IN THE DISTRICT COURT OF BLAINE COUNTY
STATE OF OKLAHOMA

MARK STEPHEN STRACK, TRUSTEE OF THE PATRICIA ANN STRACK REVOCABLE TRUST DTD 2/15/99 AND THE BILLY JOE STRACK REVOCABLE TRUST DTD 2/15/99, AND DENIELA 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.	)	CASE NO. CJ-10-75
	)	(JUDGE HLADIK)
CONTINENTAL RESOURCES, INC.,	)	
DEFENDANTS.	)	

CLASS COUNSELS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS AND A CLASS REPRESENTATIVES AWARD FROM THE COMMON FUND

Class Counsel hereby submit this Supplemental Brief in support of the motion filed on April 3, 2018 seeking an order from the Court, pursuant to 12 O.S. §2023(G) and relevant common law:

1. extending to the Settlement Class the contingency fee agreements entered into between the Class Representatives and Class Counsel, which are attached hereto as Exhibit "A";
2. awarding Class Counsel an attorneys' fee of 40% of the Gross Settlement Payments;
3. awarding Class Representatives compensation for their contribution to this Settlement (sometimes called a "Case Contribution Award") of $100,000.00 to each of the four (4) Plaintiff trusts (*i.e.*, a total award of $400,000.00); and
4. expert and consultant fees, litigation expenses and Administrative Expenses, including the fees and expenses of the Settlement Administrator, in an amount not to exceed $750,000.00 (the original motion sought up to $1,000,000.00; that amount sought is hereby reduced to $750,000.000),

(collectively "Attorneys' Fees and Expenses"), all for their services and contributions provided in the establishment of the "Common Fund."[1] The requested Attorneys' Fees and Expenses are reasonable and well within the range of fees and expenses approved by Oklahoma District Courts in similar common fund cases. In further support of the Motion, Class Counsel states as follows:

Declarations

Class Counsel Douglas E. Burns and Terry L. Stowers have executed an extensive and thorough Declaration (70 pages, plus exhibits) which is being filed simultaneously herewith ("Declaration of B&S"). The Declaration of B&S is incorporated herein by reference as if fully restated herein. Class Counsel have also secured the Declaration of former District Judge and former Oklahoma Court of Civil Appeals Justice, William (Bill) Hetherington, Jr. ("Hetherington"), which is also being filed simultaneously herewith ("Declaration of Hetherington"). The Declaration of Hetherington is incorporated herein by reference. After reviewing the history of this Litigation, awards in similar litigation and considering the law of Oklahoma, Justice Hetherington concluded, **"[i]n 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.)"** [Emphasis added.] Declaration of Hetherington, ¶14.

Extending the Contingency Fee Agreement to the Class

When this Litigation began, Class Representatives agreed to a contingent attorneys' fee of

[1] The Gross Settlement Payments: (1) for the Sub-Class 1 Claims of $49,800,000.00; and (2) for the sub-Class 2 Claims, with the amount to be determined pursuant ¶3.4 of the Settlement Agreement, shall be considered the "**Common Fund**" for purposes of this Motion. ***Although a substantial benefit to the Settlement Class, Class Counsel will not be seeking any additional fees based upon the value of the Settlement related to the Future Time Period which is estimated to exceed $50,000,000.00.***

40% of all consideration recovered:

> If we are successful, we will receive as a fee forty percent (40%) of all consideration which is received by you as a result of our efforts in prosecuting this claim, *i.e.*, forty percent (40%) of the gross recovery. As for the remainder of the class members, we will apply to the Court for the same forty percent (40%) of gross recovery fee. In the event such consideration includes non-cash consideration, such as the agreement to do or not do some future act, the present cash value of such non-cash consideration shall be determined and utilized in computing the full attorney's fee payable pursuant to this agreement.

See Fee Agreements attached to Class Counsel's Motion for Attorneys' Fees and Expenses, Exhibit "A." See also Declaration of Douglas E. Burns and Terry L. Stowers filed simultaneously herewith ("Declaration of B&S"), ¶103.

The Court has the authority to extend the contingency fee agreement entered into between the Class Representatives and Class Counsel to the Class.[2]

> **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.] 12 O.S. § 2023(G)(1).

"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**

---

[2]*See e.g.,* Supporting Fee Orders, Exhibit 2, Honorable Richard Perry, *Continental Resources, et al. v. Conoco, Inc.*, Consolidated Cases CJ-95-739 and CJ-2000-356, District Court of Garfield County, Oklahoma, Order on Motion for Attorney Fees, Litigation Expenses, and Class Representative Fees (8/22/05). In *Conoco*, Judge Perry found:

> **[T]he 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.] *[quoting from] Sholer v. State of Oklahoma*, 1999 OK CIV APP 100, ¶¶ 13-14, 990 P.2d 294.
>
> * * *
>
> **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.** [Emphasis added.] *Id.* at p. 5- 6.

arrangement to all class members." [Emphasis added.] *Sholer v. State of Oklahoma*, 1999 OK CIV APP 100, ¶¶ 13-14, 990 P.2d 294.

Oklahoma District Courts considering an award of attorneys' fees in oil and gas class actions have recognized the importance of contingency fees in our justice system, and in particular 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.** [Emphasis added. Footnotes omitted.] *[Quoting from] Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754.

Honorable Richard Perry, *Continental Resources v. Conoco*, CJ-2000-356, District Court of Garfield County, at pp. 5-6 (Supporting Fee Orders, Exhibit 2).

The Common Fund Doctrine

Under the Common Fund Doctrine, if the plaintiffs and/or their 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, the court, in the exercise of equitable jurisdiction, may order the allowance of attorney fees and litigation expenses to counsel.[3]

The Oklahoma Supreme Court has recognized the long standing common law principal that a party or attorney who helps create a "common fund" is entitled to recover a fee from that common fund.

> 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**

[3] Black's Law Dictionary (7th ed. 1999).

> **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, 1339.

> 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 County v. Oklahoma Tax Com'n, 1944 OK 250, ¶4, 151 P.2d 797.

> The plaintiff claims the right to the allowance of an attorney's fee under the rule that a court of equity, or **a court in the exercise of equitable jurisdiction, will, in its discretion, order the allowance of attorney fees to counsel who at his own expense maintained a successful suit for the preservation, protection or increase of a common fund, or common property, or who has created at his own expense, or brought into court, a fund in which others may share with him.** [Emphasis added.]

Kellough v. Taylor, 1941 OK 320, ¶4, 119 P.2d 556.

The United States Supreme Court has also consistently held that attorneys are entitled to a reasonable fee for creating a "common fund" for the benefit of a class.

> **[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee <u>from the fund as a whole</u>.** The common-fund doctrine reflects the traditional practice in courts of equity and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the

> successful litigant's expense. **Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.** [Citations omitted. Emphasis added.]

Boeing v. Van Gemert, 444 U.S. 472, 478 (1980).[4]

Decades of jurisprudence dictate that upon the creation of a common fund, class representatives and class counsel are entitled to an award of fees and expenses, to be taxed against the entire common fund.

The Creation of the Common Fund in this Litigation

After seven and a half years of vigorous discovery and litigation, the Class Representatives entered into a Settlement Agreement with Continental which will be presented to the Court for final approval on June 11, 2018, the same day as this motion. For detail on the history of the Litigation and the creation of the Common Fund, *see* Declaration of B&S, ¶ *8-35, p. 4-16*; ¶ 4-7, p. 2-4; ¶ 46-51, p. 20-22, incorporated herein by reference.

Determining Reasonable Fee and Expense Awards in Common Fund Cases: Percentage of Common Fund Approach

The issue of determining fees and expenses in class actions has been addressed by numerous district courts throughout this State, as reflected in Exhibit "A" to the Declaration of B&S outlining orders in 56 district court orders (both State and Federal) in Oklahoma royalty owner class actions, with the supporting orders submitted as "Supporting Fee Orders, Exhibits 1 through 56. One of those pronouncements came from the Honorable Richard Perry, of the Garfield County district court. Judge Perry found:

> Under the Common Fund Doctrine, and in particular in a "class action" (which is one type of action that can create a common fund),

[4] The Court should note that the U.S. Supreme Court affirmed a judgment for attorney fees amounting to approximately 34.7% of the Common Fund. *Id.*

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

* * *

The Court further recognizes the importance of contingency fees in our justice system, and in particular 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**. [Emphasis added. Footnotes omitted.] *[Quoting from] Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754.

Continental Resources v. Conoco, *supra.*, at pp. 5-6, Supporting Fee Orders, Exhibit 2.

In class actions (common fund cases), most courts have abandoned the "lodestar" approach (hours expended X hourly rate X multiplier, which is typically utilized in fee-shifting cases) as the primary approach for determining the reasonableness of the fee. **The preferred method for determining a reasonable fee in a class action is the percentage of the common fund**. *See* Declaration of Hetherington. In *Brumley v. ConocoPhillips,* CJ-2001-5, District Court of Texas County, Supporting Fee Orders, Exhibit 3, the Honorable Greg Zigler, District Judge of the First Judicial District, held that the "**calculation and award of attorney's fees using a percent of common fund approach is appropriate**." Judge Zigler relied, in part, on the leading treatise on class actions when making this finding.

The Newburg [sic] 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*, another statutory fee case, the [U.S.] 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." [Emphasis added.] *Newburg* [sic] *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. [Emphasis added.]

The rationale of Judges Perry, Zigler and other Oklahoma district courts is very compelling, and is based upon sound logic and equity. For example, in *Bridenstine v. Kaiser-Francis*, CJ-2000-1, District Court of Texas County, Supporting Fee Orders, Exhibit 4, 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.** [Emphasis added.]

In *Brumley*, Judge Zigler echoed Judge Kincannon's *Bridenstine* findings and then stated:

> 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 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. [Emphasis added.]

Brumley v. ConocoPhillips, Supporting Fee Orders, Exhibit 3.

A review of other Oklahoma district courts' orders reveals similar sound logic. Likewise, various other state and federal courts have also commented on this issue. For example:

> **A district court may use its discretionary powers to determine what is a reasonable and fair award from a common fund, where the fund itself represents the benchmark from which reasonableness is measured.**
>
> * * *
>
> **No general rule can be articulated as to what is a reasonable percentage of a common fund. Usually 50 percent of the fund is**

> **the upper limit on a reasonable fee award from a common fund** to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented. [Emphasis added.]

In re Combustion, Inc., 968 F.Supp. 1116, 1132-3 (U.S.W.D.LA 1997).

> There are two methods for calculating attorneys' fees: the lodestar method and the percentage method. **Under the lodestar, the court determines fees by multiplying the number of hours spent on the litigation by an appropriate hourly rate. This method is most commonly used in statutory fee-shifting schemes to reward attorneys for engaging in socially useful litigation. It is also applied when the type of recovery does not allow easy calculation of the settlement's value.** The lodestar has come under attack recently, however. It may encourage attorneys to delay settlement or other resolution to maximize legal fees, and it places a great deal of pressure on the judicial system, as the courts must evaluate the propriety of thousands of billable hours. **The lodestar may also compensate attorneys insufficiently for the risk of undertaking complex or novel cases on a contingency basis. These flaws have led to the increased use of the percentage method, which permits courts to reward success and penalize failure more directly. It is particularly appropriate in "common fund" cases such as this one, as it simply awards counsel some percentage of the settlement fund. Also, this method theoretically aligns the interests of counsel and class more closely than does the lodestar method: a larger recovery with fewer hours expended benefits all parties. For these reasons, the Third Circuit has "now made it clear that district courts should apply the [percentage] method of calculating fees in common fund cases such as this one."** [Citations omitted. Emphasis added.]

In re Ikon Office Solutions Security Litigation, 194 F.R.D. 166, 192-193 (U.S.E.D. Penn 2000).

> **In our circuit, following *Brown* and *Uselton*, either method [lodestar or percentage of fund] is permissible in common fund cases; however, Uselton implies a preference for the percentage of the fund method. In all cases, whichever method is used, the court must consider the twelve *Johnson* factors.** [Footnote omitted. Emphasis added.][5]

[5] In Oklahoma district courts, the *Burk* factors are synonymous with the *Johnson* factors in the federal courts. Analysis of the *Burk* factors is discussed below.

Gottlieb v. Barry, 43 F.3d 474, 483 (10th Cir. 1994).

> **There have been several cases where courts have awarded more than 40% of the settlement fund for fees and expenses.... Based upon careful review of the facts of this case and the entire record herein, the Court will award 45% of the settlement fund of $7.3 million for a total of $3,285,000.00.** . . . [Emphasis added.]

In re Ampicillin Antitrust Litig., 526 F.Supp. 494, 498 (U.S.D.C. 1981).

> The court has also been greatly aided in its analysis by the discussion of the resurgence of the common fund doctrine in H. Newburg, [sic] Attorney Fee Awards. . . . Some points particularly applicable to the matter at issues are: . . . **A percentage awarded supported by appropriate findings is the preferable method in common fund cases**. . . . Percentage awards in common fund cases recognize the economics of litigation practice. . . . In common fund cases attorney's fees should not exceed 50% of the fund recovered. . . . Weight assigned to the monetary results achieved should predominate over all other criteria in making attorney's fee awards in common fund cases. . . . **An award of attorney's fees** to plaintiffs' attorney as a group is hereby made in the amount of $400,000, being **40%** of the $1,000,000 settlement fund. . . . [Emphasis added.]

Howes v. Atkins, 669 F. Supp. 1021, 1025, 1027 (U.S.E.D. Ky. 1987).

> This Court entered Judgment . . . of $93,222,157. Post-judgment interest is accruing at 10% per annum. . . . [The attorneys also conferred] an additional benefit on Class members with fixed rate leases by assuring that their royalties will be based on proceeds in the future. . . . Class Counsel's application seeks attorney fees in the amount of $32,550,000.00, which is approximately 35% of the Judgment amount, plus a pro rata share of all post-judgment interest which accrues on that sum. . . . **Class Counsel presented exhibits demonstrating that other courts in similar cases have awarded fees in the range of 30% to 60%. . . . Class Counsel are awarded attorney fees in the amount of $32,550,000.00 from the common fund together with a pro rata share of all postjudgment interest that accrues on the common fund.** [Emphasis added.]

Hales v. Seeco, CIV-96-327 (III), Circuit Court of Sebastian County, Arkansas (12/23/98).

> The efforts of counsel for the Class have produced the recovery of a common fund of $35,338,454 as of the date of the Joint Application.

> . . **An award of attorneys' fees based on a percentage of the common fund is appropriate**. . . .
>
> **Under the common fund doctrine**, and in view of the facts and circumstances presented in this litigation, including the substantial effort expended and highly favorable result obtained, **the Court finds that attorneys' fees of 33 ⅓% of the common fund created by the efforts of counsel for the Class are in line with comparable other cases**, consistent with prevailing case law of this circuit and, accordingly, should be awarded. [Citations omitted. Emphasis added.]
>
> The Honorable Ralph Thompson, *Cimarron Pipeline Construction v. National Counsel on Compensation Insurance*, CIV-89-822-T (1983), 1993 WL 355466 (U.S.W.D. Okla. 1993).

Clearly, the prevailing approach to determine the appropriate award of fees and expenses in Oklahoma class actions is the percentage of common fund method. However, in 2009 the Oklahoma Legislature codified the process for determining reasonable attorneys' fees in Oklahoma class actions. See Declaration of B&S, ¶125. For fee motions filed after November 1, 2009, the Court must follow the guidelines set forth in12 O.S. §2023(G) when awarding attorneys' fees (which depending on the type of case, could result in a fee calculated using a Lodestar or Percentage of Fund approach):

> ATTORNEY FEES AND NONTAXABLE COSTS.
>
> 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**.
> 2. A claim for an award shall be made by motion, subject to the provisions of this subsection, at a time set by the court. Notice of the motion shall be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
> 3. A class member, or a party from whom payment is sought, may object to the motion.
> 4. In considering a motion for attorney fees filed after November 1, 2009:
>   a. the court shall conduct an evidentiary hearing to determine a fair and reasonable fee for class counsel,
>   b. the court shall act in a fiduciary capacity on behalf of the class in making such determination,

c. the court may appoint an attorney to represent the class upon the request by any members of the class in a hearing on the issue of the amount of attorney fees or the court may refer the matter to a referee pursuant to Section 613 et seq. of this title,
d. if the court appoints an attorney to represent the class for the fee hearing pursuant to subparagraph c of this paragraph or refers the matter to a referee, the attorney or referee shall be independent of the attorney or attorneys seeking attorney fees in the class action, and said independent attorney or referee shall be awarded reasonable fees by the court on an hourly basis out of the proceeds awarded to the class,
e. **in arriving at a fair and reasonable fee for class counsel, the court shall consider the following factors**:
   (1) time and labor required,
   (2) the novelty and difficulty of the questions presented by the litigation,
   (3) the skill required to perform the legal service properly,
   (4) the preclusion of other employment by the attorney 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 attorney,
   (10) whether or not the case is an undesirable case,
   (11) the nature and length of the professional relationship with the client,
   (12) awards in similar causes, and
   (13) the risk of recovery in the litigation, and
f. if any portion of the benefits recovered for the class in an action maintained pursuant to paragraph 3 of subsection B of this section are in the form of coupons, discounts on future goods or services or other similar types of noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class." [Emphasis added.] 12 O.S. §2023(G).

Each of these mandatory thirteen (13) factors are addressed extensively in the Declaration of B&S, ¶74-123, p. 30-59, which is incorporated herein by reference; *see also* Declaration of Hetherington.

Percentage of Fund Method
vs.
Lodestar Method

The Federal 10th Circuit Court of Appeals recently speculated that Oklahoma law mandated a Lodestar approach to determining attorneys' fees in class actions, with a low to no enhancement

multiplier, *see Chieftain v. Enervest*, 888 F.3d 455 (10th Cir. 2017). That interpretation is contrary to the literal language of 12 O.S. §2023(G), and certainly contrary to the legislative intent discussed in the Declaration of B&S, ¶125. Simply put, the 10th Circuit got it wrong. The 10th Circuit's speculation on Oklahoma law in *Chieftain v. Enervest* is not binding on this Court. The Court should follow the statutory guidelines set forth in 12 O.S. §2023(G), not the 10th Circuit's speculation of Oklahoma law. *See* Declaration of B&S, ¶126; Declaration of Hetherington.

Relying in part on the Declaration of Steven S. Gensler, the W. DeVier Pierson Professor of Law at the University of Oklahoma, (*see* Supporting Fee Orders, Exhibit 26(e)), Judge West recently concurred with Class Counsel's interpretation of the law in Oklahoma and disagreed with the 10th Circuit's interpretation:

> The Oklahoma Legislature amended 12 OKLA. STAT. §2023 in 2013 to add a new subsection governing the calculation of attorney's fees, 2023(G)(4)(e), which states that courts shall consider thirteen factors "in arriving at a fair and reasonable fee for class counsel," only one of which is the "time and labor required." *See* Gensler Decl. at ¶¶54-63; Reirdon Fee Order at ¶6(ee). These factors include all of the Johnson factors (plus one) that federal courts consider, as set forth above. See Gensler Decl. at ¶¶54-63; Reirdon Fee Order at ¶6(ee). **As Professor Gensler states, "[t]he best reading of Section 2023(G)(4)(e) is that it supplanted Burk for class-action common fund cases** [consistent with Stowers' discussion of legislative intent in ¶125 above], aligning Oklahoma practice with what **had been** prevailing Tenth Circuit practice [and still is except for its holding in *Chieftain v. Enervest* interpreting Oklahoma law]" Gensler Decl. at ¶55;
>
> **Following the enactment of Section 2023(G)(4)(e), Oklahoma district courts have applied the rule "as a flexible scheme that is applied differently based on whether the case involves a common fund recovery or statutory fee-shifting.**" *Id.* at ¶56; Reirdon Fee Order at ¶6(ff). 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 [Supporting Fee Orders, Exhibit 31]**("[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.**"); Gensler Decl. at ¶56; Reirdon Fee Order at ¶6(ff). 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), **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.**"); Gensler Decl. at ¶57; Reirdon Fee Order at ¶6(ff);
> **However, I do not have to decide what role a lodestar calculation should play in the fee analysis here because, as Professor Gensler opines, I find that "the fee award in this case is reasonable whether lodestar plays no role, whether it serves as a type of cross-check, or whether it serves as a baseline subject to a contingency-fee common-fund multiplier.**" Gensler Decl. at ¶58; Reirdon Fee Order at ¶6(gg). [Emphasis added.]

Chieftain (Supporting Fee Orders, Exhibit 26) at ¶6(ee-gg).

Further, the Oklahoma Supreme Court has limited the application of *Burk* (Lodestar) when either a contract or statute controls the determination of a reasonable fee (in this case, we have both):

> *We agree that generally the correct procedure for calculating a reasonable fee is to: 1) determine the compensation based on an hourly rate; and 2) to enhance the fee by adding an amount through application of the Burk factors. Nevertheless,* ***Burk applies in determining a reasonable attorney's fee in absence of a contract or statute****. Here, there is a contract entered between the owners and their attorneys settling a definite amount - determinable through calculating the hours worked multiplied by the hourly rate of $125.00 - as the owners' fee obligation. Additionally, there is statutory language limiting recovery of attorney fees to those "actually incurred."* [Emphasis added.]

State ex rel. Dept. of Transp. v. Norman Indus. Development Corp., 2001 OK 72, ¶8.

However, whether the Court utilizes the Lodestar approach in the first instance to determine a reasonable fee, or if the Court utilizes the Percentage of Fund approach after

considering the factors set forth in follows the 12 O.S. §2023(G), **the result will be the same** – a "reasonable fee" is a "reasonable fee" regardless as to how you got there. **Many courts utilize the Lodestar calculation as a cross-check to the reasonableness of the fee calculated using the Percentage of Fund method**. In this case, the Lodestar fee (before enhancement) would be $6,288,831 as of May 10, 2018. *See* Declaration of B&S, ¶129. The requested 40% contingent fee requested for Time Period 1 is $19,920,000 ($49.8 million X 40%). **The resulting Lodestar enhancement multiplier (if a Lodestar approach were utilized) in this case would be 3.17**. The Lodestar enhancement multipliers awarded in other Oklahoma oil and gas class actions (reported in 20 of the cases) set forth in COSMO's Class Action Tracking Report (see Exhibit "A" to Declaration of B&S) range from 1.31 to 10.00 (**the weighted average Lodestar enhancement multiplier for the reported 20 cases is 4.02**). *See* Declaration of B&S, ¶129. Whichever method is utilized, Percentage of Fund or Lodestar, the result is the same; Class Counsel's requested fee is fair and reasonable. *See* Declaration of B&S, ¶129; Declaration of Hetherington.

Class Counsel is seeking an award of Attorneys' Fees of the Gross Settlement Payment for Claim Period 1 and Gross Settlement Payment for Claim Period 2 (i.e. **40% of $49.8 million for Claim Period 1 and 40% of a presently undetermined Claim Period 2 payment, estimated to be $7.5 million**). **Class Counsel are not seeking an additional 40% fee on the benefits obtained for the Future Production Period**. If approved, the attorneys fee requested for Claim Period 1 would be $19.92 million, and the attorney's fee for Claim Period 2 would be $3 million if the $7.5 million Time Period 2 estimate is spot on accurate. See Declaration of B&S, ¶74. However, when viewed against the Total Settlement Value in excess of $107.3 million (which includes $49.8 million in cash for Time Period 1, plus an estimated $7.5 million for Time Period 2, plus an amount in excess of $50 million future benefits to Class Members during the first ten

(10) years of the Future Production Period) **the Fee Request represents <u>less than twenty two percent (22%)</u> of that Total Settlement Value**. Given the substantial recovery Class Counsel achieved on behalf of the Class—consisting both of a cash recovery, and binding future benefits conferred on Class Members owning interests in existing and future wells—and the efforts Class Counsel dedicated to this action, this Fee Request is fair and reasonable, regardless as to whether the Court utilizes the Lodestar approach in the first instance to determine a reasonable fee, or if the Court utilizes the Percentage of Fund approach after considering the factors set forth in 12 O.S. §2023(G), with a Lodestar "cross-check"; **the result will be the same** – the requested attorneys' fee is fair and reasonable.

<u>Objections to Attorneys' Fees</u>

Class Counsel have received only three (3) purported objections to the Motion for Attorneys' Fees and Expenses:

1. Bruce L. McLinn, Trustee of the McLinn Family Revocable Trust dtd 7/31/2008 - As noted on McLinn's letterhead, he does business as "McLinn Land Services, LLC". McLinn Land Services, LLC's website indicates "*McLinn Land Services, LLC was founded as a full service land company in 1997. The Company has consistently maintained a staff of highly experienced sub-contracting landmen since inception, allowing us to provide exceptional service that is customized to the client's needs.*" *http://mclinnland.com/*. In other words, Mr. McLinn's livelihood is derived directly from oil and gas operators like, and even perhaps including, Continental. As reflected in the Report of Class Member Filings (Opt-Outs & Objections), Mr. McLinn's "objection" does not fully comply with the requirements set forth in the Notice. The Court should therefore consider Mr. McLinn's filing as "comment" rather than an "objection";

2. Daniel McClure – Mr. McClure is a class action defense attorney; *see* pending Motion Confirming Daniel M. Mcclure to be Excluded from the Settlement Class and Motion to Strike "Objection to Motion for Attorneys' Fees and Class Representatives' Award" by Non-Class Member, Daniel M. Mcclure; and

3. Kelly McClure Callant – Ms. Callant is the sister of Daniel McClure. As reflected in the Report of Class Member Filings (Opt-Outs & Objections), Ms. Callant's "objection" does not fully comply with the requirements set forth in the Notice. The Court should therefore consider Ms. Callant's filing as "comment" rather than an

"objection".

Thus, less than 0.009%, or 1 out of every 11,297 possible Class Members, (3 "objections" / 33,890 Notices mailed out) "objected" to the requested Attorneys' Fees and Expenses. Put another way, **99.9911% the possible Class Members raised NO objection to the requested Attorneys' Fees and Expenses**. *See* Report of Class Member Filings (Opt-Outs & Objections); see also, Declaration of B&S, ¶76.

Litigation Expenses

The costs and expenses Class Counsel advanced on behalf of the Settlement Class were reasonable and necessary and were critical to the prosecution of this Litigation. These costs were expended over the course of the Litigation. Class Counsel has been without the use of these funds for several years and risked loss of the funds had the Litigation not been successful. Class Counsel's actual out-of-pocket expenses as of May 29, 2018 for which they are seeking reimbursement are **$381,408.03** (for a summary of the Litigation Expenses, *see* Exhibit "D" to the Declaration of B&S, ¶130.

In addition to these expenses, Class Counsel expects to incur future expenses related to approval of the Settlement and Administrative Expenses. The Notice of Class Action Settlement mailed to the Class Members provided:

> Class Counsel have filed a motion for: . . . (c) expert and consultant fees, litigation expenses and Administrative Expenses, including the fees and expenses of the Settlement Administrator, in **an amount not to exceed $1,000,000.00**. [Emphasis added.]

No objections to Class Counsel's request for reimbursement of these expenses (or creating a reserve for these future expenditures) have been received. However, in view of the relative low out-of-pocket expenses expended thus far by Class Counsel, Class Counsel believe the reserve for future Administrative Expenses can be reduced by $250,000.00 such that the total request would

be reduced from $1,000,000 to $750,000.00. Thus, after deducting the current out-of-pocket expenses of $381,408.03, **Class Counsel is requesting the Court approve a reserve for future Administrative Expenses ("Administrative Expense Reserve") in the amount of $368,591.97 ($750,000.00 - $381,408.03).**

Accordingly, Class Counsel is requesting that the Court authorize the payment of $750,000.00 from the Common Fund to the "Burns & Stowers, P.C. IOLTA Client Trust Account" from which Class Counsel may immediately withdraw $381,408.03 as reimbursement of current out-of-pocket expenses. Class Counsel further request authority from the Court to make withdrawals from the Administrative Expense Reserve for reimbursement of future Administrative Expenses, including fees of the Settlement Administrator and other experts, as they are incurred. At the conclusion of the administration of the Settlement, Class Counsel would then provide an accounting to the Court of all reimbursements withdrawn from the Administrative Expense Reserve. To the extent any of the Administrative Expense Reserve remained unused, it would be treated as residual settlement funds, subject to further order of the Court as to its use and/or distribution.

Class Representatives' Case Contribution Award

The Strack Trusts: From inception of this Litigation until following the certification hearing, Billy Joe Strack was the Trustee of the Patricia Ann Strack Revocable Trust dtd 2/15/99 and The Billy Joe Strack Revocable Trust dtd 2/15/99 (hereafter "Strack Trusts"). Bill Strack passed away on October 22, 2015. Prior to his death, on September 30, 2015, Bill Strack appointed Mark Stephen Strack to serve as Co-Trustee (and upon Bill Strack's death, as Sole Trustee) of the Strack Trusts. Accordingly, Mark Stephen Strack was substituted for Billy Joe Strack, as the Sole Trustee for the Strack Trusts in this Litigation. *See* Declaration of B&S, ¶133; Declaration of

Mark Strack filed simultaneously herewith ("Declaration of Strack").

The Ariola Trusts: From inception of this Litigation until her death, Hazel Ariola was the Trustee of the Hazel Ariola Living Trust and the Paul Ariola Living Trust (hereafter "Ariola Trusts"). Hazel Ariola passed away on May 2, 2013. As reflected in the Memoranda of Trusts, upon the death of Hazel Ariola, and pursuant to the terms of the Ariola Trusts, Daniela A. Renner became the Sole Successor Trustee of said Trusts. Accordingly, Daniela ("Dee") A. Renner was substituted for Hazel Ariola, as the Sole Trustee for the Ariola Trusts in this Litigation. (Collectively, the Strack Trusts and Ariola Trusts are referred to as the "Trusts".) *See* Declaration of B&S, ¶134; Declaration of Daniela Renner filed simultaneously herewith ("Declaration of Renner").

The Class Representative Trusts and their Trustees have been dedicated to this Litigation at all times. Again, this Litigation has been hard fought for over seven and one-half (7 1/2) years. The Class Representatives expended extensive time prosecuting this Litigation, from meetings and telephone conferences with Class Counsel, conducting field investigations and interviewing witnesses, attending the formal mediation sessions, providing and reviewing documents, answering interrogatories, preparing for and giving their depositions, preparing affidavits, preparing for testimony at the certification hearing, attending hearings and the certification hearing, reviewing pleadings and appellate briefs, reviewing and evaluating damage models and risk analysis, participating in the strategic decision making for the Litigation, and participating in the settlement negotiation process. *See* Declaration of B&S, ¶135; Declaration of Strack; Declaration of Renner.

In Class Counsel's opinion and experience, the Class Representatives fully understand their duties as named plaintiffs and class representatives, and at all times have been, and continue to be,

fully committed to this Litigation for the benefit of the Class. *See* Declaration of B&S, ¶136; *see also* Declaration of Strack and Declaration of Renner. Class Representatives pursued their claims vigorously in the face of strong and dedicated opposition. *See* Declaration of B&S, ¶137.

Class Representatives would not agree to settle this Litigation until they were sure the Settlement Class would achieve a result they believe to be not only fair and reasonable, but truly a meaningful recovery for the Settlement Class, including modifying Continental's royalty payment practices on a go-forward basis (*i.e.*, during the Future Production Period); all in the face of the very real risk of receiving nothing from Continental. Moreover, Class Representatives did not merely approve the Original Petition, and later the Amended Petition, and then have little or no involvement. Rather, Class Representatives have actively and effectively fulfilled their obligations as representatives of the Settlement Class, complying with all reasonable demands placed upon them during the prosecution and settlement of this Litigation. Indeed, Class Representatives have contributed significantly to the prosecution and resolution of this case and have dedicated hundreds of hours toward assisting in the successful prosecution of this Litigation. At all times, Class Representatives acted in the best interests of the Settlement Class. A good example is the Class Representative's insistence that the settlement contain future provisions requiring that in the absence of express language in leases allowing deductions for Gathering Charges, that Continental be prohibited from deducting Gathering Charges in the Future Period. Class Representatives' will not likely benefit from this provision inasmuch as most of their old leases have expired and any new leases entered into already contain Express NO Deduction clauses which prohibited deductions for Gathering Charges; however, Class Representatives' felt obligated to resolve this Litigation in a manner that would best benefit the entire Class. *See* Declaration of B&S, ¶138-139; Declaration of Strack; Declaration of Renner.

As discussed above, the risk of recovering nothing in this case was very real. In cases alleging violations of the Production Revenue Standards Act, there is always a real and substantial risk that the losing party will be required to pay the attorneys' fees and litigation costs to the prevailing party. Although Continental's fees and litigation costs are unknown to Class Counsel, it clearly is a figure that was many millions of dollars. This risk alone justifies the Case Contribution Award to Class Representatives requested herein. *See* Declaration of B&S, ¶140.

Analysis of COSMO's Class Action Tracking Report (Exhibit "A" to the Declaration of B&S), reveals that in **50 of the 56 (89.2%) of the reported cases, the trial court awarded a Class Representative Fee or Case Contribution Fee**. The range of the award is from a low of 0.12% to a high of 6.4% of the Common Fund (converted to dollars, a fee ranging from $5,000 to $890,792), with the **weighted average Case Contribution Fee being 0.6% of the Common Fund**. 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 4 Plaintiff Trusts). Assuming the Time Period 2 Common Fund is ultimately $7,500,000, **the requested award would be 0.7% ($400,000/$57,300,000) of the Time Period 1 and Time Period 2 Common Funds**. In view of the additional benefits conferred upon the Class during the Future Production Period, and the very real risk of substantial monetary loss, a Case Contribution Award to the Class Representatives slightly above the weighted average award is very justifiable and reasonable. *See* Declaration of B&S, ¶141.

Class Representatives have not been compensated for their efforts in representing the Settlement Class. The Notice stated Class Representative will seek a Case Contribution Award of $100,000 to each of the four (4) Plaintiff trusts (*i.e.*, a total award of $400,000) as compensation for their time and effort in this Action. **We have received only <u>two (2)</u> purported objections to**

the request to award the Class Representatives a Case Contribution Award:

1. Daniel McClure – Mr. McClure is a class action defense attorney; *see* pending Motion Confirming Daniel M. Mcclure to be Excluded from the Settlement Class and Motion to Strike "Objection to Motion for Attorneys' Fees and Class Representatives' Award" by Non-Class Member, Daniel M. Mcclure; and

2. Kelly McClure Callant – Ms. Callant is the sister of Daniel McClure. As reflected in the Report of Class Member Filings (Opt-Outs & Objections), Ms. Callant's "objection" does not fully comply with the requirements set forth in the Notice. The Court should therefore consider Ms. Callant's filing as "comment" rather than an "objection".

Thus, less than 0.006%, or 1 out of every 16,945 possible Class Members, (2 "objections" / 33,890 Notices mailed out) "objected" to the requested Case Contribution Award. Put another way, **99.9999% the possible Class Members raised NO objection to the requested Case Contribution Award**. *See* Report of Class Member Filings (Opt-Outs & Objections) filed simultaneously herewith. *See* Declaration of B&S, ¶142.

Conclusion

The Percentage of the Fund approach to calculating attorneys' fees in Oklahoma royalty owner class actions is not only well rooted in Oklahoma jurisprudence (*see* COSMO's Class Action Tracking Report, Exhibit "A" to Declaration of B&S, as well as Supporting Fee Orders, Exhibits 1-56), it has important advantages to the beneficiaries of the common fund (Oklahoma royalty owners) 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. Thus, under this Percentage of Fund approach, the interests of the Common Fund (*i.e.*, the Class) and Counsel are consistent and aligned.

An attorneys' fee award of 40% of the Common Fund is a fair and reasonable amount of compensation to Plaintiffs' Counsel for establishing, preserving, protecting, increasing and bringing into this Court the Common Fund. The named Plaintiffs/Class Representatives have agreed to and will pay a 40% contingency fee to Class Counsel out of their portion of the Common Fund, and it is also equitable to assess the 40% fee on the remainder of the Common Fund when the remainder of the Class will share the benefit of Class Counsel's efforts. Furthermore, an award to the named Plaintiffs/Class Representative of $400,000.00 is a fair and reasonable amount to compensate said Plaintiffs/Class Representatives for their contributions. Class Counsel are also entitled to reimbursement of litigation expenses incurred in the prosecution of this case on behalf of the Class, said expenses not to exceed $750,000.00.

Respectfully submitted,

Douglas E. Burns, OBA No. 1342
Terry L. Stowers, OBA No. 17453
BURNS AND STOWERS, P.C.
1300 W. Lindsey
Norman, Oklahoma 73069
(405) 360-6191-- Telephone
(405) 928-2019 -- Facsimile
dburns@burns-stowers.com
tstowers@burns-stowers.com

AND

Kerry W. Caywood OBA No. 1580
Angela Caywood Jones, OBA No. 18742
PARK, NELSON, CAYWOOD, JONES, LLP
P.O. Box 968
Chickasha, OK 73023
(405) 224-0386 -- Telephone
(405) 224-0907 -- Facsimile
kcaywood@pncj.com
ajones@pncj.com

CLASS COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on or before the 5th day of June, 2018, a true and correct copy of the foregoing was emailed, hand-delivered and/or mailed, postage pre-paid, to:

Jay P. Walters
GABLE GOTWALS
One Leadership Square, 15th Floor
211 North Robinson
Oklahoma City, Oklahoma 73102-7101

Taylor Pope
Eric S. Eissenstat
CONTINENTAL RESOURCES, INC.
20 North Broadway
Oklahoma City, OK 73102

Guy S. Lipe
VINSON & ELKINS, L.L.P.
1001 Fannin, Suite 2500
Houston, Texas 77002

Steven J. Adams
GABLE GOTWALS
1100 Oneok Plaza
100 West 5th Street, Suite 1100
Tulsa, Oklahoma 74103-4217

Glenn A. Devoll
GUNGOLL, JACKSON, COLLINS, BOX & DEVOLL, P.C.
323 W. Broadway Avenue
Enid, Oklahoma 73701

Terry L. Stowers