiency, and incompetence may be rewarded to the detriment of expeditious disposition of litigation. The litigation risk factor must be considered. Although the court initially looks to the hourly rate for comparable representation where compensation is guaranteed, it must adjust the basic hourly rate where compensation is contingent by assessing the likelihood of success at the outset of the representation. See *Oliver's Sportcenter, Inc. vs. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291.

In the authorities noted herein this amounts to a cross-check via the lodestar method.

Stated more clearly in terms that we are dealing with here, once the amount of reasonable hourly billing has been determined, the court generally uses this as a cross-check to determine whether the percentage recovery from the common fund is reasonable. Here one must multiply approximately 8.7 times the billed amount to equal the forty percent recovery that is requested.[20] I evaluate this multiplier under h, p. 12 below.

[20] *Newberg on Class Actions,* Fourth Edition, indicates that multipliers of one to four are frequently awarded in common fun cases, but these may be larger in "large common fund" cases. § 14.6, footnote 87 indicates that

2. Secondly, I shall review the facts also in light of the additional factors from *the Manuel for Complex Litigation*. These, I believe, give to this court necessary additional guidance in this type of case:

a. *The size of the fund and the number of persons who actually receive monetary benefits:* Clearly this is a significant fund, $150,000,000, for which every class member shall receive a benefit. All shall be paid a minimum amount[21], and those that prove damages (which I presume to be the vast majority) should receive about one hundred eighty percent of their original loss.

b. *Any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation:* This is the contingency agreement as to attorneys' fees between Class Counsel and class representative noted above. I also note that Class Counsel has agreed to limit their request for attorneys' fees to forty percent of the common fund.

c. *Any substantial objections to the settlement terms or fees requested by counsel for the class by class members (it is, however, a court's duty to scrutinize applications for fees, independently of any objection . . .:* Clearly here there were no real objections[22], and one of the larger class members, Sampson Resources, filed an affidavit urging this court to approve the fees requested by class counsel.

d. *The skill and efficiency of the attorneys; (Newberg, states this together with e, below, as "the amount of the benefit conferred upon the Class that could properly be*

multipliers from 5 to 10 have been used.
[21] This is either $5 or $10.
[22] See footnote 2 above.

attributed to Class Counsel"[23]*:* As noted above it is clear that this result could not have been reached except for the great skill, tenacity, and insight of Class counsel into both the merits of this litigation, and what was a reasonable damage amount. It is also clear that without such Class Counsel that the class would likely not have benefited, or as least that their benefit would have been much lesser.

First, until this action was filed apparently these matters had not been litigated by the class members since they began to accrue in 1983, i.e. when this alleged "double-dipping" began. Thus, the class members elected not to take the risks of litigating for these many years. Whether they did this because they did not perceive that they had a case, the returns were too small compared to the risks, BP's accounting system too complex or for some other reason; at this stage, aside from this action, it is very unlikely that the class would have received any return aside from this lawsuit.

Further, even after this action was filed, this litigation has been hard fought at least since its filing in 1997, and only settled at the very eve of trial. Even when the initial offers of settlement were tendered by BP, these were significantly less than that for which settlement was reached. The only way that the settlement became possible was via Class Counsel doing tremendous amounts of discovery, both of the merits – so that all were well aware of the strengths of their case, and of the damages – so that the amounts of loss could be accurately determined; and contesting a number of legal motions – to clarify the issues[24]. It was only at this late date after these issues became

[23] *Newberg on Class Actions*, Fourth Edition, § 14.7, p. 582.

[24] I presume the most significant single motion would be Class Counsel's Motion to Determine of the Contract Terms Were Ambiguous. This was , as were the remaining motions, hotly contested with both briefing, factual citations and oral arguments. In this, this Court's determination that the COPAS Accounting Procedure language was not ambiguous so as to possibly allow direct billing of the "Operation Centers" was quite critical.

However, even this would not have been possible without the voluminous amounts of discovery, and the

clearer, that, apparently, this matter was able to settle. This, again, was due to the skill and tenacity of Class counsel.

In summation, Class Counsel has conferred great benefits on this class for which they otherwise would not have otherwise received anything.

e. *The complexity and duration of the litigation:* I will not reiterate these findings as they were made already above, but this was very difficult and complex litigation. Its life was about ten years prior to settlement, eight of which was after the filing of the litigation.

f. *The risks of nonrecovery and nonpayment:* It is unclear whether this means prior to settlement or after, but probably after. Prior to settlement, the risks of nonrecovery, as noted above, were great. After settlement, there is virtually no risk of nonrecovery or nonpayment for any class member who has any damages since the full settlement had been paid.

g. *The amount of time reasonably devoted to the case by counsel; even where fees are to be awarded on a percentage-of-fund basis, some judges cross-check the percentage by conducting a modified lodestar analysis:* This factor divides the amount of attorneys' fee requested ($60,000,000) by the charge for billable time presented by Class Counsel (approximately $6,900,000) for a multiplier of 8.7. *Newberg* lists this as high in the acceptable range[25]. Even so, due to the factors listed in my

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prior legal motions related both to discovery and other legal issues. (One additional example was the Motion to Determine What Law was applicable to this case.) Each part is critical, pyramiding on the prior findings.

[25] In appropriate cases where Class Counsel has created a large common fund, such as in the present case, multipliers of 5 to 10 have been awarded. See, *Herbert Newberg*, Newberg on Class Actions (3rd), § 14.03 (emphasis added):

> Courts applying the lodestar approach will often use large multipliers or monetary enhancements of the time/rate (lodestar) calculation in order to reach fee award results comparable to percentage of recovery

consideration of the specifics of this case in h below, I find that due both to the difficulties of this case and the excellent settlement, this is acceptable for these particular facts.

h. *The awards in similar cases:* It is here that I review similar awards in other cases. First, both *Newberg* and the *Manuel for Complex Litigation* set the benchmark for attorneys' fees at 20-33 percent of the common-fund, and much lesser in such mega-fund settlements as this.

However, as noted above, *Newberg* somewhat disavows the declining percent of recovery for larger settlements as not accurately reflecting the market. Reducing the percent of attorney's fees for larger settlements does not encourage counsel to take the risks to secure larger settlements as their rewards not much greater. As noted, such declining attorneys' fee percentage does not truly align the interests of Class Counsel and the Class.

Additionally, as noted by the experts presented by Class Counsel, the cited benchmarks appear to be more appropriate for securities litigation than this type of oil and gas litigation. These attorneys indicated that a contingent attorneys' fee of at least forty percent of the common fund is normative for this type of "working-interests'

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fees. **Multiples ranging from <u>one to four frequently</u> are awarded in common fund cases when the lodestar method is applied. <u>A large common fund award way warrant an even larger multiple</u>.**[21]

[Fn. 21] *See e.g., In re Beverly Hills Fire Litig*, 639 F. Supp. 915 (ED Ky 1986) (personal injury class action; **<u>multiplier of 5</u> for lead counsel for contingency and superior trial skill**); *Wilson v. Bank of Am Natl Trust & Savs Assn*, No. 643872 (Cal Sup Ct Aug 16, 1982) (illegal use of escrow funds by lender for profit; noncontingent hourly rates of up to $150/hour and a **<u>multiplier of up to 10 times</u>** the hourly rate). [End of Fn. 21]

owners v. well operator" class litigation. The table of cases listed by Class Counsel supports this conclusion[26].

I have highlighted both this litigation, and the only other two working-interests owner type cases of which I am aware. The rest, I believe, are royalty owner type cases. The first of these similar cases is *Cactus Petroleum v. Chesapeake*. In this case the attorney fee granted was clearly a lesser amount of the common fund (26.37

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Statistics maintained by the Coalition of Oklahoma Surface & Mineral Owners, Inc.			Percentage of Common Fund Awarded			
Case Name	Year Awarded	"Common Fund"	Total Award of Fees & Costs	Attorney Fee	Litigation Costs	Class Rep. Fee
Fazekas v. Arco	2002	$6,250,000	**51.40%**	35.00%	10.00%	6.40%
Kouns v. ConocoPhillips	2004	$4,300,000	**46.04%**	42.56%	3.02%	0.47%
Rudman v Texaco	2001	$25,000,000	**44.27%**	40.00%	3.27%	1.00%
McIntoush v. Questar	2002	$1,500,000	**43.54%**	40.00%	3.20%	0.33%
Black Hawk v. Exxon	1999	$9,000,000	**42.87%**	31.80%	7.35%	3.72%
Brumley v. ConocoPhillips	2005	$29,261,379	**42.16%**	37.91%	3.12%	1.13%
Continental v. Conoco	2005	$23,000,000	**41.24%**	40.00%	0.74%	0.50%
Robertson/Taylor v. Sanguine	2003	$13,250,606	**41.08%**	40.00%	0.08%	1.00%
Lobo v. BP (As Requested)	2005	$150,000,000	**40.91%**	40.00%	0.50%	0.50%
Mayo v. Kaiser-Francis	2004	$5,000,000	**40.85%**	40.00%	0.85%	0.00%
Velma-Alma v. Chesapeake	2004	$10,500,000	**40.01%**	34.95%	3.05%	2.00%
Shockey v. Chevron	2005	$60,000,000	**37.77%**	33.33%	4.02%	0.42%
Duke v. Apache	2002	$1,967,500	**37.02%**	33.33%	3.69%	0.00%
Barnaby v. Marathon	2003	$3,645,241	**35.51%**	33.33%	1.85%	0.33%
Booth v. Cross Timbers	2003	$2,500,000	**35.33%**	33.33%	1.60%	0.40%
Kouns v. Kaiser-Francis	2003	$3,100,000	**34.69%**	33.33%	0.97%	0.39%
Kouns v. Louis Drefus	2003	$2,778,125	**34.56%**	33.33%	0.79%	0.43%
Bridenstine v. Kaiser-Francis	2001-04	$109,974,437	**33.89%**	30.00%	3.08%	0.81%
Duke v. Samson	1996	$1,454,375	**30.21%**	30.00%	0.21%	0.00%
Cactus Petrol. v. Chesapeake	2005	$6,500,000	**30.00%**	26.37%	3.29%	0.35%
Greghol v. Barrett	1996	$180,000	**30.00%**	30.00%	Undetermined	0.00%

percent) than is requested here. However, this matter was settled within three months of the litigation being filed, and this amid controversy about whether the settlement was proper. The trial court found said settlement to be fair and reasonable, and approved the same. His order only indicates that class counsel requests this 26 percent fee. I do not find this comparable to the settlement and litigation at bar so as to consider it in determining this attorneys' fee.

The differences are clear, but I list only three[27]. Here the litigation was quite complex and had been pursued for a number of years (ten) so that this matter was on the eve of trial when settled. Further, there is no question here but that the settlement was fair, and there were no objectors to the same.

A more closely parallel case is *Continental v. Conoco* where the litigation had progressed for ten years. Settlement was in 2005, and the initial action filed in 1995[28]. The initial certification had been granted by the trial court, and then reversed on appeal. Then, I believe, after the second certification hearing it was settled. This required 7,500 attorney hours. The settlement was apparently quite favorable, giving class members 22 percent in addition to their claimed losses.

Also in *Continental*, the court approved an attorneys' fee of forty percent of the common fund, as requested[29]. I believe that this decision, is quite analogous to the facts at bar.

[27] The testimony indicated that Class Counsel there was not as tenacious as here. I make no comment on this.
[28] A second matter was apparently filed against Conoco in 2000. This was then consolidated with the earlier case.
[29] The lodestar multiplier there was 3.6.

Further, this, with the remaining decisions on this table and the testimony of the experts presented by Class Counsel clearly indicate that the requested forty percent of the common fund for this attorneys' fee is reasonable.

Application to the Particular Facts at Bar:

Even so, to reach a decision in this case, the authorities indicate that this amount must be determined ultimately by the specific facts of this case. These findings have generally been made via my determinations above based upon the *Burk* factors, and this court's findings on the factors within which I am now working from the *Manuel for Complex Litigation.* Thus, I will only comment generally on a few of these facts.

First, this litigation was quite complex and difficult, and it was in an advanced stage of litigation when it was settled. Secondly, the settlement reached was clearly quite advantageous for each of the class members even after the requested attorneys' fees are removed. Thirdly, the Class has not objected to said request for attorneys' fee[30] and one large class member urged this court to approve the same. Fourthly, Class Counsel clearly has taken great risks, and exercised considerable skill and tenacity over an extended length of time to achieve this result. Finally, as noted by Class Counsel's experts, the forty percent figure is reasonable and normal for this type of litigation – especially in light of the other factors listed herein. For all of this reasons, it appears that the requested attorneys' fee request of forty percent is reasonable, especially for this set of facts.

Based upon the Court's analysis of all of the factors above-listed, the Court finds a reasonable fee in this case to be forty percent of the settlement fund (or $60,000,000.00), plus accrued interest thereon is reasonable in this particular case.

[30] Save the one objector noted in footnote 11 who failed to appear and whose comments indicated that he did not understand this case.

Expert Witness Fees, Litigation Expenses and Class Representatives Fee:

The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, and having heard testimony of Class Counsel regarding the necessity of such expenditures in preparation of the case, finds that reasonable expert witness fees and litigation expenses were incurred in the amount of $621,760.69.

The Court finds the Class Representative has made substantial time and labor commitments to the Class, and has incurred both legal and financial risks while pursuing this case on behalf of the Class, all of which resulted in obtaining an excellent benefit for the Class. The granting of a Class Representative fee is based upon the same equitable considerations discussed above which related to a party's efforts in the creation of a common fund for the mutual benefit of a class. Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund. In this action, Class Counsel has recommended and requested a Class Representative's fee of one-half of one percent (0.5 %) of the Settlement Fund. The Court finds that compensation to the Class Representative in the amount of one-half of one percent (0.5 %) of the Settlement Fund is fair and reasonable compensation for Lobo's services to the Class.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Class Counsel are awarded attorney fees in the amount of 40% of the Common Fund; (2) Class Counsel are awarded reimbursement of litigation expenses in the amount of $621,760.69; and (3) Class Representative is awarded fees in the amount of one-half of one percent (0.5 %) of the Settlement Fund. The Court also finds that said amounts are payable to Class Counsel and the

Class Representative "upon the Settlement becoming Final and Unappealable, or on January 2, 2006, whichever is later," as set forth in the Settlement Administration Plan.

IT IS SO ORDERED this 8th day of December, 2005.

Gerald Riffe
Judge of the District Court

Certificate of Service

This is to certify that on the 8th day of December, 2005, a true and correct copy of the foregoing document was delivered via e-mail to the too the following:

David Petty
Richard C. Godfrey
Matthew Regan
Jeffrey S. Powell
Robert J. Kee
Alan DeVore
Terry Stowers
Daniel Payton

This is to certify that on the 8th day of December, 2005, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

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BEAVER DISTRICT COURT SEAL OKLAHOMA

Sharon Raven, Beaver County Court Clerk
By: Debbie Brennon
Deputy

Exhibit 2

IN THE DISTRICT COURT OF TEXAS COUNTY
STATE OF OKLAHOMA

JEANNE BRUMLEY, TIM MEYER INDIVIDUALLY AND AS TRUSTEE OF THE ALLEN TIM MEYER REVOCABLE TRUST DATED APRIL 5, 1993, and JANITH NEVILLE INDIVIDUALLY AND AS CO-TRUSTEE OF THE CHESTER L. PHILIPPE TESTAMENTARY TRUST AND CO-TRUSTEE OF THE EDNA MAUREEN PHILIPPE TESTAMENTARY TRUST, for themselves and all others similarly situated, Plaintiffs, v. CONOCOPHILLIPS COMPANY, a Delaware Corporation, formerly known as Phillips Petroleum Company, and CONOCOPHILLIPS, a Delaware Corporation, Defendants.	)	Case No. CJ-2001-5

TEXAS COUNTY
FILED
FEB 3 - 2005
KAREN PARISH
COURT CLERK

ORDER ON CLASS COUNSELS' MOTION FOR ATTORNEYS' FEE, REPRESENTATIVES' FEE AND REIMBURSEMENT OF LITIGATION EXPENSES FROM THE COMMON FUND

This matter came on for hearing the 11th day of October, 2004, pursuant to Notice for hearing to determine the fairness and appropriateness of Class Counsel's fees and expenses and Class Representatives' fees to be paid out of the Common Fund. All named parties were present (Class Representatives were present by and through Jeanne Brumley, Tim Meyer individually and as trustee of the Allen Tim Meyer Revocable Trust dated April 5, 1993 and Janith Neville individually and as Co-Trustee of the Chester L. Philippe Testamentary Trust and Co-Trustee of the Edna Maureen Philippe Testamentary Trust) and represented by Class Counsel (Robert N.

Barnes, Charles L. Puckett, Jr., Robert G.Gum and Bryan Wright). Also appearing *pro se* were the following class members: David Patrick Long and James N. Oakes, Sr.

After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented, and being fully advised in the premises, THE COURT FINDS AND ORDERS AS FOLLOWS:

Notice:

Notice of this hearing, and Class Counsels' requested fees and litigation expense reimbursement, and Class Representative fee, was properly mailed by ConocoPhillips to Class Members with known valid mailing addresses and was published as required by this Court's previous order (see ConocoPhillips's reports concerning notice previously filed with the Court).

The Notice provided that Class Counsel were seeking an attorney fee equal to 1/3 of the Total Common Fund and recovery of litigation expenses estimated at that time to be $860,000. Also, the Notice disclosed that a Class Representative fee equal to 1% of the Total Common Fund would be sought. The Court previously approved such notice and now finds that the notice to the class of this hearing is proper and sufficient under 12 O.S. § 2023 (E), the Due Process Clause of the United States Constitution and the Due Process Clause of the Oklahoma Constitution.

Objections:

The Class includes more than 3,000 members. The attorney fee request originally made was 1/3 of the Total Common Fund. Only 18 of the class members have objected to the Class Counsel's

request for attorneys' fees.[1] There have been no objections to Class Counsel's request for reimbursement of expenses which were previously estimated to be $860,000.00.[2] One objection (James N. Oakes, individually and as joint tenants with Betty L. Oakes) has been made to the 1% of the Total Common Fund Class Representatives' fee. Mr. Oakes did not object to the requested 1/3 of the Total Common Fund attorney fee request. None of the objectors presented any evidence or witnesses. There was no evidence presented that the fee requested was unreasonable or improper. Class Counsel presented numerous exhibits, affidavits and the live testimony of Robert N. Barnes, Michael Burrage (former Oklahoma federal district judge), and Jeanne Brumley. There was no evidence contradicting Class Counsel's evidence of what a reasonable fee should be.

None of the objectors purport to represent anyone other than themselves. Objector D. Patrick Long did cross examine witnesses. Mr. Long is an attorney licensed to practice law in the State of Texas.[3] Mr. Long appeared only *pro se* and not as the representative of any other objector. None of the objectors sought in any way to represent the Class as a whole in opposition to the requested fees and expenses which are the subject of this order. Therefore, to the extent any

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[1] Persons objecting to the attorney fee along with their respective percentages of class claims are: Mary Margaret Lindley Erker .0021512%, Vonciele W. Gray.1114442%, John G. & Beatrice F. Grice .0065411%, William & Suzanne Landess 2.2914996%, Beulah Yoakam Lee .1145659%, Joe R. Lee .0853432%, Lawrence P. Lindley .0021512%, Margaret Long Lindley.0025390%, Michael P. Lindley .0021512%, Phillip B. Lindley .0021512%, Thomas Joseph Lindley .0021512%, George M. Long .0075291%, Louis & Esther Long.0094407%, Stephen K. Long .1533990%, Martha Ann Lindley McClenney .0021512%, Betty Sue Moore .0387778%, Dale Moore .0037607% and David Patrick Long .0500345%. In total the objectors represent approx. 2.9% of the class claims.

[2] At the time of the hearing, class counsel put on evidence that the expenses incurred were $912,955.36. The increased amount resulted from additional expenses incurred since the time the notice was mailed and estimated future expenses likely to be incurred during the distribution process. No objections were made to this amount at the hearing. The hearing exhibit supporting the above amount had some corrections and additions not previously reflected in Appendix 4 of Class Counsel's "Report to the Court" filed on October 7, 2004. There were no objections to class Counsel being reimbursed for all of the $912,955.36 expenses. The objection of James Oakes also asserted that one-third of the total litigation expenses be borne by class counsel, but no evidence or authority in support of this proposition was offered.

[3] Mr Long is known by this Court to be held in high regard and well respected by his colleagues and the legal communities in which he practices law. Mr. Long has appeared Pro Hac Vice before this Court on prior dates and in matters not related herein.

objector appeals this order his appeal shall only effect that portion of the award affecting his/her individual interest and not to any other class member now identified and certified by this Court. This judicial determination is necessary and proper to prevent the appeal of one or a few objectors impacting and causing lengthy delay in the distribution of settlement funds to the remaining class members.

Class Counsel's Attorneys' Fee:

Class Counsel presented evidence that the Total Common Fund is comprised of $30,000,000 cash plus accrued interest of $761,379 and future benefits of approximately $7,590,000 and less $600,000 representing the approximate portion of the Total Common Fund attributable to the interest of the Commissioners of the Land Office (CLO), which opted out of the class.[4] Thus, the Total Common Fund, after considering the CLO opt out, is estimated to be $37,751,379 through the time that distribution will be made to the Class Members in early 2005. At the time of the hearing, Class Counsel reduced their attorney fee request to a total of $11,092,736 which is 29.38% of the Total Common Fund value. This reduced amount takes into consideration the opt out of the CLO.

The attorney fee amount is to be paid out of the cash settlement proceeds consideration paid by ConocoPhillips. Class Counsel has not requested any additional amount be paid in the future even though the settlement negotiated with ConocoPhillips will result in higher royalty revenue being paid in the future. Testimony showed that the Class Representatives fee is $331,861, i.e. 0.88% of the Total Common Fund as calculated above.

[4] The future benefit is based upon pricing concessions from ConocoPhillips on future gas royalty payments which will be paid over a 10 year period commencing 8/1/04. The amount is based upon engineering estimates of future production assuming a $4/mmbtu price and discounted to present value at 8%. The evidence showed that the increased price was approximately 25% higher than the price being paid before the settlement by ConocoPhillips to royalty owners.

The objecting class member presented an argument under *Burke v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979), that attorney's fees in common fund class actions are limited to hours expended times hourly rate ("loadstar") plus a bonus of no more than 40 – 50%, if special circumstances or performance so warrants. The Court concludes that *Burke* does provide for a loadstar approach to calculating fees in cases requiring such an approach and has not been specifically overturned. However, two of the factors (so called "*Burke* factors") that a court is required to consider as to the reasonableness of a fee are the "customary fee" and the "fee awarded in similar cases." *Burke*, 598 P.2d at 661. Class Counsel introduced evidence that attorney's fees in every common fund class action in Oklahoma dealing with underpayment of royalty were calculated by the percent of common fund method and that the average fee was 32.2% of the common fund value. Class Counsel Exhibit 11 (pages 2 and 3) and testimony of Michael Burrage. This evidence was uncontroverted. The uncontroverted testimony of Michael Burrage and corresponding Class Counsel Exhibit II introduced, was of great benefit and assistance to this sitting Court for determination of the attorneys' fee award issue herein. Simply stated, the Burrage testimony and presentation gave this Court a vivid panoramic view of similar awards in State and Federal Class Action Cases and the application of Oklahoma law to its affect therein. The presentation of testimony and evidence from Michael Burrage as well, encompassed cases from the Federal 10th Circuit and State District Courts of Kansas.

A percent of common fund attorney fee award is recognized in Oklahoma:

> As a general rule attorney's fees are not recoverable absent some statutory authority or an enforceable contract. The common-fund (or equitable-fund) doctrine affords a recognized exception to this rule. When an individual's efforts succeed in

> creating or preserving a fund, which benefits similarly situated non-litigants, equity powers may be invoked to charge that fund with attorney's fees for legal services rendered in its creation or preservation. The doctrine is rooted in historic equity jurisdiction, but owes its sudden appearance in this country to U.S. Supreme Court jurisprudence of the last century. Oklahoma case law has long recognized the doctrine. [Footnote citations omitted. Emphasis added.]

Oklahoma Tax Commission v. Ricks, 1994 OK 115, 885 P.2d 1336

The Newburg class action treatise, citing and quoting from *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541 (1984), recognizes that it is appropriate to award an attorney's fees based on a percent of the value of the common fund established for the benefit of the class:

> In contrast to a statutory fee determination, payable by the defendant depending on the extent of success achieved, a common fund is itself the measure of success. While the common fund recovered may be more or less than demanded or expected, the common fund represents the benchmark from which a reasonable fee will be awarded. Accordingly, in *Blum v. Stenson*, [FN83] another statutory fee case, the Supreme Court recognized this major distinction governing the determination of fee awards under a statute in contrast to the common fund doctrines. "Unlike the calculation of attorney's fees under the 'common fund doctrine' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under 1988 [a federal fee shifting statute] reflects the amount of attorney time reasonably expended on the litigation."

Newburg on Class Actions § 14:6 (4th ed. 2002)

The calculation and award of attorney's fees using a percent of common fund approach is appropriate. The Court also considered the basic guidelines established by the Oklahoma

Supreme Court in confirming the reasonableness of fees. *Oliver's Sport Center, Inc. v. National Standard Ins. Co.*, 615 P.2d 291 (Okla.1980).

The Court has reviewed the detailed time records submitted by Class Counsel (Class Exhibit 9 and also attached as Appendix 3 to Class Counsel's Report to the Court filed on October 7, 2004) and finds that the time summarized therein (11,057.7 hours) was reasonably expended for the benefit of the Class.[5] The Court has also reviewed the hourly rates of Class Counsel as set forth in the above referenced Exhibit and finds them to be reasonable and within the acceptable range in the local legal community for this type of legal services. Thus, the Court further finds the lodestar (hours X rates) in this case to be $2,582,881 currently expended plus an estimated $300,000 (including both time recently incurred but not yet billed and future time monitoring the distribution of the Settlement Fund) for a total lodestar of $2,882,881.

Only Mr. Long objected to the lodestar amount. At the end of the hearing he advised the Court that his objection was limited to: 1.) the $500/hr rate of Robert Barnes – which he believed should be reduced; and 2.) the paralegal time of Linda Beebe. As to Mr. Barnes rate neither Mr. Long nor any one else offered evidence as to how much Mr. Barnes rate should be reduced. On the other hand, Mr. Barnes testified that several large Oil Companies in Oklahoma City would be willing to pay him $500/hr for his time. Mr. Barnes further testified he could easily bill all of his available time at this rate if he would agree to forgo working on contingent fee class actions such as this one. Judge Burrage testified that Mr. Barnes' hourly rate was indeed high. However,

[5] I note from the presentation on October 11, 2004, the few hours of Attorney Robert Barnes' time that were not attributable to this case and I take the same into consideration herein.

Judge Burrage testified that it was reasonable in this case because clients willingly paid that rate to Mr. Barnes. Judge Burrage further opined that Mr. Barnes was virtually in a league of his own among Oklahoma lawyers in relation to the extremely complex legal and factual issues involved in this case. Mr. Barnes has appeared before this Court with this Judge presiding over matters and as settlement conference judge in other matters now for a period exceeding seven (7) years from this date back. Mr. Barnes has represented both Plaintiffs' class and Defendants in class action type cases. Not addressing any one case, but certainly from now a historical mandate of results obtained for clients, it is no surprise and does not even begin to shock the conscious of this Court that Mr. Barnes commands, and is regularly paid, $500/hour for legal services rendered in the field of oil and gas. This observation I make only from a retrospective historical view and with no prospective thought or anticipation in mind as to other pending or future case. Each will stand on its own facts and circumstances. For these and other reasons the Court agrees, for purposes of lodestar calculation in this case it is appropriate to use the $500/hr rate for Mr. Barnes.

Mr. Long's objection to Linda Beebe's time at $80/hr for paralegal work is without merit. Mr. Long's only explanation for his objection was that Ms. Beebe had separately billed time as a landman expert in the case which was included as part of the expenses incurred in the case. Mr. Barnes testified that Ms. Beebe did work on the case in two different capacities i.e. as an expert testifying landman expert and as a contract paralegal. Her time was separately billed and paid. The Court finds, for purposes of calculating lodestar in this case, that Ms. Beebe's paralegal time and $80/hr rate should be allowed. It should be noted that the $80.00/hour rate for Ms. Beebe's

legal assistant time is not unreasonable when compared to the known hourly rate of legal assistants in the community of Texas County, Oklahoma, and First Judicial District.

Mr. Long also objected to the award of an attorney fee amounting to anything more than 140% of the lodestar. Mr. Long's objection was based on his legal interpretation of the Oklahoma Supreme Court holding in *Burke v. City of Oklahoma City* 598 P.2d. 659 (Okla. 1979). This legal point will be discussed later in this order. No objectors, including Mr. Long, offered in competent evidence of what the attorney fees should be if Mr. Long's legal position is rejected by this Court. It is not up to the Court to create evidence when none is offered. The Court will instead rely upon the competent evidence offered.

The Supreme Court in *Oliver's Sport Centers* confirmed twelve Attorney Fee factors to be considered by the District Court in considering the reasonableness of fees. Judge Burrage and Mr. Barnes provided evidence on each of these factors which is summarized in part below. Absolutely no contrary evidence was offered.

A. Time and labor required. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

B. The novelty and difficulty of the question. Class certification questions were vigorously contested by an excellent echelon of defense counsel who meticulously and artfully defended the certification questions with a degree of professionalism commensurate with Plaintiffs' counsel in a thirteen (13) day hearing. Furthermore, the oil and gas accounting issues involved in this case were extremely complex. Many of the legal questions presented were novel and complex.

C. The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources necessitated assembling a team of Class Counsel

skilled in oil and gas litigation, as well as details of complex litigation. Counsels' qualifications, skills and experience is well known throughout the oil and gas legal community. Class Counsel are highly skilled and capable counsel in this area of the law demanding focused expertise.

D. The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced the Class Counsel's opportunity for employment in other matters.

E. The customary fee. These types of cases (royalty accounting cases, in particular, common fund class actions) are always handled on a contingent fee basis. The fee percentage in these types of cases is typically 30% to 40% of the gross fund.[6]

F. Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representatives, and with Hitch Enterprises, Inc, (and other Hitch family members) that provided for an attorneys' fee of 1/3 of the gross consideration received from ConocoPhillips. Class Counsel agrees to advance litigation costs and recover litigation costs only from settlement proceeds received from

[6] Class Counsel's Exhibit "11" (Page 3) showed settlement in other royalty cases as follows:

Case	Amount	Percentage Fee Awarded
Rudman v. Texaco	$25,000,000	40%
Robertson v. Sanguine	$16,250,606	40%
Mayo v. Kaiser-Francis	$ 5,000,000	40%
McIntoush v. Questar	$ 1,500,000	40%
Modrall v. Hamon	$ 325,000	40%
Hieronymusv. Vince Allen & Assoc.	$ 120,000	40%
Velma-Alma v. Chesapeake	$15,500,000	35%
Fazekas v. ARCO	$ 6,250,000	35%
Shockey v. Chevron U.S.A., No. CJ-2001-7	$60,000,000 (Approx.)	33 1/3%
Barnaby v. Marathon	$ 3,645,241	33%
Kouns v. Kaiser-Francis	$ 3,100,000	33%
Kouns v. Louis Drefus NG (Dominion)	$ 2,778,125	33%
Booth v. Cross Timbers (XTO Energy)	$ 2,500,000	33%
Duke v. Apache Corp	$ 1,967,500	33%
Bridenstine v. Kaiser-Francis	$84,974,437	30%
Bridenstine v. UP/Questar/Chase	$26,500,000	30%
Duke v. Samsom	$ 1,454,375	30%
Greghol v. Barrett	$ 180,000	30%
In re Lease Oil Antitrust Litigation	$11,250,000	25%
Barnaby v. Ocean Energy	$ 2,875,000	23%
Dunsten v. Sonat Exploration	$ 1,572,500	20%
Handley v. Santa Fe Minerals	$ 4,250,000	16%
Burris v. Stephens Production Co	$ 565,000	15%

ConocoPhillips. The Court notes that Class Counsel's original agreement with Hitch was for a 30% contingent fee with Hitch paying all litigation costs. After Hitch had paid $346,427.66, Hitch no longer wished to continue paying expenses. By that time more than $90,000.00 in additional expenses had already been incurred and substantially more expenses were anticipated. A new arrangement was entered into between Class Counsel and Hitch whereby the contingent fee was increased to 1/3 of the gross consideration received and Class Counsel agreed to advance litigation costs. Class Counsel also agreed to reimburse Hitch 150% of the litigation expenses that Hitch had already paid.[7] Class Counsel, Robert N. Barnes, testified that he initially offered to handle the case based upon a 15% contingent fee plus payment of an hourly fee equal to ½ of his firm's hourly rates with Hitch paying all expenses. Alternatively, Mr. Barnes offered to handle the case for a 40% contingent fee with Mr. Barnes advancing litigation expenses. Hitch was only willing to proceed on the contingency fee basis described above. Mr. Barnes further testified that Suzanne Landess, one of the objectors, was present at that meeting and was aware that Class Counsel would be pursuing the case on a class action basis for a 30% contingency fee with Hitch paying expenses.[8] Ms. Landess was not a party to the attorney fee agreement, but she voiced no objection to the fee arrangement. Mr. Barnes testified that Stephen Long was also made aware in early 2002 that Mr. Barnes was pursuing the case on a contingent fee basis. Mr. Barnes testified that in oral conversations with Patrick Long in early 2002, he advised Mr. Long that he and other Class Counsel were pursuing the case on a 30% contingent fee basis with Hitch paying all expenses. Mr. Long voiced no objection to this attorney fee even though he was himself an experienced attorney. At the hearing none of the objectors disagreed with Mr. Barnes testimony, Mr. Barnes testified that those objectors acquiesced to the contingent fee basis for pursuing the case. The Court agrees. Pre-arranged fees, whether fixed or contingent, are not binding on the Court, but can be helpful in setting court awarded fees in a class action. Counsel for the Class has represented the Class with vigor and without prior compensation of any kind for their time.

G. Time limitations imposed by client or circumstances. While this Litigation has not involved any client-imposed time limitations, the circumstances of the case required the litigation to be vigorously pursued if an excellent recovery through settlement was to be achieved. Class Counsel, in fact,

[7] The 50% "bonus" which Class Counsel is obligated to pay to Hitch for advancing the initial expenses will be borne exclusively by Class Counsel. That additional amount is not part of the $912,955.36 being sought by Class Counsel for reimbursement of litigation expenses.
[8] As noted earlier Ms. Landess owns by far the largest interest among the objectors i.e. 2.3% out of the total 2.9%.

did vigorously prosecute the case and obtained excellent results for the Class.

H. The amount involved and the results obtained. Clearly, there can be no doubt that at the outset, Plaintiffs' Counsel had no assurance of any recovery. But for the efforts of Counsel, no Common Fund would exist. The Court considers this settlement to be an excellent result for the Class.[9] As known to this Court, the Fund created is second only to the *Bridenstine* case settlement fund when considering the results obtained over the last 15 years in Royalty Owner Class actions. The Court notes that Mr. Barnes was also class counsel in *Bridenstine.* Indeed, no class member has voiced any objection to the settlement with ConocoPhillips.

I. Experience, reputation and ability of counsel. Counsels' qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are exceptional litigators.

J. The undesirability of the case. Compared to most civil litigation, royalty owner class actions pursued on a contingent fee basis clearly fits the initially "undesirable" test. Testimony showed that only five or so Oklahoma law firms would be willing to risk investing the time and expenses necessary to prosecute this litigation. The issue of Class Certification was hotly contested and well battled in a thirteen (13) day hearing. At the time of the settlement the court had not yet ruled on certification. If the certification issue had been lost at the trial level or on appeal, Class Counsel would have received nothing for their work and would have had no way to recoup their expenses. As the Court now understands, those expenses push against the $1,000,000.00 mark. Liability issues were also strongly contested with ConocoPhillips still claiming that it had no liability. In two recent royalty owner class actions things have gone poorly at the trial level and on appeal resulting in the class counsel in those cases likely losing more than $1,000,000 in fees and expenses. In this case, there was uncontroverted evidence that the pressure of paying expenses played a large part in one of Class Counsel's firm (Robert Gum's firm) breaking apart. ConocoPhillips is well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

[9] In light of an opinion issued by the Oklahoma Supreme Court on December 7, 2004, which has not been released for publication due to a Petition for Rehearing pending with the Supreme Court. If that Opinion is ultimately released for publication by the Supreme Court, Class Members' claims in pending or future "Brumley" type cases could potentially be reduced and limited from that which was plead and asserted herein by Plaintiffs' Class. *Howell v. Texaco, Inc., 2004 OK 92*, Case Nunber 100164, Decided 12/07/04.

K. Nature and length of the professional relationship with the client. Class Counsel had no prior relationship with their clients in the case.

L. Awards in similar cases. The awards in similar cases were discussed in detail in Class Counsels' motion, exhibits and testimony. The Court incorporates said discussion herein by reference. The Court finds that a 30% to 40% fee is customary in these types of cases.

Knowing the rewards for Class Counsel can be great, so travels the path of loss for Class Counsel if defeat is the end result. Financial, personal, and emotional devastation are the potential events for a very few members of this Profession willing and able to represent thousands of strangers in order to obtain monetary benefit for those strangers that otherwise, without question, is unattainable through known legal means. From this aspect, the potential rewards of a Class Counsels' success and the potential devastation realized of a Class Counsels' defeat must be considered with open judicial mind.

While cross-examining Mr. Barnes and Judge Burrage Mr. Long claimed that the Oklahoma Supreme Courts holding in *Burke v. City of Oklahoma City* 598 P.2d. 659 (Okla. 1979) strictly limits attorney fee awards in common fund cases to 140% of lodestar. Both Mr. Barnes and Judge Burrage testified that there was no such limitation and that all subsequent district court attorney fees awards in royalty owner class actions have been on a percentage of the common fund basis averaging 32% of the common fund. Judge Burrage went on to testify that the lawyers in *Burke* actually received 100% of the then available equitable fund which a taxpayer lawsuit had created for the benefit of the City of Oklahoma City. Indeed, the award effectively allowed the attorney to even collect rentals due the city for several years into the future. Thus, to read the

Burke case as somehow limiting attorney fees in royalty owner class actions to 140% of lodestar is a view which the Court rejects.

Based upon the Court's analysis of the Attorney Fee factors, the Court finds a reasonable fee in this case to be $11,092,736 (which represents approximately 29.38% of the Total Common Fund or the lodestar of $2,882,881 times a multiplier of approximately 3.85). This percentage fee of 29.38% is notably lower than the average of 32% fee in other similar royalty owner class actions. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class and have resulted in the Common Fund.

An attorneys' fee award of approximately 29.38% of the Total Common Fund is a fair and reasonable amount of compensation to Class Counsel for establishing the Total Common Fund. The common fund percentage method also meets the relevant factors under *Burke* as it is the method used to calculate fees in all "similar cases" involving common fund class actions and is the "customary fee." This District has also applied the percent of common fund method in a similar case, explaining the reason for using this method in *Bridenstine v. Kaiser-Francis, et al.*, Case No. CJ-2000-1, District of Texas County, Oklahoma:

> The percentage fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive

> to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to date. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

Order on Class Counsels' Motion for Attorneys' Fee (And Costs) from the Common Fund in *Robertson v Sanguine*, Case No. CJ-02-150, District of Caddo County, Oklahoma. ¶5 (Copy of Order contained at Tab 17 in Authority for Class Counsel's Motion For Attorney's Fees From Settlement Proceeds, filed herein). Because of the self -regulating incentives for efficiency with the percentage fee as noted above, the percentage fee has important advantages to the Class and promotes efficiency rather than inefficiency. The percentage fee compensates Class Counsel on the real value of the services provided. The percentage fee method encouraged Class Counsel to go the extra mile and push beyond a "good" recovery to an "excellent" recovery. The Court in this case certainly considers the Total Common Fund to be an excellent recovery to the Class Members. To award Class Counsel a lesser percentage of the Total Common Fund because the efforts of Class Counsel have created an exceptionally large Fund would amount to penalizing Class Counsel for their success which the Court is unwilling to do. This Court makes no myth as to Class Counsels' attorney fee award herein. It is significant. Yet, it is reasonable and proper. It is fair and equitable. Additionally, the common sense reality is, when the efforts of Class Counsel create an exceptionally large Total Common Fund for the benefit of the Class and if Class Counsels' fees awarded therefrom are greatly restricted, then forseeably so goes later access to the Courthouse for other potential and future class members. From that common sense viewpoint and understanding it is all a matter of economics. So in conclusion, as in the many

other class cases referenced herein, under this percentage approach as thoroughly addressed hereinabove, the interests of the Class and Class Counsel will be consistent and aligned.

The Court finds that attorneys' fees of approximately 29.38% of the Total Common Fund created by the efforts of counsel for the class are appropriate, and is hereby awarded.

Expert Witness Fees, Litigation Expenses and Class Representatives Award:

The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, and having heard testimony of Class Counsel regarding the necessity of such expenditures in preparation of the case, finds that expert witness fees and litigation expenses were incurred in the amount of $912,955.36 for the benefit of the Class (including additional amounts yet to be incurred). There has been no objection by any class member to these expenses being awarded to Class Counsel.

The Class Representatives have been in attendance on many days of Court hearings. They have devoted great time and effort as Class Representatives should, both in Court and out of Court. The Court finds the Class Representatives have made substantial time and labor commitments to the benefit of the Class, and have incurred serious legal and financial risks while pursuing this case on behalf of the Class. All of which said has resulted in obtaining a huge benefit to the Class. The Court finds that fair and reasonable compensation in an amount equal to 0.88% of the Total Common Fund calculated above, ($331,861) should be awarded to Class Representatives as a fee, said amount to be split between the three Class Representatives equally.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this is a Common Fund Case. The attorney fee should be based upon a percent of the Common Fund. The Court finds that the percent of the Total Common Fund requested by Class Counsel for attorney fee is fair and equitable. Therefore, the Court awards as an attorney fee to Class Counsel 29.38% of the Total Common Fund to be paid out of the cash settlement proceeds. Likewise, the Class Representatives fee is fair and equitable. Therefore, the Court awards to the Class Representatives a fee equal to 0.88% of the Total Common Fund to be paid out of the cash settlement proceeds. Finally, the expense request is fair and equitable. Therefore, the Court awards to Class Counsel the sum of $912,955.36 as expenses to be paid out of the cash settlement proceeds.

IT IS SO ORDERED this 3rd day of February, 2005.

Greg A. Zigler
District Judge
First Judicial District
State of Oklahoma

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and accurate copy of the above and foregoing Order was mailed, postage prepaid on this 4th day of February, 2005, to the following:

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Jean Taylor
Secretary

Exhibit 3

IN THE DISTRICT COURT WITHIN AND FOR BEAVER COUNTY
STATE OF OKLAHOMA

JERALD LYNN LAVERTY, for himself and all others similarly situated,

Plaintiff,

vs.

NEWFIELD EXPLORATION MID-CONTINENT INC.

Defendant.

Case No. CJ-2002-101

ORDER ON MOTION FOR ATTORNEY FEES, LITIGATION EXPENSES, AND CLASS REPRESENTATIVE'S FEE

This matter came on for hearing on the 27th day of August, 2006, on Class Representative's and Class Counsels' motion for attorney fees, litigation expenses and Class Representative's fee. All named parties were present and represented by counsel, and no opposing parties appeared. After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented, and being fully advised in the premises, **THE COURT FINDS AND ORDERS AS FOLLOWS**:

Attorneys' Fees: This court notes that the Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14, p. 207 indicates "In class actions involving monetary stakes, the natural conflict that arises between lawyers and class members necessarily draws the judge into the role of regulating and awarding attorney fees. Unless the judge protects the interests of absentee class members, those interests may go unrepresented." In addition, the Court is well aware of its obligations under 5 O.S. § 7.1 which provides as follows:

> In class actions, in making an award of attorney fees, the court shall conduct an evidentiary hearing to determine a fair and reasonable fee for class counsel. In making such determination, the court shall act in a fiduciary capacity on behalf of the class.

The Court, in rendering this opinion, has carefully and independently considered the testimony of class counsel, the pleadings filed herein, including the authority attached to class counsel's fee application and the testimony of the class expert. The Court takes judicial notice of the time expended by Class Counsel directly before the Court on Motions to Dismiss, Motions for Summary Judgment, discovery motions, the class certification hearing and the vast amount of work required to advance a case of this complexity. In addition, the Court has taken into consideration the numerous years of experience this Court has in awarding, evaluating and determining reasonable attorney fees. The Court takes its role seriously and has taken independent and reasonable precautions to protect the interests of the class in undertaking its duties.

Newberg on Class Actions, Fourth Edition, § 14.6, p. 550, indicates that a fixed percentage, no matter the size of the common fund, aligns the interests of the class and class counsel so that as the settlement/judgment amount increases, the attorneys' fees do so proportionately. This suggests that a system using such a fixed percent mimics the market, and is best for both the class and class counsel. The Court's analysis is that the award must be based upon the specific facts of the case. Clearly, the settlement amount is to be considered within the facts of the particular case.

The Court incorporates the authorities and standards set forth in Plaintiff's Motion, including the authorities set forth within the exhibits thereto, and in the *Manual for Complex Litigation* and Oklahoma jurisprudence all of which approve the award of fees in a case such as

this as a percentage of the common fund. In class actions, percentage or contingency fees have important advantages that provide self-regulating incentives for efficiency and compensates counsel on the real value of the services provided.

In Oklahoma, the *Burk*[1] factors are to be considered. Then, the *Manual for Complex Litigation* lists certain additional factors[2]. Based upon these factors this court will evaluate the requests of counsel in light of the facts of this particular case, to wit:

a. This case was filed in December, 2002, after class counsel and the class representative conducted a preliminary investigation and research. After initial discovery, a two-day evidentiary trial was held in July, 2004, and the class was certified by the trial court on August 9, 2005. The Oklahoma Court of Civil Appeals affirmed this order in an unpublished opinion on August 25, 2006.
b. Class Counsel successfully overcame a motion to dismiss and motions for summary judgment. In addition, class counsel have engaged in extensive discovery, depositions and reviewing a significant number of boxes of documents in addition to electronic discovery. There have been contested hearings pertaining to this discovery.
c. Notice has been mailed and published to approximately 17,000 class members. The opt-outs were few and there were no substantive objections to the settlement itself.
d. The parties have retained and worked extensively with accounting and gas marketing experts.
e. Each portion of these matters heard by this court was skillfully and hotly contested by counsel; including both extensive pre-hearing briefs, and then supplementary verbal arguments.
f. In accomplishing all of the above, to date Class counsel has expended significant sums of money (the "litigation expenses" requested were $504,444.16), plus approximately 4,675 hours of billable time (the bill submitted for this calculated as the respective hourly rates for each of the respective attorneys aggregates approximately $1,636,390). This translates to great risks, skill and effort expended over a lengthy period of time by very tenacious counsel for the Class.
g. A settlement agreement has been executed by the parties, and approved by this court for $17,250,000. This amount has been deposited in a secure account where it is now drawing interest. The gross recovery equates to approximately ¢58/MCF for class members, the largest known royalty class settlement of 3rd party marketing fee deductions. Thus, this is an outstanding settlement.
h. Only three objections were filed[3]. A certain number of objections are expected in cases with a large number of class members. If only a small number of objections

[1] *State ex re/. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.
[2] Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.12, p. 214. See below.

are received, that fact can be viewed as indicative of the adequacy of the settlement. *See generally*, Newberg on Class Actions, 4th ed., §11:41 (2002), citing to *In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 174-75 (S.D.N.Y. 2000). A small number of objectors is one indication to the fairness of a settlement. *See generally*, Newberg on Class Actions, 4th ed., §11:48 (2002). The court considers the class response to the settlement as an indication that the settlement is an excellent recovery.

i. Finally the Class representative executed a contingency fee agreement with Class Counsel allowing them an attorneys' fee of Forty (40%) percent of the common fund.

j. In addition to the facts above, Class Counsel presented an expert witness who has significant experience in similar class action litigation, Allan DeVore. Mr. DeVore indicated as follows:

   i. He has extensive experience in similar class action litigation, and that there were few firms within this state who handle such litigation due both to the extreme risks and the amount of expertise involved.

   ii. The case at bar was very complex and difficult litigation with excellent defense counsel. Thus, plaintiff's counsel was equally skilled and tenacious. Class Counsel overcame substantial obstacles in getting the case certified which was affirmed on appeal.

   iii. Further, had this matter have gone to trial, the estimate is many more years of litigation which could more than double the time required, expenses, and significantly increase the risks. For example should the class loose one or more of the issues, then their recovery could be significantly reduced. Thus, while recovery could be lower or higher than the settlement, should this have proceeded to trial, the risks and expenses of said trial certainly militate in favor of this excellent settlement.

   iv. As noted above, this was an outstanding settlement. Further, it was accomplished in great part due to the tenacity and skill of class counsel. These attorneys should reap rewards for their diligence, skill and due to the risks involved.

APPLICATION:

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[3] Two objections were filed and limited only to Class Counsel's Fee request. Both of these objections were withdrawn prior to the hearing. The only other objection was the hand-written document filed by Mr. Hubbard which commented on the notice period and the fee request of counsel. The Court notes that Mr. Hubbard's filing failed to comply with the Court's notice regarding objections. In addition, Mr. Hubbard failed to appear at the hearing to present his objection and the request that his appearance be waived is denied. Moreover, Mr. Hubbard failed to provide the court with any factual or legal basis to support his objection nor did he present any argument in support thereof. Notwithstanding the deficiencies of Mr. Hubbard's filing, the Court considered the merits of the objection and, based upon all of the information before the Court, finds that said objection should be overruled and that Plaintiff's Motion for Fees and Costs should be granted.

Newberg[4], the *Manuel for Complex Litigation*[5], and Oklahoma jurisprudence[6] approve of the common fund doctrine, and allow taking a percentage or contingency of the fund created in settlement of the case as the attorney's fees for plaintiff's counsel. In class actions such as this, the percentage fee or contingency fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach rewards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

However, this court must still determine what a reasonable and fair percentage is for both counsel and the Class.

In arriving at a fair percentage, the Court will consider the basic guidelines established in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659[7], and also the additional factors from the *Manuel for Complex Litigation.* In *Burk,* the Supreme Court enunciated twelve factors to be considered by the District Court in fixing fees under the lodestar approach. These factors, evaluated below, give this Court a general indication that the requested forty percent (40%) attorney fee from the common fund is reasonable.

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[4] *Newberg on Class Actions*, Fourth Edition, § 14.6.
[5] Annotated *Manual for Complex Litigation,* Fourth Edition 2005, § 14.121
[6] *Oklahoma Tax Commission v. Ricks,* 1994 OK 115, 885 P.2d 1336, 1339 and authority cited in Plaintiff's brief are incorporated herein and made a part hereof.
[7] The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort benefited only the City of Oklahoma City. The attorneys' fee awarded in that case amounted to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future.

1) Time and labor required. Counsel has made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

2) The novelty and difficulty of the question. The oil and gas accounting issues involved in this case have proved to be very complex. Further, as noted in the hearing much of what was done here "plowed new ground". Without question the issues in the litigation were novel, complex and difficult.

3) The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources necessitated assembling a team of Class Counsel skilled in oil and gas litigation, as well as details of complex litigation. Counsel's qualifications, skills and experience are well known throughout the oil and gas legal community. Class Counsel are certainly highly skilled and capable counsel.

4) The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced Class Counsels' opportunity for employment in other matters. Class Counsel are either solo practitioners or members of small firms. The prosecution of this case has substantially reduced Class Counsels' opportunity for employment in other cases.

5) The customary fee. These types of cases (oil and gas class action cases) are handled on a contingent fee basis. What is reasonable and normal is discussed below, but this is to be determined on a case by case basis, dependant upon the facts of this particular case.

6) Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representative as discussed above.

7) Time limitations imposed by client or circumstances. Numerous time limitations were imposed on Class Counsel throughout the course of the proceedings. This Court and the appellate courts imposed time limitations through case scheduling over the past several years that forced Class Counsel to perform services of great magnitude by certain dates. The schedules of the courts, witnesses and clients were also accommodated on a regular basis by Class Counsel. A case of the size and complexity

existing here required the commitment of a large percentage of the total time and resources of the firms of Class Counsel and worked significant hardships on them over the course of this case. The circumstances of the case required the litigation to be vigorously pursued if an excellent recovery through settlement was to be achieved. Class Counsel, in fact, did vigorously prosecute the case and obtained excellent results for the Class.

8) The amount involved and the results obtained. There can be no doubt that, at the outset, Class Counsel had no assurance of any recovery. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. The Court considers this settlement to be an excellent result for the Class. As reflected herein, the settlement represents the largest class recovery on an MCF basis of third party marketing deductions in Oklahoma history.

9) Experience, reputation and ability of counsel. Class Counsels' qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are excellent litigators.

10) The undesirability of the case. Compared to most civil, contingent litigation attracting counsel to represent plaintiffs, this litigation clearly fits the initially "undesirable" test. Litigation of this nature is extremely risky, expensive and stressful and takes years of effort and energy. Not many law firms would be willing, or able, to risk investing the time and expenses necessary to prosecute this litigation. The Defendant was well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

11) Nature and length of the professional relationship with the client. Mr. Hodgden's firm has maintained an ongoing attorney/client relationship with Mr. Laverty and his family for over 44 years. There is always significant risk to a client who participates as a plaintiff in a large lawsuit, in terms of the client's reputation, future business dealings, liability for costs, and other potentially adverse considerations.

12) Awards in similar cases. This is one of the most critical factors. However, the discussions in both *Newberg* and the *Manuel for Complex Litigation* give this court better guidance on how to evaluate this factor. Thus, this Court incorporates said discussion set out below herein by reference in finding that the requested 40% fee is customary in these types of cases.

13) Multiplier as an additional factor. In 1980, the Oklahoma Supreme Court followed and modified *Burk, supra,* to further instruct District Courts that counsel fees cannot be fairly awarded on the basis of time alone, but other factors, particularly the litigation risk factor, must be considered.

The general agreement in all jurisdictions is that the time and labor spent by the attorney in performing services for which compensation is sought is a factor to be considered in setting a reasonable fee. However, it is also commonly agreed that the time element must be considered in connection with other factors. Fees cannot fairly be awarded on the basis of time alone. The use of time as the sole criterion is of dubious value because economy of time could cease to be a virtue; and inexperience, inefficiency, and incompetence may be rewarded to the detriment of expeditious disposition of litigation. The litigation risk factor must be considered. Although the court initially looks to the hourly rate for comparable representation where compensation is guaranteed, it must adjust the basic hourly rate where compensation is contingent by assessing the likelihood of success at the outset of the representation. See *Oliver's Sportcenter, Inc. vs. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291.

In the authorities noted herein, this amounts to a cross-check via the lodestar method. Once the amount of reasonable hourly billing has been determined, the court generally uses this as a cross-check to determine whether the percentage recovery from the common fund is reasonable. Here one must multiply approximately 4.2 times the billed amount to equal the forty percent (40%) recovery that is requested.[8] I evaluate this multiplier below. Based upon the authority presented by Class Counsel, the multiplier of 4.2 awarded herein is consistent with (if not below) the multipliers approved in other class action cases with similar procedural postures.[9]

[8] *Newberg on Class Actions,* Fourth Edition, indicates that multipliers of one to four are frequently awarded in common fun cases, but these may be larger in "large common fund" cases. § 14.6, footnote 87 indicates that multipliers from 5 to 10 have been used.

[9] Multipliers of (i) 8.7 approved in *Lobo v. BP* (Beaver County); 5.25 approved in *Lawrence v. Cimarex* (Caddo

In light of the additional factors from *the Manuel for Complex Litigation*, the Court is of the opinion that Class Counsels' fee request is fair and reasonable.

a. *The size of the fund and the number of persons who actually receive monetary benefits:* The Class comprises several thousand members. Clearly this is a significant fund, $17,250,000. As indicated above, the settlement represents an excellent recovery and is the largest known royalty class recovery in Oklahoma history for the claims being released.

b. *Any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation:* This is the contingency agreement as to attorneys' fees between Class Counsel and class representative noted above.

c. *Any substantial objections to the settlement terms or fees requested by counsel for the class by class members (it is, however, a court's duty to scrutinize applications for fees, independently of any objection . . .):* Clearly here there were no real objections to the fairness of the settlement.

d. *The skill and efficiency of the attorneys; (Newberg, states this together with e, below, as "the amount of the benefit conferred upon the Class that could properly be attributed to Class Counsel"[10]):* As noted above it is clear that this result could not have been reached except for the skill, tenacity, and insight of Class Counsel into both the merits of this litigation, and what was a reasonable damage amount. It is also clear that without Class Counsel, that the class would likely not have benefited. First,

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County); 4.0 – 6.6 approved in *Shockey v. Chevron* (Washita County); 3.85 approved in *Brumley v. ConocoPhillips* (Texas County).

[10] *Newberg on Class Actions*, Fourth Edition, § 14.7, p. 582.

until this action was filed these matters had not been litigated by the class members as this is the only litigation pending against Newfield for the claims being released under the settlement. Thus, the class members elected not to take the risks of litigating for these many years. It is very unlikely that the class would have received any return aside from this lawsuit. The only way that the settlement became possible was via Class Counsel doing tremendous amounts of discovery, both of the merits – so that all were well aware of the strengths of their case, and of the damages – so that the amounts of loss could be accurately determined. This, again, was due to the skill and tenacity of Class counsel. In summation, Class Counsel has conferred great benefits on this class for which they otherwise would have received nothing.

e. *The complexity and duration of the litigation:* I will not reiterate these findings as they were made already above, but this was very difficult and complex litigation.

f. *The risks of nonrecovery and nonpayment:* Prior to settlement, the risks of nonrecovery, as noted above, were great.

g. *The amount of time reasonably devoted to the case by counsel; even where fees are to be awarded on a percentage-of-fund basis, some judges cross-check the percentage by conducting a modified lodestar analysis:* This factor divides the amount of attorneys' fee requested ($6,900,000) by the charge for billable time presented by Class Counsel (approximately $1,363,390) for a multiplier of 4.2. This multiplier is well within the acceptable range of multipliers awarded in other similar class actions[11]. I find that due both to the difficulties of this case and the excellent

[11] In appropriate cases where Class Counsel has created a large common fund, such as in the present case, multipliers of 5 to 10 have been awarded. See, *Herbert Newberg*, Newberg on Class Actions (3rd), § 14.03 (emphasis added): Courts applying the lodestar approach will often use large multipliers or monetary enhancements

settlement, this is an acceptable multiplier for these particular facts. Class Counsel has devoted approximately 4,675 hours prosecuting this case. While this is a lot of time, Class Counsel had to do a lot to prepare and they were not outworked by the large law firm representing the Defendant.

h. *The awards in similar cases:* It is here that I review similar awards in other cases. A contingent attorneys' fee of at least forty percent (40%) of the common fund is normative for this type of royalty owner class litigation. The table of cases listed by Class Counsel supports this conclusion and the same is incorporated herein and made a part hereof. Also compelling is the recent decision of *Velma-Alma Ind. School Dist. No. 15 v. Texaco, Inc.*, 2007 Ok CIV APP 42, ____ P3.d ____, wherein the Court concluded that the trial court had not abused is discretion in approving an award of attorney fees equal to forty percent (40%) of the common fund in a royalty owner class settlement.

To reach a decision in this case, the authorities indicate that this amount must be determined ultimately by the specific facts of this case. These findings have generally been made via the *Burk* factors, and this court's findings on the factors within the *Manuel for Complex Litigation.*

First, this litigation was quite complex and difficult, and class counsel had engaged in significant discovery and work in preparing a damage model which, absent the settlement, would have been presented at trial. Secondly, the settlement reached was clearly quite advantageous for

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of the time/rate (lodestar) calculation in order to reach fee award results comparable to percentage of recovery fees. **Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award way warrant an even larger multiple**. *See e.g., In re Beverly Hills Fire Litig*, 639 F. Supp. 915 (ED Ky 1986) (**multiplier of 5 for lead counsel**); *Wilson v. Bank of Am Natl Trust & Savs Assn*, No. 643872 (Cal Sup Ct Aug 16, 1982) (**multiplier of up to 10 times** the hourly rate).

each of the class members even after the requested attorneys' fees are removed. Thirdly, the Class has not objected to said request for attorneys' fee[12]. Fourthly, Class Counsel clearly has taken great risks, and exercised considerable skill and tenacity over an extended length of time to achieve this result. Finally, as noted by Class Counsels' experts, the forty percent figure is reasonable and normal for this type of litigation – especially in light of the other factors listed herein. For all of this reasons, it appears that the requested attorneys' fee request of forty percent (40%) is reasonable, especially for this set of facts.

Knowing the rewards for Class Counsel can be great, so travels the path of loss for Class Counsel if defeat is the end result. Financial, personal, and emotional devastation are the potential events for a very few members of this Profession willing and able to represent thousands of strangers in order to obtain monetary benefit for those strangers that otherwise, without question, is unattainable through known legal means. From this aspect, the potential rewards of Class Counsels' success and the potential devastation realized of a Class Counsels' defeat must be considered with open judicial mind.

Because of the self-regulating incentives for efficiency with the percentage fee as noted above, the percentage fee has important advantages to the Class and promotes efficiency rather than inefficiency. The percentage fee compensates Class Counsel on the real value of the services provided. The percentage fee method encouraged Class Counsel to go the extra mile and push beyond a "good" recovery to an "excellent" recovery. The Court in this case certainly considers the Total Common Fund to be an excellent recovery to the Class. To award Class Counsel a lesser percentage of the Total Common Fund because the efforts of Class Counsel have created an exceptionally large Fund would amount to penalizing Class Counsel for their

[12] Save the one objection by Mr. Hubbard who failed to appear and whose objection contains no basis or authority to support his objection.

success which the Court is unwilling to do. This Court makes no myth as to Class Counsels' attorney fee award herein. It is significant. Yet, it is reasonable and proper. It is fair and equitable. Additionally, the common sense realty is, when the efforts of Class Counsel create an exceptionally large Total Common Fund for the benefit of the Class and if Class Counsels' fees awarded therefore are greatly restricted, the foreseeable so goes later access to the Courthouse for other potential and future class members.

The Court is satisfied that the most important determinant of the attorneys' fee award is the amount of the client recovery and that the lodestar/multiplier analysis is best used to check that the percentage of the fund award is in line with what a reasonable fee should be. Based upon the Court's analysis of all of the factors above-listed, the Court finds a reasonable fee in this case to be forty percent (40%) of the settlement fund (or $6,900,000.00), plus accrued interest thereon pursuant to the settlement agreement, is reasonable in this particular case.

Expert Witness Fees, Litigation Expenses and Class Representatives Fee:

The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, and having heard testimony of Class Counsel regarding the necessity of such expenditures in preparation of the case, finds that reasonable expert witness fees and litigation expenses were incurred in the amount of $504,444.16.[13]

The Court finds that the Class Representative has made substantial time and labor commitments to the Class, and has incurred both legal and financial risks while pursuing this

[13] It is apparent that the litigation costs and expenses advanced by Class Counsel will exceed this figure; however, they have limited their reimbursement request to this amount. Under the Settlement Agreement, Newfield is responsible for the first $250,000.00 in Administrative Expenses, with the class being responsible for amounts exceeding $250,000.00. Based upon the testimony of witnesses, it appears that the Administrative Expenses will exceed $250,000.00 and class counsel have reserved the right to file a supplemental application with the court seeking reimbursement for such expenses at a later time.

case on behalf of the Class, all of which resulted in obtaining an excellent benefit for the Class[14]. The granting of a Class Representative fee is based upon the same equitable considerations discussed above which related to a party's efforts in the creation of a common fund for the mutual benefit of a class. Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund. In this action, Class Counsel has recommended and requested a Class Representative's fee of .4% of the Settlement Fund. The Court finds that compensation to the Class Representative in the amount of .4% of the Settlement Fund is fair and reasonable compensation for the Class Representative's services to the Class.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Class Counsel are awarded attorney fees in the amount of 40% of the Common Fund ($6,900,000) plus 40% of accrued interest to the date of distribution pursuant to the Settlement Agreement; (2) Class Counsel are awarded reimbursement of litigation expenses in the amount of $504,444.16; and (3) the Class Representative is awarded fees in the amount of 0.4% ($69,000.00) of the Settlement Fund plus 0.4% of accrued interest to the date of distribution pursuant to the Settlement Agreement.

IT IS SO ORDERED this 27th day of August, 2007.

Greg A. Zigler
District Judge

[14] Mr. Laverty personally contacted Newfield prior to contacting Class Counsel about the claims in this lawsuit. After Newfield refused Laverty's request to reimburse him for the royalty deductions, Laverty contacted Class Counsel who further investigated the claims and proceeded with the lawsuit. Mr. Laverty was directly involved in the litigation, responded to numerous discovery requests, attended hearings and the mediation.

Exhibit 4

IN THE DISTRICT COURT OF TEXAS COUNTY
STATE OF OKLAHOMA

GALEN BRIDENSTINE AND GLEN BRIDENSTINE, FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED
PLAINTIFFS,

VS.

KAISER-FRANCIS OIL COMPANY, ET AL.
DEFENDANTS.

CASE NO. CJ-2000-1

TEXAS COUNTY
FILED
OCT 13 2004
KAREN PARISH
COURT CLERK
By _____ Deputy

ORDER ON CLASS COUNSELS' MOTION FOR ATTORNEYS' FEE, REPRESENTATIVES' FEE AND REIMBURSEMENT OF LITIGATION EXPENSES FROM THE COMMON FUND

This matter comes on this 13TH day of October, 2004, on Class Counsels' Motions for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund. All named parties were present and represented by counsel. After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard three days of testimony in 2002 related to Class Counsel's attorneys fee and litigation expenses, having heard the testimony and arguments presented today, and being fully advised in the premises,

THE COURT FINDS AND ORDERS AS FOLLOWS:

Notice and Objections:

1. Notice of this hearing, and Class Counsels' requested fees and litigation expense reimbursement, and Class Representative fee, was properly mailed by Kaiser-Francis to Class Members with known valid mailing addresses and was published as required by this Court's previous order (*see* Kaiser-Francis's reports concerning notice previously filed with the Court).

The Notice provided:

Class Counsel have requested final approval of the litigation costs expended on

> behalf of the Class in pursuit of this litigation, which costs are approximately $3,000,000.00 (the actual amount, and supporting detail, will be submitted to the Court for approval. $2,000,000.00 of the litigation costs were previously deducted from the prior settlements, thus only the remaining $1,000,000.00 (approx.) will be deducted from the Kaiser-Francis Settlement Proceeds, if approved. Class Counsel have also sought: 1) payment of an attorney's fee of 30% of the Settlement Proceeds (the same percentage approved by the Court on the previous settlements) and 2) payment of a Class Representatives' fee of 1% of the Settlement Proceeds, with said amounts to be deducted from the Settlement Proceeds prior to distribution to the Class.
> If you object to this distribution or the requested fees and expense reimbursement, you must file a written statement with the Court and provide a copy of same to Class Counsel on or before **October 1, 2004**, containing the information set forth in Paragraph VII (B) below

The Court previously approved such notice and now finds that the notice to the class of this hearing is proper and sufficient under 12 O.S. § 2023 (E), the Due Process Clause of the United States Constitution and the Due Process Clause of the Oklahoma Constitution.

2. The Court notes that **NO** Class Members have filed any objection the requested attorneys fee, litigation expenses or Class Representative award.

Class Counsel's Attorneys' Fee:

1. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class and which have resulted in a Common Fund that, assuming the fees and expenses are awarded by this Court as requested, will allow a recovery of 100% of the Class Members' damages, with 12% interest thereon.

2. The Court finds that an attorneys' fee award of 30% of the Kaiser-Francis Common Fund (as defined in Class Counsel's motion) is a fair and reasonable amount of compensation to Class Counsel for establishing the Kaiser-Francis Common Fund.

3. The percentage fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach

awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

4. The Court finds that attorneys' fees of 30% of the Kaiser-Francis Common Fund created by the efforts of counsel for the Class are appropriate, and should be awarded.

5. The Court also considered the basic guidelines established by the Oklahoma Supreme Court set forth in *State ex rel. Burk vs. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.[1]

6. The Court has reviewed the detailed time records submitted by Class Counsel and finds that the time reflected in the record (in excess of 29,700 hours) was reasonably expended for the benefit of the Class. The Court has also reviewed the hourly rates of Class Counsel as set forth in the record and finds them to be reasonable and within the acceptable range in the local legal community for this type of legal services. Thus, the Court further finds the lodestar (hours X rates) in this case to be in excess of $6,270,000.00. (The Court notes however that Class Counsel will be expending substantial time monitoring the distribution of the Kaiser-Francis Settlement Fund, thus substantially increasing the lodestar).

[1] The Court recognizes that *Burke* was not a class action and that the equitable fund created by the attorneys effort benefited only the City of Oklahoma City. The attorneys fee awarded in that case amounted to 100% of the equitable

7. Beyond the lodestar, in *Burk*, the Supreme Court enunciated twelve factors to be considered by the District Court in fixing fees.

A. Time and labor required. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

B. The novelty and difficulty of the question. Class certification questions are known to be vigorously contested. Furthermore, the oil and gas accounting issues involved in this case are also very complex. This case also involved novel bankruptcy issues. Finally, this case is the only known class action that has been tried in the State of Oklahoma.

C. The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources, necessitated assembling a team of Class Counsel skilled in oil and gas litigation, as well as details of complex litigation. Counsels' qualifications, skills and experience is well known throughout the oil and gas legal community. Class Counsel are certainly highly skilled and capable counsel.

D. The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced the Class Counsel's opportunity for employment in other matters.

E. The customary fee. These types of cases (royalty accounting cases, in particularly, class actions) are handled on a contingent fee. The fee percentage in these types of cases is typically 30% to 40% of the gross fund.

F. Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representatives that provides for an attorneys' fee of 30% of the gross consideration received. Pre-arranged fees, whether fixed or contingent, are not binding on the Court, but can be helpful in setting court awarded fees in a class action. Counsel for the Class has represented the Class with vigor and without prior compensation of any kind for their time.

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fund currently available and all of the benefit due the City for several years into the future.

G. Time limitations imposed by client or circumstances. While this Litigation has not involved any client-imposed time limitations, the circumstances of the case required the litigation to be vigorously pursued if an excellent recovery through settlement was to be achieved. Class Counsel, in fact, did vigorously prosecute the case and obtained excellent results for the Class.

H. The amount involved and the results obtained. Clearly, there can be no doubt that at the outset, Plaintiffs' Counsel had no assurance of any recovery. But for the efforts of Counsel, no Common Fund would exist. The Court considers this settlement to be an excellent result for the Class.

I. Experience, reputation and ability of counsel. Counsels' qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are exceptional litigators.

J. The undesirability of the case. Compared to most civil, contingent litigation attracting counsel to represent plaintiffs, this litigation clearly fits the initially "undesirable" test. Not many law firms would be willing, or able, to risk investing the time and expenses necessary to prosecute this litigation. The Defendants were all well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

K. Nature and length of the professional relationship with the client. Class Counsel have various long-term relationships with numerous Class Members.

L. Awards in similar cases. The awards in similar cases was discussed in detail in Class Counsels' motion, exhibits and testimony. The Court incorporates said discussion herein by reference. The Court finds that a 30% to 40% fee is customary in these types of cases.

8. In 1980, the Oklahoma Supreme Court followed and modified *Burk, supra,* to further instruct District Courts that counsel fees cannot be fairly awarded on the basis of time alone, but other factors, particularly the litigation risk factor, must be considered. See *Oliver's Sportcenter, Inc. vs. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291.

9. **Based upon the Court's analysis of the *Burk* factors, the Court finds a reasonable**

fee in this case to be $25,192,331.00 (which represents 30% of the Kaiser-Francis Common Fund, and when considering the previous award on the Chase/UP/Questar - $7,793,555 – a total lode star multiplier of approximately 5.25), assuming payment of the Kaiser-Francis Common Fund on November 13, 2004, with withdrawal by Class Counsel on that date.

IT IS THEREFORE ORDERED that Class Counsel are entitled to an attorneys fee of 30% of the Kaiser-Francis Common Fund, plus any earnings related thereto until said funds are withdrawn by Class Counsel, as set forth below.

Expert Witness Fees, Litigation Expenses and Class Representatives Award:

1. The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, and having heard testimony of Class Counsel regarding the necessity of such expenditures in preparation of the case, finds that expert witness fees and litigation expenses were incurred in the amount of $2,895,682.72 (as reflected on Exhibit "B" to Class Counsel's motion, plus an estimated $5,000 of additional expenses incurred after said submission plus to be incurred through consummation). The Court previously authorized payment of $2,000,000.00 to be deducted from the UP/Questar/Chase Settlements and paid to Class Counsel. **Therefore, the additional expenses to be paid from the Kaiser-Francis Common Fund is $895,682.72.**

2. The Court finds the Class Representatives have made substantial time and labor commitments to the Class, and have incurred serious legal and financial risks while pursuing this case on behalf of the Class, all of which has resulted in obtaining an

excelent benefit for the Class. **The Court finds that fair and reasonable compensation in the amount of 1% of the Kaiser-Francis Common Fund** (or $839,744.00, assuming payment of the Kaiser-Francis Common Fund on November 13, 2004, with withdrawal by Class Counsel on that date.)

IT IS THEREFORE ORDERED that on the date that this order becomes Final and Unappealable, as that term is defined in the Settlement Agreement, (1) Class Counsel shall be entitled to an award of attorneys fees in the amount of $25,192,331.00; (2) Class Counsel shall be entitled to an award of litigation expenses in the amount of $895,682.72; and (3) Class Representatives are entitled to an award in the amount of $839,744.00, all amounts are assuming payment of the Kaiser-Francis Common Fund on November 13, 2004, with a subsequent withdrawal by Class Counsel on that date. However, the Court further finds that there remains substantial contingencies and work to be completed by the end of the year by Class Counsel. Therefore, the awards herein, with earning thereon, are not payable until after January 1, 2005, with Class Counsel being entitled to withdraw an amount up to $5,000,000.00 immediately upon the funds being available, to be allocated among the various awards as counsel determines.

IT IS SO ORDERED this 13th day of October, 2004.

ASSOCIATE DISTRICT JUDGE

Exhibit 5

IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA

IVAN J. SIMMONS, MADALINE M. THOMPSON, AND GAYLON LEE MITCHUSSON,	)	
FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,	)	Case No. CJ-2004-57
PLAINTIFFS,	)	
v.	)	
ANADARKO PETROLEUM CORPORATION,	)	
DEFENDANT.	)	

STATE OF OKLAHOMA
CADDO CO.
FILED
DEC 23 2008
At ____ O'Clock ____ M.
OPAL CAROL FINCH, Court Clerk
By ____ Deputy

ORDER ON ATTORNEY FEES, LITIGATION EXPENSES, AND CLASS REPRESENTATIVES FEE

This matter comes on this 23rd day of December, 2008, on Class Representatives' and Class Counsel's motion for attorney fees, litigation expenses and Class Representatives fee. All named parties were present and represented by counsel. After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented today, and being fully advised in the premises, **THE COURT FINDS AND ORDERS AS FOLLOWS:**

Notice and Objections:

1. Notice of this hearing was properly mailed to the Class Members with known valid mailing addresses and was published as required by this Court's previous order (see Report Concerning Notice, previously filed with the Court). The Court previously approved such notice and now finds that the notice to the Class of this hearing is proper and sufficient

under 12 Okla. Stat. § 2023 (E), the Due Process Clause of the United States Constitution and the Due Process Clause of the Oklahoma Constitution.

2. The Court notes that with over 16,000 Class Members, only six (6) persons filed objections. One (1) additional objection has been dismissed and stricken because the objector is not a Class Member. Each of the six (6) Class Member objectors objected to the attorney fee request, one (1) of them objected to the award of the Class Representatives fee, and none (0) of them objected to the expenses that were incurred on behalf of the Class. None of the objectors appeared at the hearing, nor did any objector submit any credible evidence for the Court to consider or add anything of benefit to the Class. As recently explained by the Oklahoma Court of Appeals in *Velma-Alma Independent School Dist. No. 15 v. Texaco, Inc.*, 2007 OK CIV APP 42, 162 P. 3d 238, ¶13, while written comments and objections can be submitted by class members, those class members must file objections in compliance with the order and notice of the settlement court, state their intent to appear at the fairness hearing, and appear **in person** or through their disclosed counsel at the hearing for their objection to be preserved. The total percentage of the claims of all six (6) of the objectors is less than three tenths of one percent (0.3%) of the settlement fund leaving more than 99.7% of the Class as non-objectors. Without any credible evidence being presented by persons who filed timely objections, the Court finds that all evidence presented supports the requests of the Class Representatives and Class Counsel for the award of their requested fees and expenses.

Class Counsel Fees:

3. Class Counsel's efforts in this lawsuit began in late 2003 and early 2004 with an investigation that led to the filing of this lawsuit in February of 2004. Over the past five years

Class Counsel conducted extensive discovery, motion practice and other demanding prosecution of this case. The issues in this case (including issues related to discovery, class action status, due process, notice, choice of law, summary judgment on various issues, motions to stay both at the trial court and the appellate courts, and many other factual and legal issues) have been aggressively advanced throughout the history of this case. A further overview of the history of this case can be gleaned from the Court Clerk's docket sheet. This Court granted class certification in this case only after it had reviewed extensive briefing, volumes of exhibits and arguments of counsel. APC appealed the class certification decision, which appeal was fully briefed and awaiting decision on appeal when a settlement was reached by the parties. The appeal was held in abeyance, and this Court's jurisdiction to approve settlement was specifically confirmed by the appellate court.

4. Class Counsel and the Class Representatives have devoted tens of thousands of hours of time and effort, and have paid large sums of money, to achieve a fair and reasonable settlement for the benefit of the Class. Class Counsel and the Class Representatives have borne the hardships of the litigation and the risk of potential loss solely on their own shoulders. To date, Class Counsel and the Class Representatives have received no compensation for their efforts or reimbursement of their expenses. Class Counsel and the Class Representatives now request that the contingent fee and expense reimbursement contract they negotiated be extended to the Class.

5. Class Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class and which have resulted in the creation of a Common Fund of $155,000,000.00, plus accrued interest.[1]

[1] The Common Fund Doctrine is well recognized by the Oklahoma Supreme Court (as well as the United States

6. Under the Common Fund Doctrine, and in particular in a "class action" (which is one type of action that can create a common fund), the Court has the authority to extend contingency fee agreements entered into between the Class Representative and Class Counsel to the entire Class.

> **Contingent fee agreements may be appropriate in class action cases**. . . Many courts have held . . . that once a class is certified and a decision on the merits is had, **the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members**. [Emphasis added.]

Sholer v. State of Oklahoma, 1999 OK CIV APP 100, ¶¶ 13-14, 990 P.2d 294.

7. This Court recognizes the importance of contingent fees in our judicial system, especially in class actions.

> Although contingent fee contracts are subject to restrictions . . . such agreements have generally been enforced unless the contract is unreasonable. **Often contingent fee agreements are the only means possible for litigants to receive legal services ---- contingent fees are still the poor man's key to the courthouse door. The contingent fee**

Supreme Court). If the plaintiff and/or his counsel have **created, preserved, protected, or increased a common fund (or common property), or have brought into court** a fund in which others may share with him, a court, in the exercise of equitable jurisdiction, may order the allowance of attorney fees and litigation expenses to counsel.

> **The conceptual underpinnings for the chancery common-fund doctrine teach us that an equitable charge may be impressed in favor of its creator *when the fund is within the direct control of the court*.** The "pre-existing fund" must be immediately subject to counsel-fee assessment, and the benefits conferred have to be traceable with some accuracy to each beneficiary. [Footnotes and citations omitted. Emphasis added.]

Oklahoma Tax Com'n v. Ricks 1994 OK 115, ¶7-8, 885 P.2d 1336.

> It is well settled that ordinarily "a court in the exercise of equitable jurisdiction, will, in its discretion, order an allowance of counsel fees, or, as it is sometimes said, allow costs as between solicitor and client, to a complainant (and sometimes directly to the attorney) who at his own expense has maintained a successful suit for the **preservation, protection, or increase of a common fund, or of common property, or who has created at his own expense, or brought into court, a fund in which others may share with him**." [Citations omitted. Emphasis added.]

State ex rel. Board of Com'rs of Harmon Co. v. OTC, 1944 OK 250, ¶4 151 P.2d 797; *see also, Kellough v. Taylor*, 1941 OK 320, 119 P.2d 556.

> **system allows persons who could not otherwise afford to assert their claims to have their day in Court.** [Emphasis added. Footnotes omitted.] *Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754.

8. *Newberg on Class Actions* §14:6 (4th ed. 2002) recognizes that it is appropriate to award an attorney's fee based on a percent of the value of the common fund established for the benefit of the class.

9. A review of other Oklahoma District Courts' orders reveals similar sound logic. In *Bridenstine v. Kaiser-Francis, et al.*, Case No. CJ-2000-1, District Court of Texas County, State of Oklahoma, ¶3, the Honorable Ronald Kincannon explained his rationale for using the percentage of fund method for determining the appropriate attorney's fee:

> The percentage fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

In *Brumley v. ConocoPhillips,* Case No. CJ-2001-5, District Court of Texas County, Oklahoma, Judge Zigler stated additional rationales for awarding the full percentage fee:

> **To award Class Counsel a lesser percentage of the Total Common Fund because the efforts of Class Counsel have created an exceptionally large Fund would amount to penalizing Class Counsel for their success which the Court is unwilling to do.** This Court makes no myth as to Class Counsel's attorney fee award herein. It is significant. Yet, it is reasonable and proper. It is fair and equitable. **Additionally, the common sense reality is, when the efforts of Class Counsel create an exceptionally large Total Common Fund for the benefit of the Class**

> **and if Class Counsel's fees awarded therefrom are greatly restricted, then forseeably [sic] so goes later access to the Courthouse for other potential and future class members.** From that common sense viewpoint and understanding it is all a matter of economics. So in conclusion, as in the many other class cases referenced herein, under this percentage approach as thoroughly addressed hereinabove, the interests of the Class and Class Counsel will be consistent and aligned.
>
> * * *
>
> **Knowing the rewards for Class Counsel can be great, so travels the path of loss for Class Counsel if defeat is the end result. Financial, personal, and emotional devastation are the potential events for a very few members of this Profession willing and able to represent thousands of strangers in order to obtain monetary benefit for those strangers that otherwise, without question, is unattainable through known legal means. From this aspect, the potential rewards of a Class Counsel's success and the potential devastation realized of a Class Counsel's defeat must be considered with [an] open judicial mind.**
>
> Emphasis added.

10. This Court finds that the efforts of Class Counsel created an exceptionally large total common fund for the benefit of the Class. The reasoning of the above-quoted Oklahoma courts on the award of attorney fees in cases such as the present action is compelling, and this Court adopts their reasoning in this case. The Court will not reduce Class Counsel's percentage of fees from the common fund because of the remarkable success they achieved. To do so would effectively penalize Class Counsel for their success in this case and thereby restrict later access to the courthouse for potential class members in other cases who look to effective lawyers like Class Counsel in this case as their keys to the courthouse doors.

11. The Court finds that Class Counsel and the Class Representatives entered into contingency fee agreements whereby Class Counsel agreed to prosecute this action in

exchange for receiving a fee of 40% of the gross recovery for the Class plus reimbursement of litigation expenses.

12. The Court finds that the 40% contingency fee percentage contained in the agreement between Class Counsel and the Class Representatives is within the typical range of contingency fee percentages for oil and gas class action litigation approved in this State.

13. The Court finds: (a) that the 40% contingency fee agreement between Class Counsel and the Class Representatives is fair and reasonable and should be, and is hereby, approved and extended to the members of the Class, and (b) that based upon the foregoing factors and reasoning, as well as the additional analysis described below, an attorney fee award of 40% of the gross Settlement Proceeds (as defined in Compromise and Settlement Agreement), together with accrued interest thereon, is a fair and reasonable amount of compensation to Class Counsel for establishing the Common Fund.

14. The Court has reviewed the detailed time records submitted by Class Counsel and finds that the time reflected in the record (in excess of 38,000 hours) was reasonably expended for the benefit of the Class. The Court has also reviewed the hourly rates of Class Counsel as set forth in the record and finds them to be reasonable and within the acceptable range in the legal community for this type of legal services. Thus, the Court further finds the base hourly fees in this case (hours X rates), prior to consideration of the enhancement factors under a "lodestar" approach, is almost $15,000,000, which would result in a lodestar multiplier of approximately 4.2 on an attorney fee award of 40%.

15. The Court considered the basic guidelines established by the Oklahoma Supreme Court set forth in *State ex re/. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.[2]

[2] The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort

In *Burk*, the Supreme Court enunciated twelve factors to be considered by the District Court in fixing fees under the lodestar approach.

A. Time and labor required. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

B. The novelty and difficulty of the question. Class action issues are known to be difficult and vigorously contested. Furthermore, the oil and gas royalty issues involved in this case are also very complex.

C. The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources necessitated assembling a team of Class Counsel skilled in oil and gas litigation, as well as details of complex litigation. Counsels' qualifications, skills and experience are well known throughout the oil and gas legal community. Class Counsel are certainly highly skilled and capable counsel.

D. The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced Class Counsel's opportunity for employment in other matters. In fact, the Barnes & Lewis law firm and The DeVore Law Firm declined substantially all new work for their longstanding oil company clients, all of which work would have been compensated on an hourly fee basis, in order to allow Class Counsel to devote more time to this case.

E. The customary fee. These types of cases (oil and gas class action cases), are handled on a contingent fee. The fee percentage in these types of cases is typically 40% of the gross fund.

F. Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representatives that provide for an attorneys' fee of 40% of the gross consideration received, as discussed in detail above. Counsel for the Class have represented the Class with vigor and without prior compensation of any kind for their time and have advanced hundreds of thousands of dollars of litigation expenses out of their own pockets.

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benefited only the City of Oklahoma City. The attorneys fee awarded in that case amounted to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future.

G. Time limitations imposed by client or circumstances. Numerous time limitations were imposed on Class Counsel throughout the course of the proceedings. This Court and the appellate courts imposed time limitations through case scheduling over the last five years that forced Class Counsel to perform services of great magnitude by certain dates. The schedules of the courts, witnesses and clients were also accommodated on a regular basis by Class Counsel. A case of the size and complexity existing here required the commitment of a large percentage of the total time and resources of the firms of Class Counsel and worked significant hardships as time went on. The circumstances of the case required the litigation to be vigorously pursued if an excellent recovery through settlement was to be achieved. Class Counsel, in fact, did vigorously prosecute the case and obtained excellent results for the Class.

H. The amount involved and the results obtained. There can be no doubt that at the outset, Plaintiffs' Counsel had no assurance of any recovery. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. The Court considers this settlement to be an excellent result for the Class.

I. Experience, reputation and ability of counsel. Class Counsel's qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are exceptional litigators.

J. The undesirability of the case. Compared to most civil litigation attracting counsel to represent plaintiffs, this litigation clearly fits the initially "undesirable" test. Few law firms would be willing, or able, to risk investing the time and expenses necessary to prosecute this litigation. The Defendants were well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

K. Nature and length of the professional relationship with the client. Class Counsel have various long-term relationships with various Class Members.

L. Awards in similar cases. The awards in similar cases were discussed in detail in Class Counsel's motion, exhibits and testimony. The Court incorporates said discussion herein by reference. The Court finds that a 40% fee is customary in these types of cases.

16. In 1980, the Oklahoma Supreme Court followed and modified *Burk, supra,* to further instruct District Courts that counsel fees cannot be fairly awarded on the basis of time alone, but other factors, particularly the litigation risk factor, must be considered. See *Oliver's Sports Center, Inc. vs. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291.

17. Based upon the Court's analysis of the *Burk* factors, the Court finds a reasonable fee in this case to be $62,000,000.00, plus accrued interest thereon (which represents 40% of the gross Settlement Proceeds, and a lodestar multiplier on the base hourly fees of approximately 4.2, which is well within the range of reasonableness).[3]

IT IS THEREFORE ORDERED that Class Counsel be, and hereby are, awarded a fee of forty percent (40%) of the gross Settlement Proceeds, for an attorney fee in the amount of $62,000,000.00, plus accrued interest thereon.

Expert Witness Fees, Litigation Expenses and Class Representatives Fee:

18. The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, having heard testimony regarding the necessity of such expenditures in preparation of the case, and having

[3] In appropriate cases where Class Counsel have created a large common fund, such as in the present case, multipliers of even 5 to 10 have been awarded. See, *Herbert Newberg*, Newberg on Class Actions (3rd), §14.03 (emphasis added):

> Courts applying the lodestar approach will often use large multipliers or monetary enhancements of the time/rate (lodestar) calculation in order to reach fee award results comparable to percentage of recovery fees. **Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award way warrant an even larger multiple.**[21]
>
> [Fn. 21] *See e.g., In re Beverly Hills Fire Litig*, 639 F. Supp. 915 (ED Ky 1986) (personal injury class action; **multiplier of 5 for lead counsel for contingency and superior trial skill**); *Wilson v. Bank of Am Natl Trust & Savs Assn*, No. 643872 (Cal Sup Ct Aug 16, 1982) (illegal use of escrow funds by lender for profit; noncontingent hourly rates of up to $150/hour and a **multiplier of up to 10 times** the hourly rate). [End of Fn. 21]

no objections filed as to these expenses, finds that reasonable expert witness fees and litigation expenses were incurred in the amount of $820,338.17.

19. The Court finds the Class Representatives have made substantial time and labor commitments to the Class, and have incurred serious legal and financial risks while pursuing this case on behalf of the Class, all of which resulted in obtaining an excellent benefit for the Class. The granting of a Class Representative fee is based upon equitable considerations discussed above which relate to a party's efforts in the creation of a common fund for the mutual benefit of a class. Court awards to Class Representatives of 0.5% of the common fund are typical in these types of class actions with recoveries of this magnitude. In this action, Class Counsel has recommended and requested a Class Representatives' fee of $775,000.00 (one-half of one percent (0.5%) of the gross Settlement Proceeds). The Court finds that compensation to the Class Representatives of one-half of one percent (0.5%) of the gross Settlement Proceeds in the amount of $775,000.00 (to be divided equally among the three Class Representatives) is fair and reasonable compensation for their services to the Class. The Court further finds that the Class Representatives have incurred litigation expenses of their own in the amount of $5,143.56 and should be reimbursed for those expenses as reasonably expended in the performance of their duties for the benefit of the Class.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Class Counsel are awarded an attorney fee of forty percent (40%) of the gross Settlement Proceeds in the amount of $62,000,000.00, plus accrued and accruing interest thereon until paid; (2) Class Counsel are also awarded reimbursement of litigation expenses in the amount of $820,338.17; (3) Class Representatives are awarded fees of one-half of one percent (0.5%) of the gross

Settlement Proceeds in the amount of $775,000.00, to be divided equally among them; and (4) Class Representatives are also awarded reimbursement of their litigation expenses in the amount of $5,143.56.

IT IS SO ORDERED this 23rd day of December, 2008.

The Honorable Wyatt Hill
Judge of the District Court

Exhibit 6

IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA

GAYLON LEE MITCHUSSON, LOIS FOSTER, AND MADALINE M. THOMPSON,	)	
Plaintiffs,	)	Case No. CJ-2010-32
v.	)	
EXCO RESOURCES, INC.,	)	
Defendant.	)	

STATE OF OKLAHOMA
CADDO CO.
FILED
MAR 9 2012
At _____ O'Clock _____M.
OPAL CAROL FINCH, Court Clerk
By _____ Deputy

ORDER ON ATTORNEY FEES, LITIGATION EXPENSES, AND CLASS REPRESENTATIVES FEE

This matter came on for hearing on December 23, 2011 and January 24, 2012, on Class Representatives' and Class Counsel's motion for attorney fees, litigation expenses and Class Representative fees. All named parties, with the exception of Plaintiff Gaylon Mitchusson (who appeared not on the advice of his physician), were present and represented by counsel, with Mr. Mitchusson available by telephone. Also appearing in person were Class Members Charles E. Burruss, Linda Lane, Michael Burrage, Connie Chaney, and Donald H. Kniss (all of whom supported the award of the requested attorney fees, Class Representatives' fees and expenses). Also appearing was Class Member, John W. Doolin, Trustee of the John B. Doolin Trust (both personally and through counsel, John Garland). Filing affidavits supporting the requested fees and expenses were Class Members Angelo P. Williams, Jr., Jerry White, Irene Cook, Hollis K. Morris, Kenneth E. Williams, Robert Craddock, and Beulah B. McCaskill (by and through her attorney, Patrick Gilmore).

After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented, and being fully advised in the premises, **THE COURT FINDS AND ORDERS AS FOLLOWS**:

Notice and Objections:

1. Notice of hearing was properly mailed to the Class Members with known valid mailing addresses and was published as required by this Court's previous order (see Report Concerning Notice, previously filed with the Court). The Court previously approved such Notice and now finds that the Notice to the Class of hearing is proper and sufficient under 12 Okla. Stat. §2023(E), the Due Process Clause of the United States Constitution and the Due Process Clause of the Oklahoma Constitution.

2. The Court notes that with approximately 20,000 Class Members, the only objection filed and presented was that of, John W. Doolin, acting on behalf of the John B. Doolin Trust, who filed an "objection" as to attorney fees only (the "Doolin Objection"). In *Velma-Alma Independent School Dist. No. 15 v. Texaco, Inc.*, 2007 OK CIV APP 42, ¶13, 162 P.3d 238, the court noted that while written comments and objections can be submitted by class members, those class members must file objections in compliance with the order and notice of the settlement court, state their intent to appear at the fairness hearing, and appear in person or through their disclosed counsel at the hearing for their objection to be preserved. Furthermore, the Court finds that Trustee Doolin supported the settlement of $23,500,000 in this case.

Class Counsel Fees:

3. Testimony was presented at the hearing by the Class Representatives and Class Counsel, demonstrating that an attorney fee award of 40% is fair, reasonable and appropriate. The testimony was presented through affidavits (Exhibits 4 - 10), through affirmations of Class Members who appeared at the hearing, and by way of live testimony at the hearing, including the testimony of Robert N. Barnes (one of Class Counsel), Lois Foster (Class Representative), Homer Thompson (husband of Class Representative Madaline Thompson), Charles E. Burruss (Class Member, National Association of Royalty Owners Board Member), Michael Burrage (Class Member, former Oklahoma Bar Association President, former federal judge, and expert witness for the Class), and Terry Stowers (oil and gas attorney, Executive Director of the Coalition of Oklahoma Surface and Mineral Owners (COSMO), and expert witness for the Class), all of whom testified that a 40% attorney fee is reasonable, normal and customary in a case such as the present one, that Class Counsel had fully earned the negotiated 40% fee, that the Class would likely have received nothing for their claims but for the efforts of Class Counsel, and that awarding Class Counsel less than the negotiated amount would make retaining qualified counsel more difficult in future royalty class actions. The affidavits, exhibits and testimony offered by Class Counsel and the Class Representatives were entered into the Record and accepted by the Court, without objection and without cross examination by the Doolin Trust, its counsel or any other party, person or entity.

4. Without first ruling on the validity of the Doolin Objection, the Court allowed the Doolin Trust to present argument. Mr. Garland, the Trust's counsel, stated that the Doolin Trust

would not present any testimony or other evidence, but would only present oral argument relying on evidence previously submitted to the Court by Class Counsel and the Class Representatives. Mr. Garland stated that the Class Representatives' fees were reasonable and should be paid, that the expenses incurred by Class Counsel were reasonable and should be paid, that the hours spent and work completed by Class Counsel were reasonable and necessary.

5. The Doolin Trust acknowledged: (i) the reasonableness of the attorney rates, attorney hours, expenses, and Class Representatives' fees, (ii) the excellence of Class Counsel, without whom the Class would have received none of their underpaid royalty; (iii) the need of royalty owners to have lawyers like Class Counsel willing to represent classes in matters of this sort so that cases will be filed and properly pursued so as to achieve excellent results.

6. Based upon the evidence, the Court finds that Class Counsel's efforts on behalf of the Class in this lawsuit began with an investigation that led to the filing of this lawsuit in early 2010. Over the past two years, Class Counsel have devoted thousands of hours of time and effort, including extensive discovery of documents and data, research, accounting review and analysis, consultation with and preparation of expert witnesses, formal mediation, settlement negotiations among counsel, land and lease record review and analysis, engineering review and analysis, damage modeling, and other investigations and preparation. Class Counsel have paid substantial (yet judicious and necessary) amounts of money to achieve a fair and reasonable settlement for the benefit of the Class. Class Counsel have borne hardships of the litigation and the risk of potential loss primarily on their own shoulders. To date, Class

Counsel have received no compensation for their efforts or reimbursement of their expenses.

7. The settlement in this matter was 130% of the alleged underpaid royalties. By securing such a settlement Class Counsel not only recovered the monies wrongfully withheld from the Class Members, but also obtained an amount paying a large portion of their fee.

8. Class Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class and which have resulted in the creation of a Common Fund of $23,500,000.00, plus accrued interest.[1]

9. Under the Common Fund Doctrine, and in particular in a "class action" (which is one type of action that can create a common fund), the Court has the authority to extend

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[1] The Common Fund Doctrine is well recognized by the Oklahoma Supreme Court (as well as the United States Supreme Court). If the plaintiff and/or his counsel have created, preserved, protected, or increased a common fund (or common property), or have brought into court a fund in which others may share with him, a court, in the exercise of equitable jurisdiction, may order the allowance of attorney fees and litigation expenses to counsel.

> The conceptual underpinnings for the chancery common-fund doctrine teach us that an equitable charge may be impressed in favor of its creator when the fund is within the direct control of the court. The "pre-existing fund" must be immediately subject to counsel-fee assessment, and the benefits conferred have to be traceable with some accuracy to each beneficiary. [Footnotes and citations omitted.]

Oklahoma Tax Com'n v. Ricks, 1994 OK 115, ¶¶7-8, 885 P.2d 1336.

> It is well settled that ordinarily "a court in the exercise of equitable jurisdiction, will, in its discretion, order an allowance of counsel fees, or, as it is sometimes said, allow costs as between solicitor and client, to a complainant (and sometimes directly to the attorney) who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund, or of common property, or who has created at his own expense, or brought into court, a fund in which others may share with him." [Citations omitted.]

State ex rel. Board of Com'rs of Harmon Co. v. OTC, 1944 OK 250, ¶4, 151 P.2d 797; *see also Kellough v. Taylor*, 1941 OK 320, 119 P.2d 556.

contingency fee agreements entered into between the Class Representatives and Class Counsel to the entire Class.

> Contingent fee agreements may be appropriate in class action cases. . . . Many courts have held . . . that once a class is certified and a decision on the merits is had, the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members.

Sholer v. State of Oklahoma, 1999 OK CIV APP 100, ¶¶13-14, 990 P.2d 294.

10. This Court recognizes the importance of contingent fees in our judicial system, especially in class actions.

> Although contingent fee contracts are subject to restrictions . . . such agreements have generally been enforced unless the contract is unreasonable. Often contingent fee agreements are the only means possible for litigants to receive legal services -- contingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their day in Court. [Footnotes omitted.] *Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754.

11. *Newberg on Class Actions* §14:6 (4th ed. 2002) recognizes that it is appropriate to award an attorney's fee based on a percent of the value of the common fund established for the benefit of the class.

12. A review of other Oklahoma District Courts' orders reveals similar sound logic regarding the value and benefits of fixed contingent fee awards. In *Bridenstine v. Kaiser-Francis*, Case No. CJ-2000-1, District Court of Texas County, State of Oklahoma, ¶3, the Honorable Ronald Kincannon explained his rationale for using the percentage of fund method for determining the appropriate attorney's fee:

> The percentage fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

In *Brumley v. ConocoPhillips*, Case No. CJ-2001-5, District Court of Texas County, Oklahoma, Judge Zigler stated additional rationales for awarding the full percentage fee:

> To award Class Counsel a lesser percentage of the Total Common Fund because the efforts of Class Counsel have created an exceptionally large Fund would amount to penalizing Class Counsel for their success which the Court is unwilling to do. This Court makes no myth as to Class Counsel's attorney fee award herein. It is significant. Yet, it is reasonable and proper. It is fair and equitable. Additionally, the common sense reality is, when the efforts of Class Counsel create an exceptionally large Total Common Fund for the benefit of the Class and if Class Counsel's fees awarded therefrom are greatly restricted, then forseeably [sic] so goes later access to the Courthouse for other potential and future class members. From that common sense viewpoint and understanding it is all a matter of economics. So in conclusion, as in the many other class cases referenced herein, under this percentage approach as thoroughly addressed hereinabove, the interests of the Class and Class Counsel will be consistent and aligned.
>
> * * *
>
> Knowing the rewards for Class Counsel can be great, so travels the path of loss for Class Counsel if defeat is the end result. Financial, personal, and emotional devastation are the potential events for a very few members of this Profession willing and able to represent thousands of strangers in order to obtain monetary benefit for those strangers that otherwise, without question, is unattainable through known legal means. From this aspect, the potential rewards of a Class Counsel's success and the potential devastation realized of a Class Counsel's defeat must be considered with [an] open judicial mind.

13. This Court finds that the efforts of Class Counsel created an exceptionally large total common fund for the benefit of the Class. The reasoning of the above-quoted Oklahoma courts on the award of attorney fees in cases such as the present action is compelling, and this Court adopts their reasoning in this case. The Court will not reduce Class Counsel's percentage of fees from the common fund because of the success they achieved. To do so would effectively penalize Class Counsel for their success in this case and thereby restrict later access to the courthouse for potential class members in other cases who look to effective lawyers like Class Counsel in this case as their keys to the courthouse doors.

14. The Court finds that Class Counsel and the Class Representatives entered into contingency fee agreements whereby Class Counsel agreed to prosecute this action in exchange for receiving a fee of 40% of the gross recovery for the Class, plus reimbursement of litigation expenses.

15. The Court finds that the 40% contingency fee percentage contained in the agreement between Class Counsel and the Class Representatives is customary, typical and normative for oil and gas class action attorney fee awards approved in this State.

16. The Court finds: (a) that the 40% contingency fee agreement between Class Counsel and the Class Representatives is fair and reasonable and should be, and is hereby, approved and extended to the Members of the Class, and (b) that based upon the foregoing factors and reasoning, as well as the additional analysis described below, an attorney fee award of 40% of the Settlement Proceeds (as defined in Compromise and Settlement Agreement), together

with accrued interest thereon, is a fair and reasonable amount of compensation to Class Counsel for establishing the Common Fund.

17. The Court has reviewed the detailed time records submitted by Class Counsel and finds that the time reflected in the records was reasonably expended for the benefit of the Class. The Court has also reviewed the hourly rates of Class Counsel as set forth in the record and finds them to be reasonable and within the acceptable range in the legal community for this type of legal services. Thus, the Court further finds that the hours multiplied by the reasonable hourly rates yields a cross-check multiplier for a 40% contingent fee of 6.3, which is well within the bounds established by numerous courts.

18. The Court considered the basic guidelines established by the Oklahoma Supreme Court set forth in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659,[2] and codified in 12 Okla. Stat. §2023(G)(4)(e). In *Burk* and §2023(G)(4)(e), the Supreme Court enunciated various factors to be considered by the District Court in fixing fees.

a. **Time and labor required**. The almost two year history of litigation and creation of the common fund demonstrates the time and labor invested by Class Counsel in this litigation. Counsel have made large time and labor commitments which have now inured to the financial benefit of the Class and have resulted in the Common Fund. In fact, Class Counsel have expended thousands of hours of time for the benefit of the Settlement Class.

[2] The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort benefitted only the City of Oklahoma City. The attorneys fee awarded in that case amounted to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future.

b. **The novelty and difficulty of the question**. Cases filed as class actions are known to be complex and vigorously contested. That certainly was the case here. The issues and questions raised by parties in this litigation were extremely complex as can be evidenced by the pleadings and other court filings themselves. The Court takes judicial notice of this factor.

c. **The skill requisite to perform the legal services properly**. The nature of this litigation, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against a large corporate defendant like EXCO, with extensive resources, represented by the very best defense counsel, necessitated assembling a team of Class Counsel qualified, skilled and experienced in oil and gas litigation as well as the details of complex litigation. Class Counsel collectively have well over 100 years' experience in oil and gas litigation and have prosecuted numerous class actions and complex cases.

d. **The preclusion of other employment**. Class Counsel are engaged in the on-going practice of law. Furthermore, all three law firms representing the Class are relatively small firms. Had Counsel not committed their limited resources to this litigation, Counsel could have accepted other matters, but did not. The prosecution of this litigation has reduced Counsel's opportunity for employment in other matters.

e. **The customary fee**. The "customary fee" in cases of this nature is a contingency fee in the range of the fee agreed to by the Class Representatives and requested by Class Counsel. Such a contingency fee is the preferred method of compensation to the

attorneys. "These types of cases (oil and gas class action cases) are handled on a contingent fee. The fee percentage in these types of cases is typically 40% of the gross fund." Honorable Richard Perry, *Continental Resources v. Conoco*, Order, p. 8.

f. **Whether the fee is fixed or contingent**. Counsel entered into a contingency fee agreement with the named Plaintiffs, providing for an attorney fee of 40% of the gross consideration recovered, plus expenses, to be paid out of the Settlement Fund. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in a class action. In *Sholer v. State of Oklahoma*, 1999 OK CIV APP 100, 990 P.2d 294,¶¶13-14, the court explained:

> Contingent fee agreements may be appropriate in class action cases. . . . Many courts have held, however, that once a class is certified and a decision on the merits is had, the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members.

g. **Time limitations imposed by client or circumstances**. Numerous time limitations have been imposed on Class Counsel throughout the course of the proceedings. The schedules of the courts, witnesses and clients were accommodated on a regular basis by Class Counsel. A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and worked significant hardships on them over the course of nearly two years.

h. **The amount involved and the results obtained**. At the outset, Class Counsel had no assurance of any recovery. The $23.5 million settlement in this case is a large class action settlement related to oil and gas issues in the State of Oklahoma. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. But for the efforts of Counsel, no Common Fund would exist.

i. **Experience, reputation and ability of counsel**. Counsels' qualifications, skills, experience, ability and reputation were addressed above.

j. **The undesirability of the case**. Compared to most civil, contingent fee litigation attracting counsel to represent Plaintiffs, this Litigation clearly fits the initially "undesirable" test. Not many law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this litigation for almost two years (and potentially much longer). EXCO is well-financed and well-represented. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. The investment by Class Counsel of their time, money and effort, coupled with the attendant potential for non-recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. Two years of paying out hundreds of thousands of dollars of litigation and overhead costs, without income, from a case where millions of dollars of attorney fee time is being

expended, and uncertainty as to whether all would be lost, combine to create more than enough reasons to prevent most attorneys from taking on a case like this.

k. **Nature and length of the professional relationship with the client**. Class Counsel, Robert N. Barnes, Patranell B. Lewis, Allan DeVore, Jandra Jorgenson, Kerry Caywood, and Angela Caywood Jones have maintained an ongoing attorney/client relationship with the named Plaintiffs for years. There is always significant risk to a client who participates as a plaintiff in a large lawsuit, in terms of the client's reputation, future business dealings, liability for costs, and other potentially adverse considerations. Class Counsel's future representation of the Plaintiffs could have been severely jeopardized in the event of an unsuccessful end to the litigation that could have caused significant damage to the clients, thus not only adversely affecting Class Counsel and the named Plaintiffs in the present case, but also potentially impacting Class Counsel's income from other cases in the future.

l. **Awards in similar cases**. The requested award of a 40% contingency fee in this case is entirely in line with other similar class action fee awards in oil and gas related cases in Oklahoma.

19. Based upon the Court's analysis of the factors discussed above, the Court finds a reasonable fee in this case to be $9,400,000.00 (which represents 40% of the gross Settlement

Proceeds, and a multiplier on the base hourly fees of approximately 6.3, which is well within the range of reasonableness).[3]

IT IS THEREFORE ORDERED that Class Counsel be, and hereby are, awarded a fee of forty percent (40%) of the gross Settlement Proceeds, for an attorney fee in the amount of $9,400,000.00.

Expert Witness Fees, Litigation Expenses and Class Representatives Fee:

20. The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, having heard testimony regarding the necessity of such expenditures in preparation of the case, and having no objections filed as to these expenses, finds that reasonable expert witness fees and litigation expenses were incurred in the amount of $95,458.40.

21. The Court finds the Class Representatives have made substantial time and labor commitments to the Class, and have incurred serious legal and financial risks while pursuing this case on behalf of the Class, all of which resulted in obtaining an excellent benefit for the Class. The granting of a Class Representative fee is based upon equitable considerations discussed above which relate to a party's efforts in the creation of a common fund for the mutual benefit of a class. Court awards to Class Representatives of more than 0.64% of the common fund are typical in these types of class actions with recoveries of this magnitude. In this action, Class Counsel has recommended and requested a Class Representatives' fee of

[3] In appropriate cases where Class Counsel have created a large common fund, such as in the present case, multipliers of 5 to 10 have been awarded. *See* Herbert Newberg, *Newberg on Class Actions (3rd)*, §14.03.

$150,000.00 (0.64%) of the gross Settlement Proceeds. The Court finds that compensation to the Class Representatives of $150,000.00 (to be divided equally among the three Class Representatives) is fair and reasonable compensation for their services to the Class. The Court further finds that the Class Representatives have incurred litigation expenses of their own in the amount of $1,298.31 and should be reimbursed for those expenses as reasonably expended in the performance of their duties for the benefit of the Class.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Class Counsel are awarded an attorney fee of forty percent (40%) of the gross Settlement Proceeds in the amount of $9,400,000.00; (2) Class Counsel are also awarded reimbursement of litigation expenses in the amount of $95,458.40; (3) Class Representatives are awarded fees of 0.64% of the gross Settlement Proceeds in the amount of $150,000.00, to be divided equally among them; and (4) Class Representatives are also awarded reimbursement of their litigation expenses in the amount of $1,298.31. The Court finds there is no just reason for delay for this Order to be filed as a final judgment, decree and order, pursuant to 12 Okla. Stat. §994 and therefore **ORDERS** it to be filed as such.

IT IS SO ORDERED this 9th day of March, 2012.

Honorable S. Wyatt Hill
Judge of the District Court

IN THE DISTRICT COURT OF CADDO COUNTY,

STATE OF OKLAHOMA

Gaylon Lee Mitchusson et al
PLAINTIFF

CASE NUMBER: CJ-2010-32

Exco Resources Inc
DEFENDANT

AFFIDAVIT OF MAILING

I, OPAL CAROL FINCH, COURT CLERK OF CADDO COUNTY, STATE OF OKLAHOMA, DO HEREBY CERTIFY THAT ON THE 9th DAY OF March, 2012, I MAILED A TRUE AND CORRECT COPY OF THE FOREGOING: Order on atty fees & Litigation Expenses & Class Representative fee TO THE FOLLOWING PERSONS AT THE ADDRESSES LISTED BELOW:

KERRY W CAYWOOD
PARK NELSON CAYWOOD & PARK
122 N FOURTH STREET, PO BOX 968
CHICKASHA, OK 73023-0988

ANGLEA CAYWOOD JONES
PARK, NELSON, CAYWOOD, JONES
PO BOX 968
CHICKASHA, OK 73023

ALLAN DEVORE
DEVORE LAW FIRM
5709 NW 132ND STREET
OKLAHOMA CITY, OK 73142-4437

OPAL CAROL FINCH, COURT CLERK OF
CADDO COUNTY, STATE OF OKLAHOMA

BY: Rhonda Bruer
DEPUTY

JANDRA JORGENSON
DEVORE & JORGENSON PLC
5709 NW 132ND STREET
OKLAHOMA CITY, OK 73142

(SEAL)

(over)

ERIC R KING
GABLE GOTWALS
211 N ROBINSON LEADERSHIO SQU 15TH
OKLAHOMA CITY, OK 73102-7101

LESLIE L LYNCH
GABLE GOTWALS
211 N ROBINSON LEADERSHIP SQU 15TH
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RICHARD B NOULLES
GABLEGOTWALS
1100 ONEOK PLAZA 100 W 5TH STREET
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ROBERT N BARNES
BARNES & LEWIS
720 NW 50TH STREET SUITE 200B
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PATARNELL BRITTEN LEWIS
BARNES & LEWIS
720 NW 50TH STREET SUITE 200B
OKLAHOMA CITY, OK 73118

Exhibit 7

1001967197

IN THE DISTRICT COURT OF GARFIELD COUNTY
STATE OF OKLAHOMA

CONTINENTAL RESOURCES, INC., and BUFFALO ROYALTY CORPORATION,	)	FILED GARFIELD COUNTY, OKLA. AUG 22 2005 SHARON MELROSE COURT CLERK BY DEPUTY COURT CLERK
Plaintiffs,	)	
and	)	
FARRAR OIL COMPANY,	)	
Plaintiff, Intervenor,	)	
v.	)	Case No. CJ-95-739
CONOCO INC., and E.I. DUPONT DeNEMOURS & COMPANY,	)	
Defendants.	)	
CONSOLIDATED WITH		
FARRAR OIL COMPANY,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-2000-356
CONOCO INC. and E.I. DUPONT DeNEMOURS & CO.,	)	
Defendants.	)	

ORDER ON MOTION FOR ATTORNEY FEES, LITIGATION EXPENSES, AND CLASS REPRESENTATIVES FEE

This matter came on for hearing on the 17th day of August, 2005, on Class Representatives' and Class Counsel's motion for attorney fees, litigation expenses and Class Representatives fee. All named parties were present and represented by counsel. Also appearing were Robert Bishop, Stuart Yoes, and Michael Bigheart,, all three as attorneys for the sole

objector to the motion, Diane Mason ("Ms. Mason"). After reviewing the motion and all related pleadings, having reviewed the evidence submitted, having heard the testimony and arguments presented, being fully advised in the premises, and having announced its ruling in open court on the 17th day of August, 2005, **THE COURT FINDS AND ORDERS AS FOLLOWS**:

Notice and Objections:

1. Notice of this hearing was properly mailed by ConocoPhillips to the Putative Class Members with known valid mailing addresses and was published as required by this Court's previous order (*see* Report concerning notice previously filed with the Court). The Notice provided:

> Class Counsel has requested that the Court award Class Counsel an attorney's fee of 40% of the Settlement Proceeds; award the Class Representatives a combined fee of $115,000.00 to be divided among them; and award reimbursement to Class Counsel for expert and consulting fees and litigation expenses actually incurred in an amount not to exceed $500,000.00. If the Court approves these requests for fees and expenses, said amounts will be deducted from the Settlement Proceeds before distribution to the Class. In addition, the Settlement Agreement requires certain costs of notice, printing and mailing associated with the implementation of the terms of the Settlement Agreement be paid by and deducted from the Settlement Proceeds prior to any other disposition of the proceeds.
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> * * *
>
> You May Remain a Member of the Settlement Class, but Object to the Proposed Class Settlement or to Class Counsel's Request for Attorney's Fees, Class Representatives' Award, Expert and Consulting Expenses and other Litigation Expenses.
>
> Only a person or entity who remains a member of the Settlement Class shall have the right to object to the proposed settlement with ConocoPhillips and/or the requested fees and expenses as set forth above. Persons who desire to object to the Settlement or the fees and expenses must file a written statement with the Garfield County Court Clerk, P.O. Box 1664 Enid, Oklahoma 73942-1081, and provide a copy of same to Class

Counsel, Allan DeVore, 1318 N. Robinson, Oklahoma City, OK 73102, and counsel for ConocoPhillips, Gary Davis, Crowe and Dunlevy, 20 North Broadway, Suite 1800, Oklahoma City, Oklahoma 73102, on or before August 1, 2005. The written statement must contain:

(1) A heading referring to Case Nos. CJ-95-739 and CJ-2000-356 and to the District Court of Garfield County, Oklahoma;
(2) A statement as to whether the objector intends to appear at the Settlement Fairness Hearing, either in person or through counsel, and, if through counsel, identifying counsel by name, address and telephone number;
(3) A detailed statement of the specific legal and factual basis for each and every objection;
(4) A list of any witnesses the objector may call at the Settlement Fairness Hearing, together with a brief summary of each witness's expected testimony;
(5) A list of and copies of any exhibits which the objector may seek to use at the Settlement Fairness Hearing;
(6) A list of any legal authority the objector may present at the Settlement Fairness Hearing;
(7) The objector's current address;
(8) The objector's current telephone number;
(9) The objector's signature executed before a Notary Public; and,
(10) Identification of the objector's interest in Class Wells by identifying each Class Well (by Well name, ConocoPhillips well number, Section, Township and Range).

The Court previously approved such notice and now finds that the notice to the Class of this hearing is proper and sufficient under 12 Okla. Stat. § 2023 (E), the Due Process Clause of the United States Constitution and the Due Process Clause of the Oklahoma Constitution.

2. The Court notes that only one Putative Class Member, Ms. Mason, has filed an objection to the motion for attorney fees, litigation expenses and Class Representatives award. The Court notes that Ms. Mason's total estimated aggregate claim is $16.33 (i.e., approximately 0.0000007 of the settlement fund) and her share of the requested fees and expenses would be $6.73 (The Court notes that each Class Member will receive an approximate 22% increase in their net distribution over their claim amount as a result of

the Putative Class Members who opted out of the Class Settlement.) Although the Court has considered the objection of Ms. Mason, filed by, and presented to the Court by her attorneys, the Court finds that such objection is without merit and that the participation by Ms. Mason, or Ms. Mason's attorneys, in this case neither aided the Court in its determination of the proper fees and expenses to be awarded nor in any way was a benefit to the Class or added any value to the Common Fund.

The Settlement Agreement approved by the Court, provides that "[i]ndividual objections to the award of Class Fees and Expenses by a Settlement Class Member will be severed for separate review and will not affect the distribution to other Settlement Class Members of their share of the Settlement Fund." Settlement Agreement, ¶5.5. Furthermore, the Notice to the Class approved by the Court provided that "[i]f the Court determines that the settlement and the awards of fees and expenses are fair to the Settlement Class as a whole, individual objections may be severed for separate review." Therefore, the Court finds that Ms. Mason's objection to the award of fees and expenses is hereby severed for possible separate appellate review and any appeal of this order by Ms. Mason will not affect the distribution to other Settlement Class Members of their share of the Settlement Fund

Class Counsel's Attorney Fees:

3. Class Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class and which have resulted in the creation of a Common Fund of $23,000,000.00, plus accrued interest.[1]

[1] The Common Fund Doctrine is well recognized by the Oklahoma Supreme Court (as well as the United States Supreme Court). If the plaintiff and/or his counsel have **created, preserved, protected, or increased a common fund (or common property), or have brought into court**, a fund in which others may share with him, a court, in

4. Under the Common Fund Doctrine, and in particular in a "class action" (which is one type of action that can create a common fund), the Court has the authority to extend contingency fee agreements entered into between the Class Representative and Class Counsel to the entire Class.

> **Contingent fee agreements may be appropriate in class action cases**. . . . Many courts have held . . . that once a class is certified and a decision on the merits is had, **the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members**. [Emphasis added.]

Sholer v. State of Oklahoma, 1999 OK CIV APP 100, ¶¶ 13-14, 990 P.2d 294.

5. The Court finds that Class Counsel and the Class Representatives entered into contingency fee agreements whereby Class Counsel agreed to prosecute this action in exchange for receiving of fee of 40% of the gross recovery for the Class. The Court further recognizes the importance of contingency fees in our justice system, and in particular in class actions.

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the exercise of equitable jurisdiction, may order the allowance of attorney fees and litigation expenses to counsel.

> **The conceptual underpinnings for the chancery common-fund doctrine teach us that an equitable charge may be impressed in favor of its creator *when the fund is within the direct control of the court*.** The "pre-existing fund" must be immediately subject to counsel-fee assessment, and the benefits conferred have to be traceable with some accuracy to each beneficiary. [Footnotes and citations omitted. Emphasis added.]

Oklahoma Tax Com'n v. Ricks 1994 OK 115, ¶7-8, 885 P.2d 1336.

> It is well settled that ordinarily "a court in the exercise of equitable jurisdiction, will, in its discretion, order an allowance of counsel fees, or, as it is sometimes said, allow costs as between solicitor and client, to a complainant (and sometimes directly to the attorney) who at his own expense has maintained a successful suit for the **preservation, protection, or increase of a common fund, or of common property, or who has created at his own expense, or brought into court, a fund in which others may share with him.**" [Citations omitted. Emphasis added.]

State ex rel. Board of Com'rs of Harmon Co. v. OTC, 1944 OK 250, ¶4 151 P.2d 797; *see also, Kellough v. Taylor*, 1941 OK 320, 119 P.2d 556.

> Although contingent fee contracts are subject to restrictions . . . such agreements have generally been enforced unless the contract is unreasonable. **Often contingent fee agreements are the only means possible for litigants to receive legal services ---- contingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their day in Court.** [Emphasis added. Footnotes omitted.]

Sneed v. Sneed, 1984 OK 22, ¶3, 681 P.2d 754.

6. In class actions, the percentage fee or contingency fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, the percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery. The Court certainly considers the existing Common Fund to be an excellent recovery to the Class Members. Thus, under this percentage approach, the interests of the Class and Class Counsel are consistent and aligned.

7. The Court finds that the 40% contingency fee percentage contained in the agreement between Class Counsel and the Class Representatives is within the typical range of contingency fee percentages for oil and gas class action litigation approved in this State.

8. The Court finds: (a) that the 40% contingency fee agreement between Class Counsel and the Class Representatives is fair and reasonable and should be, and is hereby, approved and extended to the members of the Class and (b) that based upon the additional analysis described below, an attorney fee award of 40% of the Settlement Proceeds (as defined in

Compromise and Settlement Agreement), together with accrued interest thereon, is a fair and reasonable amount of compensation to Class Counsel for establishing the Common Fund.

9. The Court considered the basic guidelines established by the Oklahoma Supreme Court set forth in *State ex re/. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.[2]

10. The Court has reviewed the detailed time records submitted by Class Counsel and finds that the time reflected in the record (in excess of 7512 hours) was reasonably expended for the benefit of the Class. The Court has also reviewed the hourly rates of Class Counsel as set forth in the record and finds them to be reasonable and within the acceptable range in the legal community for this type of legal services. Thus, the Court further finds the base hourly fees (hours X rates), prior to consideration of the enhancement factors under a "lodestar" approach, in this case to be in excess of $2,521,000.00. (The Court notes, however, that Class Counsel has expended substantial additional time during July and August of 2005, after the time frame of the itemized billing schedule, and will be expending substantial time monitoring the distribution of the Settlement Fund, thus substantially increasing the base hourly fees.)

11. In *Burk,* the Supreme Court enunciated twelve factors to be considered by the District Court in fixing fees under the lodestar approach.

A. Time and labor required. Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Plaintiff Class.

[2] The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort benefited only the City of Oklahoma City. The attorneys' fee awarded in that case amounted to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future.

B. The novelty and difficulty of the question. Class certification questions are known to be vigorously contested. Furthermore, the oil and gas accounting issues involved in this case are also very complex.

C. The skill requisite to perform the legal services properly. The unique nature of this case, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against a large corporate defendant represented by highly capable defense counsel with extensive resources necessitated assembling a team of Class Counsel skilled in oil and gas litigation, as well as details of complex litigation. Counsels' qualifications, skills and experience are well known throughout the oil and gas legal community. Class Counsel are certainly highly skilled and capable counsel.

D. The preclusion of other employment. Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their resources to this case, Class Counsel could have accepted other matters, but did not. The prosecution of this case has very substantially reduced the Class Counsel's opportunity for employment in other matters.

E. The customary fee. These types of cases (oil and gas class action cases, are handled on a contingent fee.) The fee percentage in these types of cases is typically 40% of the gross fund.

F. Whether the fee is fixed or contingent. Class Counsel entered into contingency fee agreements with the Class Representatives that provides for attorneys' fee of 40% of the gross consideration received as discussed in detail above. Counsel for the Class have represented the Class with vigor and without prior compensation of any kind for their time.

G. Time limitations imposed by client or circumstances. Numerous time limitations were imposed on Class Counsel throughout the course of the proceedings, beginning with time constraints imposed by statute for the filing of a case for punitive damages before the new statute restricting the amount of such damages went into effect the day following the filing of the case. Many subsequent time constraints were imposed on Class Counsel. This Court and the appellate courts imposed time limitations through case scheduling over the last ten years that forced Class Counsel to perform services of great magnitude by certain dates. The schedules of the courts, witnesses and clients were also accommodated on a regular basis by Class Counsel. A case of the size and complexity existing here required the commitment of a large percentage of the total time and resources of the firms of Class Counsel and worked significant hardships on them over the course of a decade or more. The circumstances of the case required the litigation to be vigorously pursued if an excellent

recovery through settlement was to be achieved. Class Counsel, in fact, did vigorously prosecute the case and obtained excellent results for the Class.

H. The amount involved and the results obtained. There can be no doubt that at the outset, Plaintiffs' Counsel had no assurance of any recovery. When the Continental Resources Class Action was filed, there had never been another class action case based on similar facts anywhere in the country to the Court's knowledge. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. The Court considers this settlement to be an excellent result for the Class.

I. Experience, reputation and ability of counsel. Class Counsel's qualifications, skill, experience, ability and reputation are well known throughout the oil and gas and complex litigation legal communities. Class Counsel are exceptional litigators.

J. The undesirability of the case. Compared to most civil, contingent litigation attracting counsel to represent plaintiffs, this litigation clearly fits the initially "undesirable" test. Not many law firms would be willing, or able, to risk investing the time and expenses necessary to prosecute this litigation. The Defendants were well-financed, and well represented. Certainly, the possibility of a recovery was a risky matter.

K. Nature and length of the professional relationship with the client. Class Counsel have various long-term relationships with various Class Members.

L. Awards in similar cases. The awards in similar cases were discussed in detail in Class Counsel's motion, exhibits and testimony. The Court incorporates said discussion herein by reference. The Court finds that a 40% fee is customary in these types of cases.

12. In 1980, the Oklahoma Supreme Court followed and modified *Burk, supra,* to further instruct District Courts that counsel fees cannot be fairly awarded on the basis of time alone, but other factors, particularly the litigation risk factor, must be considered. See *Oliver's Sportcenter, Inc. vs. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291.

13. Based upon the Court's analysis of the *Burk* factors, the Court finds a reasonable fee in this case to be $9,200,000.00, plus accrued interest thereon (which represents 40% of the Settlement Proceeds, and a total multiplier of the base hourly fees of approximately 3.6 under a lodestar approach which is well within the range of reasonableness).[3]

IT IS THEREFORE ORDERED that Class Counsel be, and hereby are, awarded an attorney fee of 40% of the Settlement Proceeds, plus accrued interest thereon.

Expert Witness Fees, Litigation Expenses and Class Representatives Fee:

1. The Court, having reviewed the accounting records which detail the expert witness fees and litigation expenses incurred in pursuit of class claims, and having heard testimony of Class Counsel regarding the necessity of such expenditures in preparation of the case, finds that reasonable expert witness fees and litigation expenses were incurred in the amount of $170,780.59.

2. The Court finds the Class Representatives have made substantial time and labor commitments to the Class, and have incurred serious legal and financial risks while pursuing this case on behalf of the Class, all of which resulted in obtaining an excellent

[3] In appropriate cases where Class Counsel have created a large common fund, such as in the present case, multipliers of even 5 to 10 have been awarded. See, *Herbert Newberg*, Newberg on Class Actions (3rd), § 14.03 (emphasis added):

> Courts applying the lodestar approach will often use large multipliers or monetary enhancements of the time/rate (lodestar) calculation in order to reach fee award results comparable to percentage of recovery fees. **Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award way warrant an even larger multiple.**[21]
>
> [Fn. 21] *See e.g., In re Beverly Hills Fire Litig*, 639 F. Supp. 915 (ED Ky 1986) (personal injury class action; **multiplier of 5 for lead counsel for contingency and superior trial skill**); *Wilson v. Bank of Am Natl Trust & Savs Assn*, No. 643872 (Cal Sup Ct Aug 16, 1982) (illegal use of escrow funds by lender for profit; noncontingent hourly rates of up to $150/hour and a **multiplier of up to 10 times** the hourly rate). [End of Fn. 21]

benefit for the Class. The granting of a Class Representative fee is based upon the same equitable considerations discussed above with related to a party's efforts in the creation of a common fund for the mutual benefit of a class. Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund. In this action, Class Counsel has recommended and requested a Class Representatives' fee of $115,000.00 (one-half of one percent (0.5 %) of the Settlement Proceeds). The Court finds that compensation to the Class Representatives in the amount of $115,000.00 (to be divided among the three Class Representatives) is fair and reasonable compensation for their services to the Class.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Class Counsel are awarded attorney fees in the amount of 40% of the Common Fund (i.e., $9,200,000.00 plus accrued and accruing interest thereon); (2) Class Counsel are awarded reimbursement of litigation expenses in the amount of $170,780.59; and (3) Class Representatives are awarded fees in the amount of $115,000.00.

IT IS SO ORDERED this 22nd day of August, 2005.

Richard M. Berry

Richard Perry
Judge of the District Court

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of August, 2005, a true and correct file-stamped copy of the above and foregoing *Order on Motion for Attorney Fees, Litigation Expenses and Class Representatives Fee* was mailed, postage prepaid, to:

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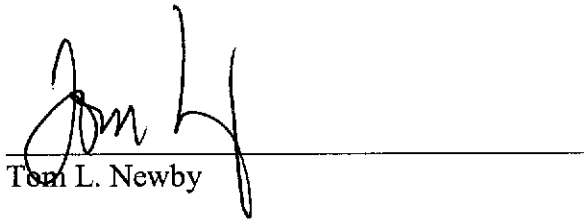

Tom L. Newby

Exhibit 8

IN THE DISTRICT COURT OF DEWEY COUNTY
STATE OF OKLAHOMA

DEWEY COUNTY, OKLAHOMA
FILED
DEC 23 2013
RACHELLE ROGERS, Ct. Clerk
By _____ DEPUTY

PHILLIP J. CORNETT and ASHCRAFT GROUP LLC, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

SAMSON RESOURCES COMPANY, an Oklahoma Corporation,

Defendant.

Case No. CJ-09-81

FINAL ORDER GRANTING CLASS COUNSEL FEES, LITIGATION COSTS, AND INCENTIVE AWARD

This matter came before the Court for an evidentiary hearing on issues regarding the Motion for Attorneys' Fees, Litigation Costs, and Class Representative Award from the Common Fund and Brief in Support Thereof. The Court has considered all submissions and evidence, including all matters presented at the hearing and everything presented by the various objectors and now grants the motion in its entirety. In doing so, the Court has considered and followed all the requirements and considerations set forth in 12 O.S. § 2023 (G)(4)(e) (effective Sept. 10, 2013).

The cited statute governs the award of fees to Class Counsel in this case. The Court has considered each of the statutory factors, acting as a fiduciary on behalf of the class and determining, after consideration of all factors and the submissions and evidence before the Court as noted above, that a fair and reasonable attorneys' fee for Class Counsel is the requested amount—40% of the $15,200,000 cash portion of the recovery (subject to opt-out adjustment per para. 5.2 of the Settlement Agreement), which shall be paid from the Settlement Proceeds.

The Court finds that consideration of all 13 factors, individually and collectively, found in 12 O.S. § 2023 (G)(4)(e) supports the conclusion that the amount awarded herein is a fair and reasonable fee for Class Counsel. The Court addresses the 13 factors below in the order of importance in class action litigation such as is involved in this case:

1. **Whether the fee is fixed or contingent.** Class action fee agreements are almost always contingent fee agreements. Most class member cannot afford to finance a class action on a fixed hourly basis or it would not be worthwhile to do so. As a result, many of the hourly related factors, such as time spent, client relationship length, client imposed deadlines, and hourly rates are of lesser importance in most class actions. Class Counsel here entered into a contingency fee agreement with the named Plaintiffs which provides that attorneys would be compensated at a 40% contingency fee. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in a class action. In *Sholer v. State of Oklahoma*, 1999 OK CIV APP 100, 990 P.2d 294, ¶¶ 13-14, the court explained:

> Contingent fee agreements may be appropriate in class action cases. . . . Many courts have held, however, that once a class is certified and a decision on the merits is had, **the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members**. [emphasis added.]

That concept in the Oklahoma law has been carried through by the Oklahoma Legislature in adopting 12 O.S. § 2023 (G)(1) ("In a certified class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law *or by the parties' agreement*.") (emphasis added). *See also Continental Res. v. Conoco, Inc.*, Consolidated Cases CJ-95-739 and CJ-2000-356 (Okla. Dist. Ct. Garfield County) (Aug. 22, 2005, Order at 5-6)(holding that: "The Court has the authority to extend the contingency fee agreements entered into between the Class Representative and Class Counsel to the entire Class.") (citing *Sholer*). The contingent fee

agreement here should be spread across the Class unless the remaining factors indicate a reason to increase or decrease the amount in that agreement which represents the actual market contingency rate for this case at the time the outcome was unknown.

2. **The customary fee.** The customary fee is the second most important factor because in a contingent fee context, the fee is set before the case is filed and discovery and motion practice determines whether the case is a loser or winner, or if a winner, how big. The "customary fee" in cases of this nature is a 40% contingency fee essentially as the Class Representatives and Class Counsel entered into. Had the actual contingent fee agreement been at variance with the customary fee for this type of case, additional scrutiny would have been required. "These types of cases (oil and gas class action cases) are handled on a contingent fee. **The fee percentage in these types of cases is typically 40% of the gross fund.**" (emphasis added). Honorable Richard Perry, *Continental Resources v. Conoco*, Order at 8. That customary fee is reflected in this case.

3. **The amount in controversy and the results obtained.** At the outset, Class Counsel had no assurance of any recovery. Cases brought against operators on behalf of royalty interest owners are riddled with tenuous issues, and some (especially recently in federal court) have not recovered at all. [1] Considering the amount in controversy and, most importantly for a contingent fee case, the result obtained of $15.2 million (plus some on notice costs and mutual releases), which provides outstanding benefits to the Class, this factor weighs strongly in favor of the requested fee.

4. **Awards in similar cases.** This is an important factor as it generally reflects the customary fee entered into in the free market, adjusted for reasonableness, and in this case it

[1] *See Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646, 654 (W.D. Okla. 2011) (Oklahoma royalty underpayment class certification denied); *Morrison v. Anadarko Petroleum, Corp.*, 280 F.R.D. 621 (W.D. Okla. 2012) (same).

again reflects the actual fee agreement entered into. The "awards in similar cases" is approximately 40% of the total value. *See Laverty v. Newfield*, Case No. CJ-2002-101, (Okla. Dist. Ct. Beaver Co.) ("finding that the requested 40% fee is customary in these types of cases" and that "[a] contingent attorneys' fee of at least forty percent (40%) of the common fund is normative for this type of royalty owner class litigation") (emphasis added); *Cont'l Resources v. Conoco Inc.*, No. CJ-95-739 (Dist. Ct. of Garfield Co. Order of Aug. 22, 2005) ("The fee percentage in these types of cases is typically 40% of the gross fund."); *Been* v. *O.K. Industries, Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *5 (E.D. Okla. Aug. 16, 2011) ("[A] source of comparison is the oil and gas class action settlements in Oklahoma … In those cases, there is a consensus for a 40% fee award."); *Kouns v. ConocoPhillips*, Case No. C-98-61 (Okla. Dist. Ct. Dewey Co.) (42.56% fee); *Velma-Alma v. Texaco*, Case No. CJ-2000-1 (Okla. Dist. Ct. Stephens Co.) (40%); *Rudman v. Texaco*, Case No. CJ-97-1-E (Okla. Dist. Ct. Stephens Co.) (40%); *McIntoush v. Questar*, Case No. CJ-02-22 (Okla. Dist. Ct. Major Co.) (40%); *Robertson/Taylor v. Sanguine*, Case No. CJ-02-150 (Okla. Dist. Ct. Grady Co.) (40%); *Lobo v. BP*, Case No. CJ-97-72 (Okla. Dist. Ct. Beaver Co.) (40%); *Mayo v. Kaiser-Francis*, Case No. CJ-93-348 (Okla. Dist. Ct. Grady Co.) (40%); *DSR v. Devon*, Case No. CJ-11-12 (Okla. Dist. Ct. Dewey Co.) (40%); *Tatum, et al. v. Devon*, FJ-2010-77 (Okla. Dist. Ct. Nowata Co.) (45%).

5. **The risk of recovery in the litigation.** If there was no risk in the litigation, the customary fee would be much lower. However, the risk of recovery in all class actions is high. Class certification can be denied, and even if granted, the Class can lose on the merits on summary judgment, trial, or on appeal.

6. **Experience, reputation and ability of counsel.** Class Counsels' qualifications, skills, experience, ability and reputation in class actions in general and in royalty underpayment in particular are highly regarded by state and federal courts throughout Oklahoma and Kansas.

7. **The novelty and difficulty of the questions presented by the litigation.** Cases filed as class actions are known to be complex and vigorously contested. That certainly was the case here as evidenced by the class certification briefing and expert opinions attached thereto. Substantial litigation risks existed in this case, both at the certification stage and on the merits.

8. **The skill required to perform the legal services properly.** The nature of this litigation, coupled with the issues, mandated that the Class be represented by highly skilled counsel. To prosecute these claims against well-financed defendants with vast resources, represented by the well-known defense counsel, necessitated assembling a team of Class Counsel qualified, skilled, and experienced in oil and gas litigation as well as the details of complex litigation. Class Counsel collectively have decades of experience in oil and gas litigation and have prosecuted numerous class actions and complex cases.

9. **The preclusion of other employment.** Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed their limited resources to this litigation, Class Counsel could have accepted other matters, but did not. The prosecution of this litigation has reduced Class Counsel's opportunity for employment in other matters.

10. **Time and labor required.** This factor in the contingent fee common fund class actions such as this one is intended to show that the case was not a lay-down (though it may have more importance in a fee shifting class action). The history of this litigation and creation of the common fund demonstrate that substantial time and labor were invested by Class Counsel. Class

Counsel risked substantial time, several thousand hours, and many more will be expended before the Settlement allocation is finalized, paid out, and the case closed.

11. **The undesirability of the case.** Compared to most civil contingent fee litigation attracting counsel to represent plaintiffs, this class action fits the "undesirable" test. Few law firms are willing to litigate cases which require reviewing thousands of pages of detailed contracts and accounting records, consulting and hiring expert witnesses, and risking a substantial investment of time, trouble, and expense necessary to prosecute a case with such uncertainty. Defendant is well-financed and well represented. The risk of success was uncertain and the potential exposure for failure was significant. The investment by Class Counsel of their time, treasure, and effort, coupled with the attendant potential for non-recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature.

12. **Time limitations imposed by client or circumstances.** Though not a significant factor in this case, or in most class actions, time limitations have been imposed on Class Counsel throughout the course of the proceedings not by the client, but by the Court.

13. **The nature and length of the professional relationship with the client.**

Both named Plaintiffs are long-time clients of class counsel, Kandi Jepsen Pate and Mark A. Wolfe. Plaintiffs have consulted with their attorneys on numerous occasions concerning many facets of their mineral ownership. Plaintiffs have assisted Class Counsel with developing this case and discovery.

Based on a review of these 13 factors, the Court finds the 40% contingency fee contained in the fee agreement between Class Counsel and the Class Representatives is within the typical range of contingency fee percentages for oil and gas class action litigation approved in this State,

is fair and reasonable in similar cases, and is fair and reasonable in this case and should be, and is hereby, approved and extended to the members of the Class.

II. Litigation Expenses Are Reasonable.

The requested expenses are $271,319.21. All of the expenses incurred, or to be incurred are reasonable and necessary and the Court expressly so finds after due consideration of the evidence.

III. The Requested 1% Incentive Award To Each Of The Class Representatives Is Reasonable.

The Class Representatives have performed well based on the evidence before the Court and the Court's knowledge from presiding over this litigation. Without the Class Representatives' willingness to litigate on behalf of other royalty owners, this case could not have proceeded and no recovery would have been had for the Class. The Class Representatives spoke with Class Counsel about their royalty payments and about the facts and legal issues in the case, negotiated the fee agreement, provided documents, participated in the mediation process and consulted with Class Counsel on the terms of the Settlement, all to enable the Class's recovery on its claims.

The incentive award sought is consistent with such awards in other cases. Recently, courts have awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. *See Continental Res. v. Conoco, Inc.*, Consolidated Cases CJ-95-739 and CJ-2000-356 (Okla. Dist. Ct. Garfield County Aug. 22, 2005) ("Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund"); *Velma-Alma Independent School District No. 15 v. Texaco, Inc.*, Consolidated Case Nos. CJ-2002-304, CJ-04-581-E and CJ-2005-496M (Okla. Dist. Ct. Stephens County Dec. 22, 2005) (awarding 1.07% of the respective total settlement

amounts); *Robertson v. Sanguine, Ltd.*, Case No. CJ-02-150, (Okla. Dist. Ct. Caddo County July 11, 2003) (approving 1%); *Fazekas v. ARCO*, Case No. C-98-65 (Okla. Dist. Ct. Latimer County 2002) (awarding 6.40%); *Rudman v. Texaco*, Case No. CJ-97-1-E (Okla. Dist. Ct. Stephens County 2001) (awarding 1.00%); *Brumley v. ConocoPhillips*, Case No. CJ-2001-5 (Okla. Dist. Ct. Texas Co. 2005) (awarding 1.13%); *Robertson/Taylor v. Sanguine*, Case No. CJ-02-150 (Okla. Dist. Ct. Grady County 2003) (awarding 1.00%); *DSR v. Devon*, Case No. CJ-11-12 (Okla. Dist. Ct. Dewey Co.) (awarding 1%). A fee of 1% of the Settlement Proceeds to each of the Class Representatives is reasonable.

IV. **Objections**

On December 9, 2013, Charles A. Newman filed his written objection, which among other contentions, contends that the Attorneys Fees and class representatives' incentive award are not proper. Class Counsel has filed their response to these contentions. Mr. Newman also states that he will not appear at the hearing to present his objection, which appearance is required by this Court and the Notice of Proposed Settlement of Class Action.

On December 2, 2013, Tony Ray Whisenant, filed an objection to the proposed settlement contending that the attorneys fee of 40% (as requested by Class Counsel) should be reduced by the Court to 30%. Mr. Whisenant stated in his objection that he planned to attend the hearing "unless weather or an unforeseen (sic) event prevents it". Class Counsel has responded to this objection.

Don Edward Williams, on November 20, 2013, filed a motion to continue the Fairness Hearing to which Class Counsel responded by filing their Motion to Strike Improperly Filed Motion to Continue. On December 6, 2013, Mr. Williams filed a Notice of Intent to Be Heard

Before the District Court of Dewey County in the State of Oklahoma. Class Counsel has responded to this filing.

The Court, having reviewed all related pleadings and filings, including the pleadings filed by Charles A. Newman, Tony Ray Whisenant and Don Edward Williams, having heard the presentation of counsel for the Class, the Defendant, and other proper participants, hereby finds that that all the objections to the requested attorney fees, litigation expenses and incentive award to class representatives are without merit and should be and hereby denied. In addition, objections of those objectors who failed to appear are denied for failure to appear as required by the Court; however, as recited above, based on the submissions presented, all objections have been and are denied on the merits as well without reference to whether appearance was made.

V. Conclusion

The Court finds reasonable, approves, and orders: 1) an award of 40% of the Settlement Proceeds as a fee to Class Counsel (subject to opt-out adjustment per para. 5.2 of the Settlement Agreement); 2) an award of $271,319.21 in litigation expenses to Class Counsel; and 3) an incentive award of 1% of the Settlement Proceeds to each of the Class Representatives (subject to opt-out adjustment per para. 5.2 of the Settlement Agreement), all of which shall be paid from the Settlement Proceeds.

There is no reason for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Sec. 994 of the Oklahoma Code of Civil Procedure.

IT IS SO ORDERED THIS 23rd DAY OF DECEMBER, 2013.

Ray Dean Linder, District Court Judge

Exhibit 9

IN THE DISTRICT COURT OF WASHITA COUNTY
STATE OF OKLAHOMA

BANK OF AMERICA, N.A., formerly known as NATIONS BANK, N.A., as TRUSTEE OF THE VIRGINIA C. EARMAN TRUST, et al.,	)	
Plaintiffs,	)	**Case No. CJ-2004-45**
v.	)	**Judge Christopher S. Kelly**
EL PASO NATURAL GAS COMPANY, A Delaware Corporation; and BURLINGTON RESOURCES OIL & GAS COMPANY, LP, formerly Burlington Resources Oil & Gas Company, a Delaware Corporation, formerly Meridian Oil, Inc.; formerly El Paso Exploration Company, a Delaware Corporation,	)	
Defendants.	)	

FINAL ORDER GRANTING CLASS COUNSEL ATTORNEYS' FEES, LITIGATION COSTS, AND CLASS REPRESENTATIVE INCENTIVE AWARD

On July 18, 2017, the following matters came before the Court for evidentiary hearing: Class Counsels' Motion for Attorneys' Fees, Litigation Costs, Class Representative Incentive Fees, and Anticipated Administrative Costs From the Settlement Fund and Memorandum in Support Thereof filed May 18, 2017; and Class Counsels' Supplemental Motion for Attorneys' Fees, Litigation Costs, Class Representative Incentive Fees, and Anticipated Administrative Costs From the Settlement Fund and Memorandum in Support Thereof filed June 30, 2017 (collectively, "the Motion"). Appearing at the hearing for the certified subclasses and Plaintiffs were Bradley D. Brickell of BRICKELL & ASSOCIATES, Stephen R. McNamara and Brian T. Inbody of MCNAMARA, INBODY, AND PARRISH, Loyd Benson, Stephen Beam, Karen Aubrey,

and Stan Koop; for the Defendant El Paso Natural Gas was Terry Ragsdale of GABLEGOTWALS; for the Defendant Burlington Resources Oil & Gas Company were Robert Sutphin of HOLLAND & HART and Charles Correll of KING & SPALDING; for the Objector Charles David Nutley was Daniel V. Carsey of RISCHARD & CARSEY, PLLC; and for the Objector William L. Galbreath was Bonner Walsh.

Having reviewed and considered all testimony and evidence tendered by Class Counsel, including the testimony of all witnesses presented at the hearing, including the Objections of Charles David Nutley and William L. Galbreath, ("Galbreath") also filed herein on June 14, 2017, (collectively the "Objections"), and having reviewed and considered the briefing submitted and arguments of Class Counsel and Attorneys for Objectors, including Closing Argument Briefs of both Class Counsel and the Objectors, the hereby **GRANTS** Class Counsel's Motion and **FINDS** as follows:

ATTORNEYS' FEES

A. The "Lodestar" Analysis

The Court **FINDS** that the following evidence and cited authorities were submitted by Class Counsel:

At the outset of this case, starting in 1997, Class Counsel entered into one hundred and forty (140) separate contingency fee agreements with the named Plaintiffs. These agreements called for a 40 percent, or in some cases, a 45 percent, contingency fee and were introduced as Exhibit 21.

Recently, on July 11, 2017, the Oklahoma Court of Civil Appeals ("COCA"), Division IV, in *Hess v. Volkswagen Group of America, Inc.*, 2017 OK CIV APP 35 ("*Hess III*"), held:

> In Oklahoma, "in all cases, the attorney fees must bear some reasonable relationship to the amount in controversy."

Hess III, at ¶ 8.

In *Hess III,* the COCA approved an award of attorney's fees in the amount of $983,616.75 even though the amount recovered was $45,780.00. Here, the Common Fund amounts to $127,622,000.00, which represents present cash value of $115,000,000.00 plus an additional cash value of $14,000,000.00 to be paid over ten (10) years to the New Mexico "non-same-as-fed" Class Members as a result of the payment method change agreed to in ¶ 3.2 of the Settlement Agreement. The testimony of Class Administrator Barbara Ley established the present monetary value of this payment method change as $12,622,000.00. Ms. Ley also testified that should the Court award Class Counsels' requested fee, only those beneficiaries of this payment method change would be allocated attorney fees associated with that value. Rather than the relative minor amount recovered in *Hess*, this case represents one of the three Oklahoma royalty owner class actions to have exceeded one hundred million dollars. The result herein clearly establishes justification for an increase over the "lodestar hours."

Even though the term "lodestar" is not mentioned in 12 O.S. § 2023(G)(4)(e), some authorities, including *Burk v. Oklahoma City*, 1979 OK 115 598 P.2d 659, specifically mention lodestar. The lodestar analysis is a starting point for the appropriate attorney fee analysis and is used to cross-check an appropriate attorney fee by comparing the fee requested with any percentage award.

Exhibit 19, admitted at the July 18, 2017 hearing, shows that the lodestar for this case exceeds $16,383,278.00. Evidentiary support for Exhibit 19 was provided at the hearing on July 18, 2017, and Exhibit 19A, which was also admitted, contains copies of time records for twenty (20) years, which were maintained on a contemporaneous basis. Lead Class Counsel Brad Brickell testified that the 36,665.90 hours documented in those time records were accurate and in

fact incurred by Class Counsel.

Class Counsel's expert witness, former Court of Civil Appeals Judge William Hetherington, testified that he also had reviewed Exhibit 19A prior to the hearing and, based upon his review, the summary of hours set forth as a lodestar as Exhibit 19 were reflective of the voluminous time records of Exhibit 19A. Both Mr. Brickell and Judge Hetherington testified that the hourly rates reflected in Exhibit 19 were, in their experience, fair and reasonable hourly rates for this particular case. Judge Hetherington further testified that the hourly rates reflected in Exhibit 19 are similar and corresponded to rates approved in royalty owner and other class action cases in Oklahoma. Mr. Brickell testified that his rates reflected in Exhibit 19 were in fact less than what he believed to be his current market rate for this type of case.

The "hourly rate analysis" de-emphasizes the length of time that Class Counsel has labored on this particular case. In 1997, when this case was initially filed, a fair and reasonable hourly rate would have been less than the current market value for the same services.

In using a lodestar analysis, a common multiplier is 1 to 4 times the attorneys' hours and rates, and "[a] large common fund may warrant an even larger multiple." *Velma-Alma Indep. School Dist. No. 15, et al. v. Texaco, Inc., et al.*, No. CJ-2002-104 (Okla. Dist. Ct., Texas Cty. Dec. 22, 2005), p. 25 (quoting *Newberg on Class Actions,* 3d ed., § 14.03); *Laverty v. Newfield Exploration Mid-Continent, Inc.* (Okla. Dist. Ct. Beaver Cty. Aug. 27, 2017), p. 11, n. 11 (same) (citing federal cases approving multipliers of 5 to 10). In a large common fund case such as this one, the testimony and declaration of Judge Hetherington illustrated that lodestar multipliers in Oklahoma have ranged from 5.25 to 8.7, as follows:

> Multipliers of (i) 8.7 approved in *Lobo v. BP* (Beaver County); (ii) 5.25 approved in *Lawrence v. Cimarex* (Caddo County); (iii) 4-6.6 approved in *Shockey v. Chevron* (Washita County); (iv) 3.85 approved in *Brumley v. ConocoPhillips* (Texas County).

Laverty, p. 8 (approving 4.2 multiplier). *See also Bridenstine v. Kaiser Francis* (5.25 multiplier); Order on Attorney Fees, Litigation Expenses, and Class Representatives Fee, *Simmons, et al. v. Anadarko Petroleum Corp.,* No. CJ-2004-57 (Okla. Dist. Ct. Caddo Cty. Dec. 23, 2008), at 7 (4.2 multiplier); *Mitchusson v. EXCO Res.,* No. CJ-2010-32, Caddo County, Oklahoma, p. 9 (6.3 multiplier). Here, as evidenced by the chart admitted as Exhibit H-5, a multiplier of 3 to 3.6 easily comports to the 40 percent fee request and is well-within the parameters of fees granted in similar cases.

B. The 12 O.S. § 2023(G)(4)(e) Factors:

Upon consideration of the evidence submitted and applying the 13 factors, individually and collectively as set forth in 12 O.S. § 2023(G)(4)(e), the Court **FINDS** the following:

1. Time and labor required 12 O.S. § 2023(G)(4)(e)(1).

The history of this litigation and creation of the common fund demonstrate that over 36,000 hours of time and labor spanning approximately twenty years were invested by Class Counsel in the presentation of this litigation. This is an extraordinary dedication to this case by class counsel. Included are two removals to federal district court and to the Tenth Circuit, two appeals to the Oklahoma Supreme Court, consideration of appeal to the U.S. Supreme Court, and voluminous depositions plus hours and hours of document discovery amounting to multiple terabytes of data were exchanged.

2. The novelty and difficulty of the questions presented by the litigation, 12 O.S. § 2023(G)(4)(e)(2).

Cases filed as class actions are known to be complex and vigorously contested. This matter was even more complex, involving three states. This is evidenced by the district court record, expert testimony, the appellate record, and the lengthy settlement process. Also, while

the implied covenant to market may not be novel, the complexity of the pricing and deductions being assessed to the Class and the calculation methods used on a monthly basis (50,000 Class Members) is extraordinarily complex. Class Counsel and their experts spent many years and over $1,400,000.00 in advanced costs and expenses to determine the ways in which Burlington's payment methods, across four different accounting systems affected Class Members. The evidence clearly showed increasing substantial litigation risk exists in this case, both for class certification and in a trial on the merits.

3. The skill required to properly perform the legal services, 12 O.S. § 2023(G)(4)(e)(3).

The nature of this litigation, coupled with the issues presented herein, mandated that the class be represented by highly skilled counsel with knowledge of the natural gas industry. In addition, Class Counsel had to be highly skilled and experienced oil and gas attorneys in order to prosecute these claims against defendants with vast resources, who were represented by multiple firms of defense counsel. Class Counsel individually and collectively have decades of experience in oil and gas litigation and have prosecuted numerous class actions and complex cases. This case could not have been prosecuted by few, if any other, counsel.

4. The preclusion of other employment, 12 O.S. § 2023(G)(4)(e)(4).

Class Counsel are engaged in the on-going practice of law. Had Class Counsel not committed all of their relatively limited resources to this litigation, Class Counsel could have accepted other matters, but did not. The hours expended alone show the prosecution of this litigation significantly reduced Class Counsels' opportunity for employment in other matters.

5. The customary fee, 12 O.S. § 2023(G)(4)(e)(5).

The customary fee is reflective of the competitive market for attorneys willing and able to take on this type of case and see it to conclusion. In a contingent fee agreement, the percentage

of recovery is set by contract before the case is filed, pursuant to Rule 1.5, 5 O.S. 2011 Ch. 1, App. 3-A, ORPC, and long before it can be determined whether the case can be won, not to mention the effort, time and expenses required. In the royalty underpayment class action content, the evidence revealed the customary contingency fee is forty (40) percent. Order on Motion for Attorney Fees, Litigation Expenses, and Class Representatives Fee, *Continental Resources, Inc. et al. v. Conoco, Inc., et al.*, No. CJ-1995-739 (Okla. Dist. Ct., Garfield Cty. Aug. 22, 2005) (Perry, J.), at 8 ("These types of cases (oil and gas class action cases) are handled on a contingent fee. The fee percentage in these types of cases is typically 40% of the gross fund."), *see Velma-Alma*, at 27 ("The 'customary fee' in cases of this nature is contingency fee in the range of 40%-50%."). Hearing Exhibit 21 shows that Class Counsel entered into 140 separate fee agreements with Plaintiffs for a forty percent fee, and most were signed in 1997. Here, the evidence presented in Hearing Exhibit 33 shows the fees awarded in similar royalty owner underpayment class actions in Oklahoma District Courts were 40 percent, with some slightly lower and some higher. The cases shown involving settlements exceeding $100,000,000 dollars awarded a forty (40) percent fee.

6. Whether the fee is fixed or contingent, 12 O.S. § 2023(G)(4)(e)(6).

This case is a common fund case, not a fee shifting case, and the Court's analysis begins with the basis under which counsel accepted the representation. Here, the case was undertaken on a contingent, not a fixed or hourly, basis. Hearing Exhibit 21. This evidence is undisputed. This fact has legal significance because, had the representation been undertaken on a fixed basis, *i.e.* hourly rate multiplied by the number of hours, or were this a fee-shifting, rather than a common fund award, then a lodestar/multiplier analysis, would be applicable. *See State ex rel. Dept. of Transp. v. Norman Indus. Development Corp.*, 2001 OK 72, 41 P.3d 960.

When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee. *See* June 21, 2006 Order entered by Judge Ellis Cabaniss, Case No. CJ-97-68, Washita County. The legal representation for this case, like most, if not all, class actions, was undertaken on a contingent fee basis. No class member could afford to finance this case on a fixed hourly basis because the cost would exceed any individual benefit recovered.

7. Time limitations imposed by client or circumstances, 12 O.S. § 2023(G)(4)(e)(7).

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), defines "priority work" as that work which delays other legal work of the attorney. This case continually called for "priority" time, especially when removals were filed in federal court; when voluminous class certification evidence was gathered and prepared; and when witnesses were deposed and when vast discovery data was reviewed.

8. The amount in controversy and the results obtained, 12 O.S. § 2023(G)(4)(e)(8).

The amount in controversy was in excess of $200,000,000.00. The Defendants continually disputed all damages and even whether any interest was awardable. Many similar royalty owner class action settlements recovered a smaller percentage of claimed damages. The cash value of this Settlement is close to 50 percent of claimed damages, going back to 1992, without interest. This is an outstanding result for the Class, especially when compared to similar royalty underpayment class action settlements in various Oklahoma district courts.

> According to expert accounting witness Barbara Ley's damage calculations, the *Kouns [v. ConocoPhillips,* No. CJ-98-61, Dewey Co. Dist. Ct., OK] settlement represented a recovery of approximately 14% of the class damages accruing within the five year limitations

> period...Further, Ms. Ley testified that the class recovery in the *Brumley v. ConocoPhillips,* No. CJ-2001-5, Texas Co. Dist. Ct., OK case...represented less than 30% of the total class damages...Moreover, Mr. Pulliam testified that the recovery in the *Shockey v. Chevron*, No. CJ-2001-7, Washita Co. Dist. Ct., OK case represented a recovery of approximately 7.5% of the total potential damage universe available to the class, and notwithstanding the settlement represented an excellent recovery for the class given the litigation risks which the class faced...as to the post-production cost portion of the Settlement in *Lawrence v. Cimarex*, Mr. Waterman calculated the Class recovery at 33.6% of total damages (exclusive of interest) accruing within the five year limitation period.

Order Granting Approval of Settlement Agreement and Findings of Fact and Conclusions of Law, *Lawrence v. Cimarex,* No. CJ-2004-391 (Okla. Dist. Ct. Caddo Cty. Feb. 24, 2006), at 19-20. The recovery of more than 50 percent of the *potential* damages over a twenty five year period weighs strongly in favor of a higher fee. The result here, $127,660,000.00, is the most important factor in the contingent fee analysis.

9. Experience, reputation and ability of counsel, 12 O.S. § 2023(G)(4)(e)(9).

Class Counsel's persistence, qualifications, skills, experience and ability were personally witnessed by this Court, while pursuing this matter against some of the best class action and oil and gas defense attorneys in the country. The Defendants were represented by three of Oklahoma's very largest firms and two out of state, international firms with over a thousand lawyers. The reputation and demonstrated skill of Class Counsel are simply among the best in this state and region, having pursued complex class cases for years. These same Counsel have pursued and settled the three largest cases ever filed in this county.

10. The undesirability of the case, 12 O.S. § 2023(G)(4)(e)(10).

Measuring the desirability of this case against other civil contingent fee cases and its "attractiveness" to any potential counsel capable of representing a huge class of royalty owners, this class action satisfies the "undesirable" factor. Few lawyers are willing to litigate cases

requiring review of millions of pages of contracts and accounting records, carry their office overhead with no income for years and additionally, advance expenses over $1,400,000.00, plus an investment of over 36,000 hours throughout twenty (20) years on a case with high risk that includes both the trial and appellate level, especially with class certification issues. Expert witness Robert Gum testified that the appellate courts in Oklahoma, and especially federal court, have evidenced a growing trend of de-certifying similar cases.

Defendants' counsel bears no such risk, as payment of their hourly fees and recovery of their out-of-pocket expenses are assured, especially when the Defendants are some of the largest oil and gas companies in the world. When Class Counsel accepted representation and filed suit, the risk was high and a positive outcome was far from guaranteed. Class Counsel's investment of time, money and effort, paired with a substandard risk of losing all that investment, makes the case undesirable such that few law firms would take it, and may have settled early for pennies on the dollar.

11. The nature and length of the professional relationship with the client, 12 O.S. § 2023(G)(4)(e)(11).

In cases accepted on an hourly basis and when the client and attorney have a long-standing relationship or a significant volume of business, the client may receive a discounted fee. This factor does not apply to this matter accepted on a contingent fee agreement basis. Therefore, the Court evaluates this factor as neutral in determining the reasonableness of the attorneys' fee request here.

12. Awards in similar cases, 12 O.S. § 2023(G)(4)(e)(12).

Hearing Exhibit 33 compiles a long list of "awards in similar cases." These Oklahoma State Court oil and gas class action settlements reflect an attorney fee award at or very close to forty (40) percent. More than half are forty (40) percent or slightly higher. Judge Hetherington,

testifying as an expert witness, stated that an award below forty (40) percent would be atypical. *Id.* This factor heavily favors a forty (40) percent fee in this case.

13. The risk of non-recovery in the litigation, 12 O.S. § 2023(G)(4)(e)(13).

In class actions, the risk of no or minimal recovery is very high, especially when recent appellate cases in Oklahoma and the Oklahoma federal courts, including the U.S. Supreme Court are considered. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011), and its progeny. At the outset of a royalty owner class action, plaintiff's counsel has no assurance of class certification, much less recovery. Significant risks of "non-recovery" included (i) the recent class decertification rulings in *Wal-Mart v. Dukes, id. Comcast Corporation, v. Behrend,* 133 S. Ct. 1426 (2013), *Panola v. Unit Petroleum*, 2012 OK CIV APP 94, 87 P.3d 1033, and *Tipton Home v. Burlington Resources*, Appeal No. 111,735; (ii) factors specific to this case include two federal court removals (2007 and 2016), as well as appeals of the Oklahoma, Texas, and New Mexico sub-class certifications, separately, almost to the U.S. Supreme Court (Justice Sotomayor issued extension to file); and (iii) defenses which had the potential to severely limit damages such as: statute of limitations claims for each state, the *Altheide* settlement which released claims in COR1 period per ruling in Case No. CJ-97-68, comity defense and motion to dismiss with the New Mexico subclass, an overriding royalty interest ruling in Case No. CJ-97-68, Texas law which allows post-production deductions, and lack of a clear precedent in New Mexico. Class Counsels' withdrawal of support for the preliminary approval of a prior $9,000,000.00 settlement in 2007, based on accounting discrepancies and then litigating for ten more years. Class Counsel incurred large direct and indirect expenses over the last twenty (20) years with a great risk of no recovery.

C. The Litigation Expenses Requested by Class Counsel Were Actually Incurred, Reasonable and Necessary.

The requested expenses are $1,453,981.51 as of July 18, 2017. *See* Hearing Exhibit 20. Class Counsel and the Class Administrator testified that an additional $669,324.34 has been estimated for expenses to Class Counsel and the Administrator for the cost of completion of allocation work through final distribution and mailing of checks for the approximately 50,000 Class Members. Accordingly, the Court **HEREBY AWARDS** Class Counsel $1,453,981.51 in litigation expenses incurred, and authorizes the Settlement Administrator to pay and disburse up to an additional $669,324.34 in administrative expenses to be accounted for in quarterly reports to the Court and at final closing.

D. A $75,000.00 Incentive Award to Each of the Class Representative is Reasonable.

Without the Class Representatives' willingness to litigate on behalf of other Class Members, this case could not have proceeded and no recovery would have been obtained for the Class. The Court **FINDS** that the Class Representatives went to extraordinary lengths to provide documents, attended hearings and testified for class certification. Some Class Representatives traveled from out of state. All Class Representatives took the risk of bearing the defendants' attorney fees, individually, if the case had been lost. The Representatives' participation materially enabled the Class's settlement recovery.

In the instant case, the incentive award very conservatively reflects the degree of time and commitment that the Class Representatives dedicated to pursuing the claims of the Class Members. Four of the Class Representatives appeared at the Fairness Hearing and testified regarding the time and efforts they have expended in this case over the past decade. Judge Hetherington opined that, in light of the Class Representatives' efforts, the requested award was fair and reasonable. No witness or evidence contradicted Judge Hetherington's opinion.

The Court **FINDS** the incentive award is fully justified by the risk alone. Even when viewed as a percentage of the Settlement, it is far less than every case presented into evidence (Hearing Exhibit 33) and identified by expert witness Judge Hetherington.

CONCLUSION

The Court, acting as fiduciary on behalf of the Class, as the Statute directs, has considered each statutory factor and applicable case law and evidence, as well as this Court's own personal observations over the years of litigation herein and **HEREBY FINDS** and **IT IS ORDERED** that a fair and reasonable attorney fee is equal to forty (40) percent of the $115,000,000.00 cash portion of the recovery, plus forty (40) percent of $12,662,000.00, the present discounted value of the $14,000,000.00 New Mexico payment method agreed to in ¶ 3.2 of the Settlement Agreement, for a total attorney fee award of $51,048,000.00 to be paid and disbursed from the Settlement Fund. Only those New Mexico Class Member receiving the benefit of the payment method change will proportionately bear the attorney fees associated therewith. In addition, the reimbursement of reasonable litigation expenses is the amount of $1,453,981.51 is hereby **ORDERED**, payable and disbursed to Class Counsel and a reasonable incentive award of $75,000.00 paid to each of the four (4) listed Class Representatives: Robert Lakey, The Tipton Children's Home, Raymond Keating, III, trustee, and Donna Robertson. The Class Administrator is **FURTHER AUTHORIZED** and **ORDERED** to expend and disburse up to an additional $669,324.00 in administration costs, with reports of expenditures to be filed quarterly, until final closing. All amounts are to be paid directly from the Common Fund Settlement Proceeds.

There is no reason for delay in the entry of this Judgment. Pursuant to 12 O.S. § 994 of the Code of Civil Procedure of the State of Oklahoma, the Court directs the Clerk of the Court to immediately enter this Judgment. The claims of non-objecting, participating Class Members are final, as well as Objecting Class Members as found in the separate Order(s) issued concurrently herewith.

IT IS SO ORDERED THIS 20 DAY OF August, 2017.

CHRISTOPHER S. KELLY
JUDGE OF THE DISTRICT COURT