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

DASA INVESTMENTS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:18-CIV-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	)	*(Removed from District Court of*
	)	*LeFlore County, State of*
Defendants.	)	*Oklahoma, Case No. CJ-18-25)*

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR APPROVAL OF CASE CONTRIBUTION AWARD

Class Representative DASA Investment, Inc. (hereinafter, "DASA" or "Class Representative"), by and through its counsel of record, submits the following memorandum of law in support of its *Motion for Approval of Case Contribution Award*.

I. SUMMARY OF THE ARGUMENT

In connection with Class Representative's request for approval of the Settlement[1] in the above-captioned Litigation, Class Representatives respectfully moves the Court for a Case Contribution Award of $75,000 from the Gross Settlement Fund, as compensation for its valuable time, effort, and assistance throughout this Litigation, which culminated in a Settlement with a total value of at least $15 million.[2] This award is supported by the Declaration of DASA Investments, Inc. by Gene Hacker ("DASA Decl.")[3] demonstrating the time and effort, as well as the risk and burden he incurred; Joint Declaration of Patrick M. Ryan and Jason A. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl."); the Affidavit of Dan Little ("Little Aff."); the Affidavit of Castlerock Resources, Inc., ("Gonce Aff."); the affidavit of Clear Energy, Ltd. ("Clear Aff."); the Affidavit of Acorn Royalty Company, LLC ("Acorn Aff."); the Affidavit of Pagosa Resources, LLC, ("Pagosa Aff."); and the Affidavit of Kelsie Wagner, Trustee of the Kelsie Wagner Trust and Successor Trustee of the Wade Costello Trust ("Wagner Aff.").

---

[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, 2019 (the "Settlement Agreement"), a copy of which was 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 Aff."), attached as Exhibit 3 to Class Representatives' *Memorandum of Law in Support of Class Representatives' Motion for Final Approval* ("Final Approval Memorandum"), at ¶3.

[3] The declarations and affidavits referenced herein are attached to the Final Approval Memorandum at Exhibits 1-9.

Therefore, and for the reasons below, DASA Investments, Inc. respectfully requests the Court grant his *Motion for Approval of Case Contribution Award* (the "*Motion*").

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of time and judicial economy, Class Representative will not recite the factual and procedural background of this Litigation. Instead, Class Representative respectfully refers the Court to the Memorandum of Law in Support of Class Representatives' Motion for Final Approval, the Joint Class Counsel Decl., the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n. 21 (10th Cir. 2009) (court may take judicial notice of its own files and records).

III. ARGUMENT

In recognition of the time, effort, risk and burden DASA incurred to produce such a significant result for the Settlement Class, DASA seeks a case contribution award of $75,000.00 from the Gross Settlement Fund. As demonstrated below, this request is fair, reasonable, and adequate and should, therefore, be granted.

A. The Parties Have Agreed Federal Common Law Controls the Case Contribution Award

The Parties here 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***, the Parties agree that this Settlement Agreement shall be ***governed solely by any federal law*** 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. For any such matters where there is no federal common law, Oklahoma state law will govern.

Settlement Agreement at ¶11.8.

The Parties' decision to contractually agree that federal common law controls the case contribution award should be enforced. Indeed, the Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and also the fact that courts typically honor the parties' choice of law:

> 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.

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)). Further expanding on this freedom to contract, the Restatement of Conflict of Laws states:

> 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 (2nd 1988); *see also Williams v. Shearson Lehman Bros*., 1995 OK CIV APP 154, 917 P.2d 998, 1002 (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.").

Put simply, litigants are free to select the choice of law that will govern decisions regarding interpretation and enforcement of a settlement agreement and all matters relating to thereto. Here, in light of the fact that this is a multi-state class action, governed by Federal Rule of Civil Procedure 23, and a case over which this Court has jurisdiction because of the application of the

Class Action Fairness Act, the parties contractually chose to apply federal common law to all matters regarding the reasonableness and fairness of the settlement, including but not limited to, the issue of any Class Representative incentive award.

B. The Case Contribution Award Is Reasonable Under Federal Common Law.

Federal courts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case. *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.");[4] *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)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling $100,000 from $37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (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*

[4] *Newmont* held the district court did not abuse its discretion in denying an incentive award to a *pro se* objector because: (i) his objections did not confer a benefit on the class, (ii) he did not incur any risk, "nor could he, since his participation as an objector began after a settlement was reached and a common fund was created" (*id*. at 236), and (iii) his objections to class counsel's attorneys' fees were "general and lacking in meaningful analysis" (*id*. at 237).

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, (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. . . .").

In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative to be paid out of the common fund, finding that the record did not contain sufficient evidence to support the percentage incentive award in that case of 0.5%. *EnerVest* is currently on remand to the district court. However, regardless of the ultimate outcome in *EnerVest*, the opinion is wholly inapplicable here because that case 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 case contribution award. Moreover, *EnerVest* is factually distinguishable because the record in this matter provides ample support for

Class Representatives' request for a Case Contribution Award. Although incentive awards can be percentage-based or dollar-based,[5] DASA seeks a flat dollar award reasonably based on the hours spent by Mr. Hacker (on behalf of DASA) on the litigation, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*.[6]

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");

---

[5] *EnerVest* noted that "the weight of authority apparently disfavors percentage-based awards." 861 F.3d at 1196. However, Oklahoma federal and state courts routinely award percentage-based incentive awards. *See, e.g., Laredo* Fee Order at 10 (finding a 1% case contribution award "to be fair and reasonable"); *See* Miller Decl. at ¶87-88; *EnerVest*, 861 F.3d at 1196 (recognizing that a percentage calculation can be used to check an award for excessiveness by reference to the percentage of the fund it represents).

[6] Moreover, even under *EnerVest*, incentive awards are still viable, and in fact, are "not uncommon." 861 F.3d at 1192 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006)). There, the Tenth Circuit (1) rejected a claim that incentive awards evidence a conflict of interest (*id.* at 1196, n.7) and (2) rejected the idea that a relationship with counsel evidences some type of impermissible conflict (*id*. at 1191, n.5). Also, even though the Tenth Circuit applied Oklahoma state law to determine the appropriate amount of the incentive award, it recognized a "marked increase in the frequency of incentive awards, with the rate approaching 80% by 2011." *Id.* at 1192 (citing Newberg § 17:7). In applying Oklahoma state law in *EnerVest*, the Tenth Circuit did not find that the amount awarded by the district court was unsupportable on its face; instead, it simply held that more evidence of the class representative's time and rate was required. *Id.* at 1196-97. Moreover, the Tenth Circuit did not hold that percentage-based incentive awards are never allowed. And, the Tenth Circuit relied on federal common law (e.g., *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) because the Court found "Oklahoma Supreme Court has not addressed incentive awards nor have we been directed to or found any opinions by lower courts of that state." *Id.* at 1195-96. As such, the result under federal common law or Oklahoma state law is likely the same.

Newberg § 17:18.

Here, DASA seeks an award of $75,000. This request is supported by the abundant evidence submitted by DASA, including its own declaration, and six (6) affidavits of absent class members. For example, class member Dan Little provided his support for the requested class contribution award, stating:

> "[I] support the request for the Class Representative to receive up to $75,000 for his contribution to this case. If entities or individuals did not take on the responsibility of representing classes of Owners, the benefits of a class recovery like this Settlement would not be possible for Oklahoma Owners."

See Little Aff. At ¶6; See also 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.

DASA's representative, Mr. Hacker, has extensive experience on matters related to oil and gas mineral interests. *See* DASA Decl. attached as Exhibit 1 to the Final Approval Memorandum, 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 interest 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 ¶¶4-5.

As demonstrated by his Declaration, Mr. Hacker dedicated approximately 180 hours to this Litigation. *See* DASA Decl., 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 hearings, reviewing depositions and attending mediation. *Id*. All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id*. Moreover, Mr. Hacker will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the Final Fairness Hearing and, if approved, assisting with administration of the Settlement. Mr. Hacker will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Mr. Hacker never worked another hour on this case, the request of $75,000 would be reasonable.

Indeed, Mr. Hacker was heavily involved in all aspects of the Litigation. He actively and effectively fulfilled his obligations as representative of the Settlement Class, complying with all reasonable demands placed upon him during the prosecution and settlement of this Action, and they provided valuable assistance to Class Counsel. *See* DASA Decl., at ¶¶8-11. 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. *Id.*

Mr. Hacker was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See* DASA Decl., at ¶20. In fact, Mr. Hacker 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 his request. *Id*. In other words, Mr. Hacker fully supports the Settlement as fair, reasonable, and adequate, <u>even if he is awarded no case contribution award at all</u>. *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 Mr. Abernathy's request for a Case Contribution Award. *See generally*, Little Aff.; Gonce Aff.; Clear Aff.; Acorn Aff.; Pagossa Aff.; and Wagner Aff. at Exhibits 5-10 to the Final Approval Memorandum.

Because DASA, by and through Mr. Hacker, has dedicated its time, attention, and resources to this Litigation, he is entitled to the requested Case Contribution Award. *See* Joint Class Counsel Decl. at ¶¶71-75. DASA respectfully requests the Court award him a Case Contribution Award of $75,000 to reflect the important role that he played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

C. The Case Contribution Award Is Reasonable Under Oklahoma State Law Even if *EnerVest* is Applicable.

Even if this Court decided not to enforce the Parties' express agreement that federal common law controls the case contribution award and apply Oklahoma state law instead,

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, which historically are larger than the flat amount sought here. *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); and *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.").

As such, DASA's request for an incentive award of $75,000 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.; Little Aff.; and Joint Class Counsel Decl. at ¶¶71-75.

IV. CONCLUSION

For the foregoing reasons, DASA respectfully requests the Court enter an order granting approval of a Case Contribution Award to DASA in the amount of $75,000.

DATED: February 21, 2020

Respectfully submitted,

s/Patrick M. Ryan
Patrick M. Ryan, OBA No. 7864
Jason A. Ryan, OBA No. 18824
Paula M. Jantzen, OBA No. 20464
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73104
Telephone: 405-239-6040
Facsimile: 405-239-6766
pryan@ryanwhaley.com
jryan@ryanwhaley.com
pjantzen@ryanwhaley.com

Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com

COUNSEL FOR PLAINTIFF

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:

Guy S. Lipe – glipe@velaw.com
Jay P. Walters – jwalters@gablelaw.com
J. Kevin Hayes – khayes@hallestill.com
Pamela S. Anderson – panderson@hallestill.com

s/Patrick M. Ryan
Patrick M. Ryan