

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

DASA INVESTMENTS, INC.,)	
)	
Plaintiff,)	
)	
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.)	

ORDER AWARDING CASE CONTRIBUTION AWARD

Before the Court is Class Representative’s *Motion for Approval of Case Contribution Award* (Doc. No. 89) (the “*Motion*”) and *Memorandum of Law* in support thereof (Doc. No. 90) (the “*Memorandum*”), wherein DASA Investments, Inc. (hereinafter, “DASA” or “Class Representative”) seeks a Case Contribution Award of \$75,000 to be paid out of the Gross Settlement Fund. The Court has considered the *Motion* and *Memorandum*, all matters submitted in connection therewith, and the proceedings on the Final Approval Hearing conducted on March 23, 2020. The Court finds the *Motion* should be granted.

IT IS THEREFORE ORDERED as follows:

1. This *Order* incorporates by reference the definitions in the Settlement Agreement and all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court, for purposes of this *Order*, incorporates its findings of fact and conclusions of law from its *Order Granting Final Approval of Class Action Settlement* as if fully set forth herein.

3. The Court has jurisdiction to enter this *Order*, and jurisdiction over the subject matter of the Litigation and all parties to the Litigation, including all Settlement Class Members.

4. The Notice stated that Class Representative would seek a Case Contribution Award of up to \$75,000 to be paid out of the Gross Settlement Fund. Notice of Class Representative's request for a Case Contribution Award was given to all Settlement Class Members who could be identified with reasonable effort and in compliance with this Court's Order. The form and method of notifying the Settlement Class of the request for a Case Contribution Award is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.

5. DASA provided the Court with abundant evidence in support of its request for a Case Contribution Award, including: (1) the Motion and Memorandum; (2) the Declaration of Steven S. Gensler (Doc. No. 88); (3) the Declaration of Gene Hacker on behalf of DASA (Doc. No. 96-1); and (4) the affidavits of multiple absent Class Members (Doc. Nos. 96-5 to 96-10). This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was subject to objection or otherwise refuted by any Settlement Class Member.

6. DASA is hereby awarded a Case Contribution Award of \$75,000 with such Award to be paid out of the Gross Settlement Fund. In making this Case Contribution Award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of \$8,000,000 in cash and resulted in binding material changes to the EnerVest Defendants' statutory interest payment practices and policies in Oklahoma, having a present value of at least \$7 million. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representatives and Class Counsel;

(b) On January 21, 2020, JND Legal Administration LLC ("JND") caused the Notice of Settlement to be mailed via first-class regular mail using the United States Postal Service to 38,212 unique mailing records identified in the mailing data. *See* JND Decl. at ¶8 (Exh. 4 to Doc. No. 96). The Notice expressly stated that Class Representatives would seek a Case Contribution Award of up to \$75,000 to be paid out of the Gross Settlement Fund. *See* Exh. A to JND Decl. There were no objections to the requested Case Contribution Award;

(c) DASA filed its *Motion for Approval of Case Contribution Award* fourteen (14) days prior to the deadline for Settlement Class Members to object. No objections were filed in opposition to Class Representative's Request for a Case Contribution Award;

(d) The Parties contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and 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;

(e) This choice of law provision should be, and hereby is, enforced. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)); *see also Williams v. Shearson Lehman Bros.*, 917 P.2d 998, 1002 (Okla. Ct. App. 1995) (concluding that parties’ contractual choice of law should be given effect because it does not violate Oklahoma’s constitution or public policy); *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.”);

(f) Applying federal common law,¹ federal courts regularly grant incentive awards to compensate named plaintiffs for the work they performed. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232 (10th Cir. 2009) (“Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.”); *Laredo Fee Order at 9 (Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May, 13, 2015)) (case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.”) (*citing In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218

¹ Because the Parties here contractually agreed that federal common law controls the case contribution award, I find that the opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative of 0.5%, is inapplicable.

(S.D. Fla. 2006) (1.5% of \$1.06 billion fund, equaling \$15,900,000 to be split amongst nine class representatives and stating “[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23, 400 U.S. App. D.C. 428 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class”);

(g) The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081

(7th Cir. 2013) (if the lead plaintiff's services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be "untethered to any service or value [the lead plaintiff] will provide to the class"); Newberg § 17:18;

(h) Here, Class Representative's request is supported by the abundant evidence submitted by Class Representative, including declarations from Mr. Hacker on behalf of DASA, Professor Steven Gensler, and multiple absent class members. *See* Newberg § 17:12 (evidence might be provided through "affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award."). This evidence demonstrates DASA is seeking reasonable payment for reasonable time expended on services that were helpful and non-duplicative to the litigation;

(i) DASA's representative, Mr. Hacker, has extensive experience on matters related to oil and gas mineral interests. *See* DASA Decl. at Doc. No. 96-1 at ¶4-5. Mr. Hacker obtained a Bachelor of Arts degree in Philosophy with a minor in History from Oklahoma Baptist University in 1961. He began in the oil and gas business in 1980 as a partner with C.W. Dobbins and Sons which purchased oil and gas leases for the major operators at the time. In 1981, he formed Legends Exploration which purchased oil and gas leases for major producers at the time, including LCX Corporation. In 1985, he formed DH Minerals, a corporation in the business of acquiring oil and gas minerals. In 2000 he and his wife, Cheryl, started DASA which bought the mineral interest held by DH Minerals. Since that time, DASA has continued to hold and manage Mr. Hacker's and his family's oil and gas interests. Since its inception, DASA has also performed title work for many of the large producers in Oklahoma, Texas, and Arkansas. Mr. Hacker has owned

over 100 oil and gas interests throughout his career spread throughout Oklahoma, Kansas, Colorado, Arkansas, and Texas. He has owned and managed mineral interests in more than 20 counties in Oklahoma alone. Further, he has owned and managed oil and gas interests operated by most all major companies, including, but not limited to, ExxonMobil, BP, ConocoPhillips, Texaco, Apache Corp., Devon Energy, Chesapeake, Chevron Corp., Samson Energy Co., SM Energy Co., EnerVest, and FourPoint Energy, and others. *See* DASA Decl. at Doc. No. 96-1 at ¶¶4-5.

(j) As demonstrated by its Declaration, DASA, by and through Mr. Hacker, dedicated approximately 180 hours to this Litigation. *See* DASA Decl. at Doc. No. 96-1 at ¶19. These hours were spent collecting documents for production, reviewing emails and draft pleadings from Class Counsel, consulting and/or meeting with Class Counsel, traveling to and from meetings, and attending mediation. *Id.* All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id.* Moreover, DASA worked on behalf of the Settlement Class in preparation for the Final Fairness Hearing and DASA will assist with administration of the Settlement. DASA will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if DASA never worked another hour on this case, its request of \$75,000 would be reasonable;

(k) Indeed, DASA's representative, Mr. Hacker, was heavily involved in all aspects of the Litigation. He actively and effectively fulfilled DASA's obligations as the representative of the Settlement Class, complying with all reasonable demands placed upon him during the prosecution and settlement of this Action, and he provided valuable assistance to Class Counsel. *See* DASA Decl. at Doc. No. 96-1 at ¶¶8-13 & 19. Mr. Hacker

has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed significantly to the prosecution and resolution of this case. *Id.* In addition, Mr. Hacker has produced documents, reviewed pleadings, motions, and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended the formal mediation session in person, and actively participated in the negotiations that led to the settlement of this Action. *See* DASA Decl. at Doc. No. 96-1 at ¶¶9-11;

(l) DASA was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See* Hacker Decl. at Doc. No. 96-1 at ¶20. In fact, DASA understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on its request. *Id.* In other words, DASA fully supports the Settlement as fair, reasonable, and adequate, even if it is awarded no case contribution award at all. *Id.* DASA does not have any conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, multiple absent Class Members executed affidavits supporting DASA's request for a Case Contribution Award. *See* the Affidavit of Dan Little; the Affidavit of Castlerock Resources, Inc. (by Robert E. Gonce, Jr.); the Affidavit of Clear Energy, Ltd. (by Phil Steffano); the Affidavit of Acorn Royalty Company, LLC (by Robert Abernathy); the Affidavit of Pagosa Resources, LLC (by Mike J. Weeks); and the Affidavit of Kelsie Wagner Trustee of the Kelsie Wagner Trust and Successor Trustee of the Wade Costello Trust, Absent Class Member; *See* Doc. Nos. 96-5 to 96-10;

(m) Because DASA has dedicated its time, attention, and resources to this action, I find that DASA is entitled to its requested Case Contribution Award of \$75,000,

to reflect the important role that it played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement;

(n) Assuming, arguendo, that Oklahoma state law governs the case contribution award despite the express language to the contract in the Settlement Agreement, I find that Oklahoma law strongly supports incentive awards, particularly in oil and gas class actions such as this. In fact, Oklahoma state courts routinely grant percentage-based incentive awards to class representatives. *See, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *9 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (“The incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . . [Collecting cases] . . .”); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (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.”); and

(o) Thus, Class Representative’s request for an incentive award of \$75,000 to DASA is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See generally* DASA Decl.; Gensler Decl.; the Affidavit of Dan Little; the Affidavit of Castlerock Resources, Inc. (by Robert E. Gonce, Jr.); the Affidavit of Clear

Energy, Ltd. (by Phil Steffano); the Affidavit of Acorn Royalty Company, LLC (by Robert Abernathy); the Affidavit of Pagosa Resources, LLC (by Mike J. Weeks); and the Affidavit of Kelsie Wagner Trustee of the Kelsie Wagner Trust and Successor Trustee of the Wade Costello Trust, Absent Class Member;


7. Any appeal or any challenge affecting this Order Awarding Case Contribution Award shall in no way disturb or affect the finality of the Final Approval Order, the Settlement Agreement, or the Settlement contained therein.

8. Jurisdiction is retained over the Parties and the Settlement Class Members as provided in the Order and Judgment Granting Final Approval of Class Action Settlement.

9. There is no reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

10. There were no objections to the Class Representative's Request for a Case Contribution Award.

IT IS SO ORDERED this 23rd day of March, 2020.



Steven P. Shreder
United States Magistrate Judge
Eastern District of Oklahoma