

**IN THE DISTRICT COURT OF BLAINE COUNTY  
STATE OF OKLAHOMA**

MARK STEPHEN STRACK, SOLE SUCCESSOR TRUSTEE )  
OF THE PATRICIA ANN STRACK REVOCABLE TRUST )  
DTD2/15/99 AND THE BILLY JOE STRACK )  
REVOCABLE TRUST DTD 2/15/99, AND )  
DANIELA A. RENNER, SOLE SUCCESSOR TRUSTEE )  
OF THE PAUL ARIOLA LIVING TRUST AND THE )  
HAZEL ARIOLA LIVING TRUST, )

FOR THEMSELVES AND ALL OTHERS )  
SIMILARLY SITUATED, )

PLAINTIFFS, )

VS. )

CONTINENTAL RESOURCES, INC., )

DEFENDANT. )

CASE NO. CJ-10-75

**DECLARATION OF WILLIAM C. (BILL) HETHERINGTON, JR.**  
**IN SUPPORT OF**  
**ATTORNEYS' FEES AND CLASS REPRESENTATIVES' AWARD**

I, WILLIAM C. (BILL) HETHERINGTON, JR., state the following:

**Disclosures**

I have been engaged by Class Counsel to offer an analysis and report of my opinions in the class action settlement as styled above and currently set for fairness hearing before the

Honorable Judge Dennis W. Hladik. The scope of my engagement is limited to opinions which focus on: 1. Based upon Oklahoma law, what is common practice amongst the District Courts in the State of Oklahoma, and other Courts, with respect to class counsel fees in similar cases; 2. The obligations imposed by Title 12 O.S. §2023; and, 3. The twelve "Burk" factors<sup>1</sup> and their applicability to this case, all relevant to a fair and reasonable attorney fee award to Class Counsel in this matter as well as the reasonableness of class representatives' fees and reimbursement of litigation costs.

My curricula vitae and biographical information is attached to this opinion Declaration as "**Exhibit A**".

The factual and legal analysis included in this report is based upon my review and investigation of the pleadings and record documents provided to me relevant thereto. The record documents I have reviewed for preparation of this opinion and fairness hearing testimony includes Petition and Amended Petition with Supplements, other pleadings and filings to include the Order and Supplemental Order re: Class Certification Hearing, Notice of Settlement, Settlement Term Sheet and Settlement Agreement, proposed class settlement structure and administration to include "Sub-Class 1" and "Sub-Class 2" divisions by claim periods (Claims Periods 1 & 2), and summary and detailed class counsel time logs for attorney fees and expenses. I also reviewed Class Counsel's Declaration including all exhibits attached thereto (Declaration of Burns and Stowers). Particular attention was given to a review of the Oklahoma and Federal class cases listed by spreadsheet as a summary of twenty-plus years of both State and Federal Court cases in royalty underpayment class actions. (COSMO's Class Action Tracking Report - Exhibit "A" to Declaration of Burns and Stowers and COSMO's Recent

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<sup>1</sup> Title 12 O.S. §2023(G)(4)(e) now sets out thirteen "Burk" Factors.

Reported Lodestar Rates in Oil and Gas Class Actions in Oklahoma of both State and Federal Courts – Exhibit “B” to Declaration of Burns and Stowers).

As my biographical information indicates, I served as Judge on the Oklahoma Court of Civil Appeals from 2009 until September 2, 2016. Prior to that I served as a trial District Judge in Cleveland County, Oklahoma beginning in 1992 and as a Special District Judge 1981 to October 1985. Between 1985 and 1992 I was in private practice. During my District Court Judicial tenure I was assigned the following representative class action cases and conducted all of the proceedings to include the fairness hearing upon a settlement, or class certification proceedings where the case eventually ended up consolidated in another Court as described below:

1. *The State of Oklahoma, ex rel., Attorney General, et al., v. R.J. Reynolds Tobacco Company, et al.* (CJ-96-1499 - Initial assignment through national global settlement fairness Order resulting in a settlement for Oklahoma in excess of two billion and creation of the Oklahoma Tobacco Settlement Endowment Trust “TSET”);
2. *Rudman v Texaco, et. al.*, (CJ-97-1(E) - Initial assignment, cases consolidated into Stephens County with Judge Enos, however, I approved the class settlement and fees);
3. *Lerma v. Walmart*, (CJ-2001-1395 - Initial assignment through settlement and fairness hearing);
4. *Seely v. Dr. Hill, Dr. Lewis and Norman Regional Hospital*, (CJ-2002-1679 - Many filed Hepatitis C cases consolidated into one case, assignment through settlement and fairness hearing).
5. Most recently following retirement from the Judicial Branch, I served as a Designated Expert Witness regarding these same issues in *Bank Of Oklahoma, N.A., formerly known*

*as Nations Bank, N.A., as Trustees Of The Virginia C. Earman Trust, et. al. v. El Paso Natural Gas Company, et. al.*, in Judge Christopher S. Kelly's Court in Washita County.

Initial discussions regarding my possible role as a class counsel expert began on February 19, 2018. My hourly billing rate and retainer base for this case is \$375.00 per hour.

### **A Reasonable Class Counsel Fee Should Be 40%**

1. This is a "Common Fund" contingent fee case. That is important for four reasons. First, complicated class actions are never taken on an hourly basis for fair access to our courts reasons. Second, as a Common Fund case, it is not a fee shifting case where the opposing party is to pay attorneys' fees in addition to the settlement amount or in addition to a judgment. In such fee shifting cases, courts often use the "lodestar" approach based on hourly fees. A percentage approach is routinely approved in Common Fund contingent fee cases such as this one.<sup>2</sup> Third, this case does not involve a "claims made" settlement where most class members will never make a claim or be paid anything. *See Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.3d 662 (finding lodestar multiplier important where the Common Fund did not truly benefit the class because they had to make claims). Fourth, the Class does not benefit from the hourly rate or hours that class counsel toils, but from the result class counsel obtains.

2. Layn Phillips, a well-known former federal judge in the Western District of Oklahoma, recently concluded in a royalty underpayment class action that a one-third to forty percent fee

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<sup>2</sup> Even in federal court, Magistrate West recently pointed out "a majority of circuits recognize that trial courts have the discretion to award fees based solely on the fund approach and are not required to conduct a lodestar analysis in Common Fund class actions. *See e.g. Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)." *Compusource Okla. Bd. of Trustees v. BNY Mellon, N.A., et al.*, 2012 WL 6864701 at \*8 (E.D. Okla. Oct. 25, 2012) (no lodestar analysis at all in a federal securities fraud class action).

was “reasonable.” Declaration of Layn R. Phillips, *Hitch Enterprises, Inc., et al. v. Cimarex Energy Co., et al.*, (No. CIV-11-13 (W.D. Okla. Dec. 28, 2012) (Doc. 82-2)).

3. Further, our Oklahoma Court of Civil Appeals has also upheld the award of a contingent fee in a royalty owner class action. *See Adkisson v. Koch Industries, Inc.*, Oklahoma Court of Civil Appeals (COCA), Division III (Hanson, Mitchell & Joplin), (Case No. 106,452 August 7, 2009 (unpublished)). In *Adkisson*, the COCA relied upon *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, 990 P.2d 294 (upholding use of contingent fee agreement between named plaintiff and class counsel), *Tibbetts v. Sight 'n Sound Appliance Centers, Inc.*, 2003 OK 72, 77 P.3d 1042 (reversing award of attorney fee to class counsel where jury awarded no damages) and *Oklahoma Tax Com'n v. Ricks*, 1994 OK 115, 885 P.2d 1336 (equity powers may be invoked to charge a Common Fund with the attorney's fee incurred in creating the Common Fund).

4. From my personal experience overseeing and adjudicating class action litigation in Oklahoma, from examining dozens of contingent fee agreements in oil and gas class cases, and from my review of contingent fee agreements and court awards of contingent fee percentages in oil and gas class action litigation in Oklahoma and Federal cases, analysis shows that a total of 67.55% of Common Fund Dollars were assessed a fee award greater than or equal to 40% (weighted average of 40.53%). Declaration of Burns and Stowers Exhibit “A”, shows the exact detail by case from both State and Federal Courts.

5. As the Table of Cases in the Declaration of Burns and Stowers Exhibit “A” shows, of the total of all Oil and Gas class cases reported, 30 were awarded a class counsel common fund fee greater or equal to 40%. 14 were awarded a fee of 30 to 35% , 6 were awarded a fee 35% to 40% and 6 were awarded a fee of less than 30%. Three additional class cases are pending final

approval, including this one. Based upon these statistics, an award below 40% would be atypical.<sup>3</sup> In five cases in which the common fund exceeded \$100,000,000 a 40% or higher fee award was approved. A case review of the degree of complexity, time period of litigation, mere size, legal and administrative management difficulty, tracks consistently with and supports fairness for a 40% as contracted fee award for the two time periods requested here.<sup>4</sup>

6. The more recent contingent fee percentages in oil and gas class actions in Oklahoma have been clumped around the 40% level (more than half have been 40% or higher) because of the recent added risk of: (a) some oil and gas class actions not being certified as class actions in state and federal court; (b) the Oklahoma Legislature's renewed activism antagonistic to royalty owners and class actions; (c) the added risk coming from a higher cost of litigation due to expert fees and management of electronic data; (d) carrying that higher cost even longer as cases are stretched out with multiple motions and appeals; (e) more time and expertise to handle the intricate class action and oil and gas issues; (f) the constantly changing law due to judicial decisions and legislative action; and (g) the increased risk of failure at almost every stage of the litigation (motions to dismiss, motions for summary judgment, limine motions against experts, class certification, trial, and multiple appeals).

7. I believe the contingent fee percentage in this case should be higher than one-third since this case was uniquely difficult and risky. First, the risks have increased over the last few

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<sup>3</sup> Importantly, this common fund fee request does not seek any recovery upon "Go Forward" or "other benefits" of the settlement. The percentage fee case analysis shown in Class Counsel's Exhibit "A", and this request, use as their denominator the "Cash" portion of the settlement only. Significant Class Counsel time went into negotiating the future accounting/deduction standards to be developed and implemented in the near future. If the value of the Go Forward provisions were considered, the effective percentage rate would be 22%. See Declaration of Burns and Stowers. Importantly, Class Counsel retains the fiduciary responsibility to class members to ensure the implementation of the settlement terms, including the new, reformed accounting/deduction standards.

<sup>4</sup> See also federal cases *Hill v. Kaiser-Francis Oil Co.*, CIV-09-07(Judge Russell)(2013) - 35% fee; *Fankhouser v. XTO Energy, Inc.*, CIV-07-798(Judge Leonard)(2012) - 35% fee.

years for reasons addressed in ¶6, above and more fully discussed in the Declaration of Burns and Stowers. During the years of this case, the reality of risk has substantially increased and the goal posts continually shifted.

8. Obviously, this has been a lengthy case, beginning with the filing of the Petition in November 2010 through this fairness process and into the future “Go Forward” period. The number of Continental gas wells involved approximates two thousand (2,000) wells in at least 31 Oklahoma counties. The number of class members (Continental Oklahoma royalty owners) exceeds thirty-three thousand (33,000) and they reside in numerous states throughout the United States. During this time, Class Counsel was obligated to bear the cost of litigation, all expert witness fees and the management of electronic data without financial assistance from any source. As noted in the Declaration of Burns and Stowers Exhibit “D”, the total costs incurred by Class Counsel in prosecuting this case will exceed \$381,408.03. Hence, Plaintiffs’ Class Counsel bore one-hundred percent (100%) of the witness fees and discovery expenses that were incurred in this case.

9. A third factor is the time and expertise required to handle the intricate class action and oil and gas issues. There was over seven years of litigious and settlement discovery. The Declaration of Burns and Stowers provides this Court with chronologic detail of the entire process and I will only refer to some key procedural challenges faced in this case. Continental vigorously denied liability with superb counsel who fought class certification at every turn. As a litigation strategy, Plaintiffs initially sought class certification of the action as a B1 and B2 class for the purpose of declaratory, injunctive and/or mandamus relief in the form of accounting for production and proceeds attributable to the subject wells, reserving the damage portion of the case for a later B3 class certification. Document production was extremely

protracted and difficult. Plaintiffs initially sought class certification with respect to approximately 48 issues herein. An “informal stay” of discovery was agreed to by the parties in early 2011 to allow the parties to gather data and explore settlement of the litigation (although documents and information were produced as part of the settlement negotiation process). The stay of formal discovery remained in place until the unsuccessful conclusion of a settlement mediation held before former Federal Judge Layn R. Phillips concluding on July 19, 2013. On November 3, 2014, Plaintiffs filed their Amended Petition, followed by the service of Plaintiffs’ Amended Motion for Class Action Certification on Defendant on January 9, 2015. Following extensive briefing and hearing on the matter, the trial court entered its June 11, 2015 Order granting Plaintiffs’ Amended Motion for Class Action Certification. Continental thereafter appealed from this judgment. This appeal raised unique questions including a first impression issue of certification of a hybrid or issue class action, as well as complex and novel questions of both law and fact which Class Counsel had to navigate. While the appeal was pending, in December 2015, the parties had yet another failed mediation attempt with Judge Phillips, and thereafter requested a stay of the district court proceeding to explore settlement opportunities.

10. On February 8, 2017, The Court of Civil Appeals in *Strack v. Continental Resources, Inc.*, 2017 OK CIV APP 53, 405 P.3d 131 (rehearing denied May 3, 2017 and mandate issued October 27, 2017) reversed and remanded the June 11, 2015 Order granting Plaintiffs’ Amended Motion for Class Action Certification for an issue class, indicating nothing herein precluded the trial court’s consideration of certification of a B3 class for damages.

11. On May 23, 2017, Plaintiffs filed a Petition for Certiorari to the Oklahoma Supreme Court. The Petition for Certiorari was denied by the Oklahoma Supreme Court by a vote of 9-0 on October 2, 2017. Mandate issued October 27, 2017. Prior to the mandate issuing, plaintiffs

filed a new motion to certify the case as a B3 class. The Settlement Agreement was executed March 29, 2018.

12. After the Order certifying the B1 and B2 Class on June 11, 2015, mediation and settlement discussions resumed. From June 2015 through May 2018 (almost 3 years), Class Counsel has invested over 1,000 hours negotiating and documenting the settlement term sheet and Settlement Agreement, as well as preparing the Settlement for approval by the Court. Time in excess of 500 hours will be necessary to continue to implement the settlement expected to take over two years and possibly up to four years.

13. In Oklahoma state court, pursuant to Okla. Stat. tit. 12 O.S. § 2023(G), the state court must consider thirteen “Burk” factors. Those factors are covered by the Declaration of Burns and Stowers and in the Motion and Brief in Support of Attorney Fees, Litigation Costs and Incentive Award filed herein provided to this Court and will not be repeated here. However, it should be emphasized that in my opinion the most critical factor relevant to this case is number 8,<sup>5</sup> the amount in controversy and the result obtained for the class. *Tibbetts v. Sight "n Sound Appliance Centers, Inc.*, 2003 OK 72, ¶4, 77 P.3d 1042, 1046, *as corrected* (Sept. 30, 2003). This is so in every contingent fee case because the client does not directly benefit from the quantity of time the lawyers spend or their experience, the difficulty or novelty of the factual and legal issues, or any factor other than the result obtained. That is the measuring stick for the benefit to the class members from the litigation. And in a contingent fee case, the higher the result, the higher the fee; and the lower the result, the lower the fee - but the same contingent fee percentage regardless. Class Counsel participates in the risk regardless of time spent, experience, lost practice opportunity, etc.

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<sup>5</sup> Okla. Stat. tit. 12 O.S. § 2023(G)(4)(e)(8).

14. Most important is the recognition by the Legislature in Okla. Stat. tit. 12 O.S. § 2023, that contingency fee agreements do exist. Contrary to some professional Objectors' argument, §2023 does not prohibit contingency fee agreements. In my opinion, contingency fee contracts between Class Counsel represents the best evidence of arm's length negotiation contemporaneous with the commencement of the case. Class Counsel has negotiated written fee agreements with Named Plaintiff Class Representatives entitling Class Counsel a 40% fee. (See Declaration of Burns and Stowers and a copy of the fee agreement attached to the Motion for Attorneys' Fees as Exhibit "A"). Under Okla. Stat. tit. 12 O.S. § 2023(6)(1), the Court is authorized to award reasonable attorney's fees and costs that are authorized by law *or by the party's agreement* (emphasis added). Further, in Okla. Stat. tit. 12 O.S. § 2023(G)(4)(e)(6), the Court must consider if the fee is fixed or *contingent*. As a consequence, because it would be inequitable to saddle the Named Plaintiffs with a 40% contractual fee while imposing a lesser fee to Class Members, the only real question is whether to extend the existing contingent fee agreements to all Class Members. That question has clearly been answered in Oklahoma; "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 ex rel. Dept. of Pub. Safety*, 1999 OK CIV APP 100, 990 P.2d 294, 299-300 (citing *Deposit Guaranty Bank*, 100 S.Ct. at 1174). This extension of the contingent fee agreement is shown in *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; see Counsel's Supporting Fee Orders, Exhibit 2):

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, supra*]. The Court finds 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.

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.... (See Continental Res. Order, Counsel's Supporting Fee Orders, Exhibit 2 .)

So it is here. In my opinion, the contingent fee contracts between the Class Representatives and Class Counsel should be extended to the members of the Class as they have been properly notified (*see* Declaration of Burns and Stowers) of Class Counsel's intent to seek 40% of the Common Fund. (*See* Affidavit of Notice Mailing.)

15. The Honorable Greg Zigler appropriately summarized the risk/reward analysis involving a class contingency in royalty underpayment class actions.

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 Class Counsel's defeat must be considered with [an] open judicial mind. (*See* Counsel's Supporting Fee Orders, Exhibit 24, *Mitchusson v. EXCO*, Case No. CJ-2010-32 District Court of Caddo County, OK, p. 7.) Quoting from *Brumley v. ConocoPhillips*, Case No. CJ-2001-5 District Court of Texas County, OK. (*See* Counsel's Supporting Fee Orders, Exhibit 3).

16. This District Court [Judge Zigler] was, and this former district and appellate judge is, well aware of the risk borne by Class Counsel in royalty underpayment class actions, especially now because a few recent royalty underpayment actions have been denied certification, leaving royalty owners with no recovery. Judge Zigler further recognized that awarding \$10 million in fees, although significant in amount, was justified:

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 foreseeably so goes later access to the Courthouse for other potential and future class members. *Brumley v. ConocoPhillips*, Case No. CJ-2001-5 District Court of Texas County, OK. (See Counsel's Supporting Fee Orders, Exhibit 3).

17. Moreover, the percentage fee award was approved in a similar case to this case by Judge Ellis Cabaniss:

"15. The *Manual for complex Litigation*, and Oklahoma jurisprudence approve of the Common Fund doctrine, and allow a percentage or contingency of the fund created in settlement of the case as the attorney's fees for plaintiff's counsel. In a class action 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*)(Emphasis added). Second, the percentage approach rewards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, i.e. 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 herein 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. (See Order on Motion for attorney fees, litigation expenses, class representative fees and administrative costs from the common fund. (See Hon. Ellis Cabaniss June 21, 2006 Order on Motion for Attorney Fees, Litigation Expenses, Class Representative Fees and Administration Costs From the Common Fund, *Bank of America, et al. v. El Paso Natural Gas Company and Burlington Resources*, Case No. CJ-97-68, District Court of Washita County, Oklahoma, Counsel's Supporting Fee Orders, Exhibit 28.)

18. For these reasons, Class Counsel's request for a forty percent (40%) fee as detailed in the Declaration of Burns and Stowers for the two described time periods is reasonable in this case, and I urge approval.

## **Class Representatives' Award**

19. Analysis of the Class Action Tracking Report (Class Counsel Exhibit "A"), reveals that the courts in 50 of the 56 (89.2%) reported cases, awarded a Class Representative or Case Contribution award. The range of the award is shown to be from a low of .12% to a high of 6.4% of the common fund (or a fee ranging from \$5,000 to \$890,782), with the weighted average being .6% of the common funds. In this case, Class Counsel is requesting a Class Representative Fee or Case Contribution award in the amount of \$400,000 (to be divided between the four Plaintiff Trusts). Assuming the Time Period 2 Common Fund is ultimately \$7,500,000, the requested award would be .7% ( $\$400,000/\$57,300,000$ ) of the Time Period 1 and Time Period 2 Common Funds. In view of the additional benefits to be conferred upon the class during the Future Production Period, a Case Contribution Award to the Class Representatives slightly above the weighted average award in the reported 50 cases I believe to be reasonable and justified. (*see* Burns and Stowers' Declaration for discussion of Class Representative efforts contributed to this case). Class Counsel has recommended this Court award a Class Representative Fee or Case Contribution award in the amount of \$400,000 to be divided between the four plaintiff trusts and I urge acceptance of this recommendation. In *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), the Court allowed payment from the common fund because the assumption of risk, inconvenience and commitment of time by each class representative has conferred a benefit on the entire class.

Part of my role is to offer this Court an analysis of what courts both state and federal, have routinely done for many years. All but a few of the Exhibit "A" royalty underpayment case legal analysis' results in an approval of some methodology for a Class Representative

incentive or Class Representative case contribution award (and in the few cases where one was not awarded, it is unclear as to whether one was requested).

Fees requested in this case are justified in light of the significant contributions to the Class and are consistent with historical Class Representative fees approved by our Courts.

### **Class Counsel's Time Records and Expenses**

20. As part of my engagement, I was also asked to review the time records of Class Counsel and a summary of the expenses incurred in this case. Okla. Stat. tit. 12 O.S. § 2023(G)(4) now mandates that the Court should conduct an evidentiary hearing to determine a fair and reasonable fee for Class Counsel and the Court must act as a fiduciary to the Class in making its determination. To that end, I reviewed the underlying timesheets and Summary of Class Counsel's Detailed Time Records supporting Class Counsel's represented 7,961.83 hours as set forth on "Exhibit C" to the Declaration of Burns and Stowers. These records, some dating back over seven years, consist of 193 pages of detailed time records for Douglas E. Burns and Terry L. Stowers and 7 pages of detailed time records for Kerry W. Caywood and Angela Caywood Jones. Each entry sets forth the day upon which the time was expended, the actual time expended (rounded to the nearest 1/10<sup>th</sup> of the hour) and describe the specific work undertaken by each attorney. As a consequence, the hourly records appear to have been routinely kept and maintained in accordance with the time retention and billing policies of the firms and represent actual, contemporaneously kept time records. Based upon my review of these billing summaries, it is my opinion Class Counsel has invested the represented time in prosecuting this action on behalf of the Class.

21. I also reviewed the expense record provided by Kerry W. Caywood, which itemized expenses incurred from November 2010 through April 2018 in the amount of \$1,005.23. Additionally, I reviewed the expense summary of this case. The litigation expense summary was provided by Burns & Stowers and attached as Exhibit “D” to the Declaration of Burns and Stowers. Each entry was independently itemized. I therefore attest that the total expenditure of \$381,408.03 appears to have been actually expended by Class Counsel as of May 29, 2018 on costs and expenses that were necessary to prosecute the Class claims.<sup>6</sup>

### Summary

22. As a former judge, I have a unique perspective on the realities and practicalities of class action settlements. To protect and benefit the absent Class Members in a class action settlement, the judge insures that class notice and communication about the settlement is clear, timely, fair and balanced, that the settlement itself is adequate, that fees and expenses are accurate and reasonable, and that the allocation is rationally based.

23. Class actions are almost never initiated and pursued on a lodestar or hourly fee basis, and royalty owner underpayment class actions never have been in Oklahoma. In *Hess v. Volkswagon of America, Inc.*, 2014 OK 111, 341 P.3d 662, the Court rejected an award of \$7 million in attorney fees where the class recovery was less than \$50,000. The majority opinion analyzed the lodestar method because the trial court utilized the lodestar method. Obviously, had a contingency fee agreement existed, it would have precluded any meaningful recovery at all. The *Hess* Court *did not* reject contingency fee awards. It held at ¶39 there is a presumption

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<sup>6</sup> This amount will certainly increase prior to the Fairness Hearing.

that the lodestar method will reflect a reasonable fee, and, cited *solely* to federal jurisprudence to support that holding. *Hess* did *not* prohibit application of a percentage fee. The concurring opinion of Justices Taylor and Winchester stated:

¶3 There are two primary methods of calculating attorney fees in class actions: the lodestar method and the contingency fee method. The contingency fee method assures that the fee has a reasonable relationship to the recovery. Even though this Court adopted the lodestar method in *Burk*, 1979 OK 115 at ¶ 10, 598 P.2d at 661, the contingency fee method is incorporated into any calculation of attorney fees because the amount in controversy and the results obtained must be considered in determining reasonable attorney fees. 12 O.S. Supp. 2013, § 2023(G)(8). In fact, the relationship of the attorney fees to the recovery is “the most critical factor” in determining reasonable attorney fees. *Tibbetts v. Sight ‘n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶ 13, 77 P.3d 1042, 1049. Attorney fees that are out of proportion with or have no relation to the recovery may be indicative of a case being overworked, of fee churning, and of unnecessarily protracted litigation.

24. Hourly and the lodestar only method is not a useful measuring stick in this case. If it was, no one would ever take the risk as class counsel in gas royalty underpayment litigation.<sup>7</sup> Percentage of the Common Fund is the way class action fees have routinely been handled in Oklahoma. *Root v. Kamo Elec. Co-op., Inc.*, 1985 OK 8, 699 P.2d 1083 (1985).

25. The overall “take” from royalty owners - fees, expenses, and administrative fees, are less in this case than in most Oklahoma royalty owner class litigation, and within the fair and reasonable norm and investment backed expectations of both sides (Class and Class Counsel).

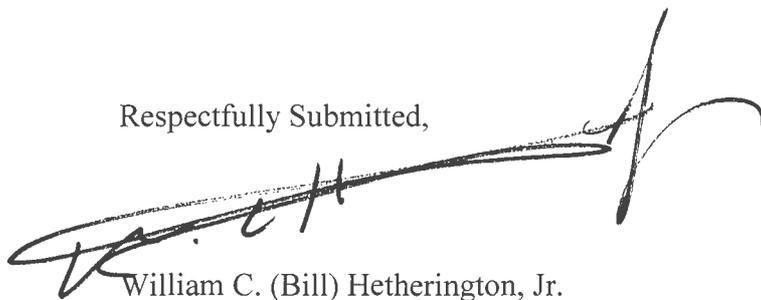
I respectfully recommend and it is my opinion they should be approved.

Done this 31<sup>st</sup> day of May, 2018.

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<sup>7</sup> I do not know of any royalty underpayment class action in Oklahoma undertaken and pursued on an hourly basis.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "W.C. Hetherington, Jr.", written in a cursive style. The signature is positioned above the printed name and extends across the width of the text.

William C. (Bill) Hetherington, Jr.

# **Exhibit “A”**

## **CIRRICULUM VITAE**

### **WILLIAM CLARK HETHERINGTON, JR. (BILL)**

231 S. Peters #A  
Norman, Oklahoma 73069  
(405) 321-8272 (office)

#### **ACADEMIC BACKGROUND**

Graduate, Norman High School - 1965

Graduate, University of Oklahoma - January 1970

Degree: B.B.A. Major - Petroleum Land Management

Honored as Outstanding Junior Cadet, Army R.O.T.C. - 1968

Dean's Honor Roll

Graduate, Oklahoma City University School of Law - 1979

Degree: Juris Doctorate

Faculty Honor Roll, Oklahoma City University School of Law

Phi Delta Phi Legal Fraternity Officer - 1978, 1979

Student Board of Governors

Graduate, National Judicial College - General

Jurisdiction - 1983

Completed, "Mediating The Litigated Case", Straus Institute for Dispute

Resolution Program, Pepperdine University - 2016

#### **BUSINESS & PROFESSIONAL**

Part Owner, Manager, Hetherington Insurance Agency 1969 to 1976;

Home builder, developer, real estate - 1969 to 1977;

General Practice of Law - 1979 to 1982;

Special District Judge, Cleveland County, Oklahoma - 1982 to October 1985;

Private Practice of Law - October 1985 to August, 1992;

Cleveland County District Judge, Office No. 1, Judicial District No. 21 August, 1992 to 2009;

Chief Judge in Cleveland County six terms;

Received Governor's Commendation for achievement by serving as an appellate

panel member for the Temporary Court of Criminal Appeals Judicial District 21;  
Past President Oklahoma State Judicial Conference;  
Presiding Judge South Central Judicial Administrative District;  
Oklahoma Bar Association Judicial Conference Delegate;  
Past Member Oklahoma State Judicial Conference Legislative Committee;  
Trial Judge Presiding over 400 trials;  
Appointed to the Oklahoma Court of Civil Appeals 2009 to September 2016;  
Elected Chief Judge Oklahoma Court of Appeals 2015;  
Twenty-Eight years of service to the Oklahoma Judicial Branch.

### **PROFESSIONAL & CIVIC AFFILIATIONS**

1. Member, Oklahoma Bar Association and Cleveland County Bar Association; admitted to practice in Oklahoma, United States District Court, Western District of Oklahoma and United States Tax Court. Master member emeritus Luther Bohanon American Inn of Court and past President.
2. Past Board of Directors, City National Bank and Trust Company of Norman; past Board of Directors, Norman Regional Hospital Foundation; past Board of Directors and Vice Chair, Cleveland County Citizen's Advisory Committee to Department of Human Services, Child Welfare Division; past Advisory Board Member, Norman Alcohol Information Counsel. Life Member Aircraft Owner and Pilots Association.
3. Member, President's Associates, Oklahoma University; OU Alumni Association and Sooner Club; Past Board of Directors, Norman Lion's Club 1974 to 1976;
4. National Director, Norman Home Builders Association 1974 through 1977; President, Norman Home Builders Association 1976; Co-Chairman, Norman Community Development Block Grant Program 1975; past Board of Directors, Norman Chamber of Commerce; past United Way of Norman Board 1974 to 1976; past Officer, Norman Independent Insurance Agents Association.
5. Past Senior Warden (Chairman), St. John's Episcopal Church Vestry Board. Vestry Board Member two terms; Current Board of Trustees Member St. John's Foundation.

6. Two Terms Executive Council, Cleveland County Bar Association.
7. Past youth soccer coach, Norman Youth Soccer Association.
8. Many years as frustrated actor and singer in Norman Sooner Theatre Follies and Mystery Dinner Theatre.
9. Member of “Almost Outlaws” three man band with Lindsay Bailey, local Norman attorney and Dr. Bruce Remy.

## **PERSONAL**

Age 71

Born, Oklahoma City, Oklahoma, February 21, 1947, Norman resident 70 years.

Married: Susan Wright Hetherington

Children: Shea Nicole Hetherington Barakatt, William C. Hetherington, III, and Dr. Kellie J. Hetherington

Grandchildren: Melanie L. Hetherington, Hunter Males, and William C. Hetherington IV

Parents: Clark & Marian Hetherington, Norman, Oklahoma and West Palm Beach, Florida (Deceased)

Brother: Steven K. Hetherington, Edmond, Oklahoma

## BIOGRAPHICAL INFORMATION-DISTRICT JUDGE BILL HETHERINGTON

Judge Hetherington was born in Oklahoma City in February, 1947; resident of Norman, Oklahoma for sixty two years and a graduate of Norman High School, University of Oklahoma and received his Juris Doctorate degree in 1979 from the Oklahoma City University School of Law. Judge Hetherington served on the alumni Board of Trustees of the OCU School of Law through the end of his term in 2004.

Judge Hetherington's judicial career began in 1982 as a Special District Judge. He retired from the bench and entered private practice in 1986 through 1991. He was appointed District Judge, Office No. One, Cleveland County in 1992. He has been re-elected to five four year election terms, unopposed. Judge Hetherington has served the Judicial Branch as a District Judge since that time and during his tenure as a District Judge has served as Chief Judge, Judicial District 21, Cleveland County, for seven terms and was

elected by his peers as Presiding Judge of the South Central Administrative Judicial District serving in that capacity during 2001 and 2002. Judge Hetherington also served on the Executive Board of the Oklahoma State Judicial Conference for six years and as President of the Conference in 2000.

As one of three District Judges sitting in Cleveland County, Judge Hetherington shares both civil and criminal felony caseload dockets with District Judge Tom Lucas and District Judge Lori Walkley. Judge Hetherington has extensive experience in handling mass tort litigation, having been the assigned Judge in the State of Oklahoma Attorney General Tobacco case, several oilfield class-action cases and is currently assigned class action tort cases involving the Oklahoma Wal-Mart employees and the "Hepatitis C" cases out of central Oklahoma. He is assigned Judge and responsible for Judicial administration of the Cleveland County Community Corrections

Intervention system. He designed and implemented the Cleveland County Mental Health Court, and was co-assigned judge with Judge Jequita Napoli.

In 2000, Judge Hetherington was nominated by the Judicial Nominating Commission as one of three nominees to then Governor Keating for appointment consideration to the Oklahoma Supreme Court.

Judge Hetherington regularly serves as visiting lecturer at the University Of Oklahoma School of Law and is a master member emeritus and past President of the Luther Bohanon American Inn Of Court.