

Class Representatives and Class Counsel move the Court for an order: (1) extending to the Class the contingency fee agreement entered into between the Class Representatives and Class Counsel; (2) awarding Class Counsel an attorneys fee of 40% of the Common Fund as said Fund may be adjusted by paragraph 5.2 of the Settlement Agreement; (3) approving reimbursement to Class Counsel of the actual litigation expenses incurred by Class Counsel for the benefit of the Class in an amount not to exceed \$286,700.00; and (4) awarding each Class Representative, a Class Representative award of 1% of the Common Fund, as said Fund may be adjusted by paragraph 5.2 of the Settlement Agreement, for their services and contribution provided in the establishment of the Common Fund. (These requested fees and costs shall collectively be referred to as “Fees and Costs”). The total requested Fees and Costs in this case are within the range of Fees and Costs approved by Oklahoma District Courts in oil and gas related common

fund cases, as specifically reflected in the table of Fees and Costs awarded in recent Oklahoma oil and gas class actions set forth in Section I, below.

## **I. OVERVIEW OF FEES AND COSTS AWARDED IN RECENT OKLAHOMA OIL AND GAS CLASS ACTIONS**

Ample precedent exists to support Class Counsel's requested attorney fee equal to 40% of the common fund. The Oklahoma Court of Civil Appeals approved a 40% attorney fee award from the common fund in a royalty owner class action settlement in *Velma-Alma Ind. School Dist. No. 15 v. Texaco, Inc.*, 2007 OK CIV APP 42, 162 P.3d 238 (case filed in 2002 and settled in 2005). In the *Velma-Alma* case the Oklahoma Court of Civil Appeals concluded that the trial court did not abuse its discretion in approving an award of attorney fees equal to 40% of the common fund (\$27 million). The *Velma-Alma* case is sufficient authority for the approval of the attorney fee requested herein. The following is a summary of attorney fee awards, expense reimbursements and class representative awards approved as fair and reasonable by various Oklahoma District Courts in oil and gas class settlements: (References marked with “\*” are to endnotes following the Table)

Statistics maintained by the Coalition of Oklahoma Surface & Mineral Owners, Inc.			Percentage of Common Fund Awarded <sup>*3</sup>			
Case Name <sup>*1</sup>	Year Awarded	"Common Fund" <sup>*2</sup>	Total Award of Fees & Costs	Attorney Fee	Litigation Costs <sup>*4</sup>	Class Rep. Fee
<i>Fazekas v. Arco</i> <sup>*5</sup>	2002	\$6,250,000	<b>51.40%</b>	35.00%	10.00%	6.40%
<i>Kouns v. ConocoPhillips</i> <sup>*6</sup>	2004	\$4,300,000	<b>46.04%</b>	42.56%	3.02%	0.47%
<i>Velma-Alma v. Texaco</i> <sup>*22</sup>	2007	\$27,000,000	<b>46.02%</b>	40.00%	4.95%	1.07%
<i>Rudman v. Texaco</i> <sup>*7</sup>	2001	\$25,000,000	<b>44.27%</b>	40.00%	3.27%	1.00%
<i>McIntoush v. Questar</i> <sup>*8</sup>	2002	\$1,500,000	<b>43.54%</b>	40.00%	3.20%	0.33%
<i>Kouns v. Kaiser-Francis</i> <sup>*19</sup>	2003	\$3,100,000	<b>43.39%</b>	33.33%	9.67%	0.39%
<i>Laverty v. Newfield</i>	2007	\$17,250,000	<b>43.32%</b>	40.00%	2.92%	0.40%
<i>Black Hawk v. Exxon</i> <sup>*9</sup>	1999	\$9,000,000	<b>42.87%</b>	31.80%	7.35%	3.72%
<i>Brumley v. ConocoPhillips</i> <sup>*10</sup>	2005	\$29,261,379	<b>42.16%</b>	37.91%	3.12%	1.13%

<i>Continental v. Conoco</i> <sup>*11</sup>	2005	\$23,000,000	<b>41.24%</b>	40.00%	0.74%	0.50%
<i>Robertson/Taylor v. Sanguine</i> <sup>*12</sup>	2003	\$13,250,606	<b>41.08%</b>	40.00%	0.08%	1.00%
<i>Lobo v. BP</i> <sup>*23</sup>	2005	\$150,000,000	<b>41.00%</b>	40.00%	0.50%	0.50%
<i>Mayo v. Kaiser-Francis</i> <sup>*13</sup>	2004	\$5,000,000	<b>40.85%</b>	40.00%	0.85%	0.00%
<i>Bank of America v. El Paso</i> <sup>*24</sup>	2006	\$66,000,000	<b>40.53%</b>	37.00%	3.19%	0.34%
<i>Shockey v. Chevron</i> <sup>*15</sup>	2005	\$60,000,000	<b>37.77%</b>	33.33%	4.02%	0.42%
<i>Timberline v. Burlington</i>	2008	\$2,400,000	<b>37.57%</b>	33.33%	3.20%	1.04%
<i>Barnaby v. Marathon</i> <sup>*17</sup>	2003	\$3,645,241	<b>35.51%</b>	33.33%	1.85%	0.33%
<i>Booth v. Cross Timbers</i> <sup>*18</sup>	2003	\$2,500,000	<b>35.29%</b>	33.33%	1.60%	0.36%
<i>Kouns v. Louis Drefus</i> <sup>*20</sup>	2003	\$2,778,125	<b>35.05%</b>	33.33%	1.29%	0.43%
<i>Bridenstine v. Kaiser-Francis</i> <sup>*21</sup>	2001-04	\$109,974,437	<b>33.89%</b>	30.00%	3.08%	0.81%

### **Endnotes for Table of Fees and Costs Awarded in Oklahoma Oil and Gas Class Actions:**

<sup>\*1</sup> This table of cases is presented in descending order based upon the total percentage of the Common Fund awarded as Fees and Costs.

<sup>\*2</sup> For comparison purposes, "**Common Fund**" reflects only the cash consideration paid by the defendant(s). "Common Fund" does **not** include any estimated value of future benefits which may have been included in, or realized from the settlement.

<sup>\*3</sup> Awards of attorneys fees, litigation expenses and Class Representative fees have been converted, where necessary, from a dollar amount to a percentage of the cash settlement Common Fund.

<sup>\*4</sup> "Litigation Costs" also include administration expenses to the extent paid from the Common Fund and were reported in the order awarding Fees and Costs, or were otherwise ascertainable.

<sup>\*5</sup> **Honorable Bill Welch**, Case No. C-98-65, District Court of Latimer Co., Oklahoma.

<sup>\*6</sup> **Honorable Ray Dean Linder**, Case No. CJ-98-61, District Court of Dewey County, Oklahoma. The cash portion of the Common Fund was \$4,300,000 (plus accrued interest). Class counsel estimated, and the court considered, the value of future benefits from the settlement to be approximately \$1,086,000. Judge Linder awarded Class counsel a 33.3% fee of the cash Common Fund **plus** the estimated value of the future benefits. The award of attorney's fees translates into an awarded of 42.56% of the cash Common Fund, i.e., 42.56% of the cash on hand.

<sup>\*7</sup> **Honorable William C. Hetherington**, Case No. CJ-97-1-E, District Court of Stephens Co., Oklahoma.

<sup>\*8</sup> **Honorable N. Vinson Barefoot**, Case No. CJ-02-22, District Court of Major County, Oklahoma.

<sup>\*9</sup> **Honorable Deborah C. Shallcross**, Case No. CJ-93-02226, District Court of Tulsa County, Oklahoma. Litigation Costs include: (1) \$164,094.27 in litigation expenses; plus (2) \$297,107.43 administration expenses incurred; plus (3) \$200,000.00 administration expenses to be incurred after the date of the order (p. 5-6, ¶9). The Class Representative fee includes only those amounts that could be ascertained from the order that were paid to Petroleum Management System, Inc., as a "finder's fee" based upon the contract with the Class Representatives (p.5, ¶9(d)).

<sup>\*10</sup> **Honorable Greg Zigler**, Case No. CJ-2001-5, District Court of Texas County, Oklahoma. The cash portion of the Common Fund was approximately \$29,261,379 (\$30,000,000, plus \$761,379 interest (Order, p.4), less \$1,500,000 for CLO opt out (5/16/05 Motion, p.3, fn. 2). Class counsel estimated, and the court considered, the value of future benefits from the settlement to be approximately \$7,590,000 (p.4). Judge Zigler originally awarded

Class counsel a 29.38% fee of the cash Common Fund **plus** the estimated value of the future benefits. The Common Fund (including the value of the future benefits) was decreased to \$35,996,398, thus modifying the awarded percentage to 30.84% (6/05 Order). The award of attorney's fees translates into an awarded of 37.91% of the cash Common Fund (\$11,092,736 / 29,261,379), i.e., 37.91% of the cash on hand. Similarly, Judge Zigler's order refers to the Class Representative fee of \$331,861 as representing ".88% of the Common Fund as calculated above" (p. 4). When considering the cash portion of the Common Fund, the award would equate to 1.13%. Litigation expenses of \$912,955.36 were awarded (p. 16).

<sup>\*11</sup> **Honorable Richard Perry**, *Continental Resources, et al. v. Conoco, Inc.*, Case No. CJ-95-739, consolidated with CJ-2000-356, District Court of Garfield County, Oklahoma.

<sup>\*12</sup> **Honorable Richard VanDyck**, Case No. CJ-02-150, District Court of Grady County, Oklahoma.

<sup>\*13</sup> **Honorable Richard VanDyck**, Case No. CJ-93-348, District Court of Grady County, Oklahoma.

<sup>\*14</sup> **Honorable Joe H. Enos**, Case No. CJ-2002-331-E, District Court of Stephens County, Oklahoma.

<sup>\*15</sup> **Honorable Ellis Cabaniss**, Case No. CJ-2001-7, District Court of Washita County, Oklahoma. Litigation Costs reflects \$1,912,363.04 in litigation expenses (p.9, ¶22), plus \$500,000 in administration expenses (p. 10, ¶23).

<sup>\*16</sup> **Honorable Joe Jackson**, Case No. CJ-94-32, District Court of Dewey County, Oklahoma. Judge Jackson approved an additional \$5,194.70 to Apache related to administration costs.

<sup>\*17</sup> **Honorable Bill Welch**, Case No. C-96-40, District Court of Latimer County, Oklahoma.

<sup>\*18</sup> **Honorable Ray Dean Linder**, Case No. CJ-98-16, District Court of Dewey County, Oklahoma.

<sup>\*19</sup> **Honorable Ray Dean Linder**, Case No. CJ-98-45, District Court of Dewey County, Oklahoma. The record reflects total litigation costs to be approximately \$300,003.21; \$50,003.21 for Class Counsel's out-of-pocket expenses (Tr. 68), plus \$250,000 in administration expenses.

<sup>\*20</sup> **Honorable Judge Cullen**, Case No. CJ-98-20, District Court of Dewey County, Oklahoma.

<sup>\*21</sup> **Honorable Ronald Kincannon**, Case No. CJ-2000-1, District Court of Texas County, Oklahoma. There were two orders addressing Fees and Costs, both orders are included as part of Exhibit "4." Litigation Costs include \$2,895,682.72 referenced in Exhibit "4", p. 6, plus \$493,554.87 in administration expenses paid to the Special Master through July 2005, as reflected in the records of the Court Clerk of Texas County.

<sup>\*22</sup> *Velma-Alma Ind. School Dist. No. 15 v. Texaco, Inc.*, Case No. CJ-02-304, District Court of Stephens County, Oklahoma. The Trial Court's Order Approving Class Counsel's fee request (40% of the common fund) was issued in 2005 and was approved in a published opinion by the Oklahoma Court of Civil Appeals in *Velma-Alma Ind. School Dist. No. 15 v. Texaco, Inc.*, 2007 OK CIV APP 42, 162 P.3d 238.

<sup>\*23</sup> Case No. CJ-97-72, District Court of Beaver County, Oklahoma.

<sup>\*24</sup> Case No. CJ-97-68, District Court of Washita County, Oklahoma.

#### **\*End of Table End Notes\***

In the *Brumley v. ConocoPhillips* case, the Honorable Greg Zigler appropriately recognized and summarized the risk/reward analysis that a court should be mindful of when considering an application for Fees and Costs in a class action.

Knowing the rewards for Class Counsel can be great, so travels the path of loss for Class Counsel if defeat is the end result. Financial, personal, and emotional devastation are the potential events for a very few members of this Profession willing and able to represent thousands of strangers in order to obtain monetary benefit for those strangers that otherwise, without question, is unattainable through known legal means. **From this aspect, the potential rewards of a Class Counsel's success and the potential devastation realized of a Class Counsel's defeat must be considered with [an] open judicial mind.** [Emphasis added.]<sup>1</sup>

In *Laverty v. Newfield*, Case No. CJ-2002-101, District Court of Beaver County, OK, The Honorable Greg Zigler approved a 40% fee in accordance with the negotiated fee contract with the class representative (“finding that the requested 40% fee is customary in these type of cases” and that “a contingent attorneys’ fee of at least forty percent (40%) of the common fund is normative for this type of royalty owner class litigation”) (emphasis added). The Court should also note that many of the district court orders summarized above, go into great detail regarding the law with regard to determining Fees and Costs in these types of class actions and are incorporated herein by reference.

Additional support for Class Counsels’ requested fees and expenses are the recent orders entered in three other Oklahoma royalty owner class actions: *Mitchusson et.al v. EXCO Resources, Inc.*, CJ-2010-32, District Court of Caddo County, OK, wherein Judge Richard VanDyck awarded Class Counsel a 40% attorneys fee (March 9, 2012); *Tatum, et al v. Devon Energy Production Company, L.P.*, Case No. FJ-2010-77, District Court of Nowata County, OK ,wherein Judge Carl G. Gibson awarded Class Counsel a 45% attorneys fee (April 19, 2013); and *Drummond, et al v. Range Resources Corporation, et. al* , Case No. CJ-2010-510, District County of Grady County, OK, wherein Judge Richard Van Dyck awarded Class Counsel a fee

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<sup>1</sup> *Brumley v. ConocoPhillips*, Case No. CJ-2001-5, District Court of Texas County, Oklahoma, p. 13.

equal to 40% and an class representative fee award of 1% of \$87,500,000.00 settlement amount (September 9, 2013).

## **II. HISTORY OF THE CASE**

Plaintiffs filed this case against Defendant in 2009 alleging that Defendant had underpaid royalties during the time period it had operated certain Oklahoma wells in which Plaintiffs owned mineral interests. Plaintiffs also asserted that they believed other royalty owners had been treated similarly and been underpaid in Defendant's Oklahoma wells and asked that the case be certified to proceed as a class action. Plaintiffs asserted that Defendant breached the lease contracts, including the implied duty to market the gas, and breached fiduciary and other duties allegedly owed to its royalty interest owners. Plaintiffs further claimed that Defendant had not reported royalty payments correctly in violation of both statutes and other applicable law and had misrepresented certain information related to its royalty payments. Plaintiffs undertook discovery of Defendant's records relating to its gas sales, marketing, conditioning and processing contracts and its royalty owner accounting methodology related thereto and took numerous depositions of Defendant's employees. Plaintiffs and their counsel hired expert witnesses to assist in the evaluation of discovery material and the potential damages incurred by Plaintiffs and the class as a result of the alleged netting of the gas conditioning and processing costs from royalty owners. The parties agreed to participate in a formal mediation which mediation efforts were ongoing for a number of months, and as a result the parties were able to agree upon a settlement of all claims in this case.

Class Counsel and the Class Representatives have borne the hardships of the litigation and the risk of potential loss solely on their own shoulders. To date, Class Counsel and the Class Representatives have received no compensation for their efforts or reimbursement of their

expenses. Class Counsel and the Class Representatives now request that the contingent fee and expense reimbursement contract they negotiated be extended to the Class. As detailed in that contract, fees and expense reimbursement are payable only in the event of a successful outcome for the Class, and when a successful outcome is achieved, Class Counsel is to receive 40% of the gross recovery.

### **III. THE REQUESTED FEES AND COSTS ARE FIRMLY GROUNDED IN DECADES OF JURISPRUDENCE**

#### **A. 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.<sup>2</sup>

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 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.]

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<sup>2</sup> Black's Law Dictionary (7<sup>th</sup> ed. 1999)

*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 from the fund as a whole.** 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), *see* Exhibit “26.”<sup>3</sup>

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 Costs, to be taxed against the entire Common Fund.

## B. THE CREATION OF THE COMMON FUND

In September 2013, the Class Representatives, on behalf of themselves and the proposed settlement class, entered into a Settlement Agreement with Defendant which was presented to and preliminarily approved by the Court (the “Settlement Agreement” or “Settlement”). As part of the Settlement, a class was certified for settlement purposes and Defendant agreed to pay Fifteen Million Dollars, Two Hundred Thousand Dollars (\$15,200,000.00) as settlement for alleged damages, which is referred to herein as the Settlement Fund or the Common Fund.<sup>4</sup>

## C. DETERMINING REASONABLE FEE AND COST AWARDS IN COMMON FUND CASES – PERCENTAGE OF COMMON FUND APPROACH

The issue of determining Fees and Costs in oil and gas class actions has been addressed by numerous District Courts throughout this State, as well as this Judicial District, as reflected in Section I above. In the case of *Lobo v. Amoco*, the Honorable Gerald Riffe, Associate District Judge, Beaver County, Oklahoma, approved a 40% attorney fee award (\$60,000,000) from the common fund, finding the award fair and reasonable considering the result obtained and in relation to the fees awarded in other similar cases (See Section I). One pronouncement (August

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<sup>3</sup> The U.S. Supreme Court affirmed a judgment for attorney fees amounting to approximately 34.7% of the Common Fund. *Id.*

<sup>4</sup> In addition to the common fund, Defendant has agreed to pay notice and settlement administration expense and to a mutual release. This release prevents Defendant from making certain prior period adjustments to royalty owners in wells where some or all of the leases contain “express deduction” clauses. During discovery it was determined that not all midstream/ gas conditioning costs that could have been deducted from certain royalty owners had been. Therefore, this is an additional benefit to the royalty owner class resulting from the settlement.

22, 2005) came from the Honorable Richard Perry, Associate District Judge in Garfield County, Oklahoma, in a case (*Continental Resources v. Conoco*) involving joint interest billing issues among working interest owners . In *Conoco*, 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), **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.

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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.

**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. 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.** . . . [Emphasis added.].

*Continental Resources v. Conoco*, at p. 5-6.

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) for determining the reasonableness of the fee. **The preferred method for determining a reasonable fee in a class action is a percentage of the common fund.** In *Brumley*, The Honorable Greg Zigler, District Judge of the First Judicial District, recently 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 class action treatise, citing and quoting from *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), recognizes that it is appropriate to award an attorney’s fees based on a percent of the value of the common fund established for the benefit of the class:**

**In contrast to a statutory fee determination, payable by the defendant depending on the extent of success achieved, a common fund is itself the measure of success. While the common fund recovered may be more or less than demanded or expected, the common fund represents the benchmark from which a reasonable fee will be awarded.** Accordingly, in *Blum v. Stenson*, [FN83] another statutory fee case, the [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 on Class Actions* § 14:6 (4<sup>th</sup> ed. 2002).

**The calculation and award of attorney’s fees using a percent of common fund approach is appropriate.** [Emphasis added.]

*Brumley*”, p. 6.

The rationale is very compelling, not to mention being based upon sound logic and equity. For example, in *Bridenstine*, 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.]**<sup>5</sup>

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 foreseeably [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*, Exhibit "3" at p. 15.

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*Bridenstine v. Kaiser-Francis, et al.*, Case No. CJ-2000-1, District Court of Texas County, Oklahoma, ¶3.

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.**

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**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).<sup>6</sup>

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

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<sup>6</sup> *In re Combustion*, which had settlements totaling \$127,396,000, the court approved a 48% reserve for Fees and Costs (36% attorneys fee, 6% litigation costs and 6% administration costs). *Id.*

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).<sup>7</sup>

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.]<sup>8</sup>

*Gottlieb v. Barry*, 43 F.3d 474, 483 (10<sup>th</sup> 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.DC 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, 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.]

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<sup>7</sup> *In re Ikon*, which had settlements totaling \$111,000,000, the court approved an award of 32.7% for Fees and Costs (\$3,825,497.86 expenses, plus a 30% attorneys fee based upon the net settlement.) *Id.*

<sup>8</sup> In Oklahoma district courts, the *Burk* factors are synonymous with *Johnson* factors in the federal courts. Analysis of the *Burk* factors is discussed below.

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

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).

Clearly, the prevailing approach to determine the appropriate award of Fees and Costs in Oklahoma oil and gas class actions is the Percentage of Common Fund method.

**D. THE COURT SHOULD ALSO CONSIDER THE 12 O.S. 2023(G)(4)(e)(1-13) FACTORS IN EVALUATING THE REASONABLENESS OF ATTORNEY FEES**

The basic factors established by the Oklahoma Legislature are the 13 factors set forth in 12 O.S. Section (G)(4)(e). These factors are separately discussed as they apply to the circumstances in the instant case.<sup>9</sup>

1. **Time and labor required.** The history of this litigation and creation of the common fund discussed above demonstrate the time and labor invested by Class Counsel in this Litigation. Counsel have made significant time and labor commitments which have now inured to the financial benefit of the Class and have resulted in the Common Fund. (See Declaration in

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<sup>9</sup> At the time of the hearing on this motion, Class Counsel will supplement this motion with testimony through live witnesses and/or affidavits further supporting this request and elaborating on these factors.

Support of Court Approval of Plaintiff Class Counsel Fees and Expenses to be submitted prior to the settlement fairness hearing herein).

2. **The novelty and difficulty of the question.** Cases filed as class actions are known to be complex and vigorously contested. That certainly was the case here. The issues and questions raised by parties in this litigation were extremely complex as can be evidenced by the pleadings and other court filings themselves. The Court can take judicial notice of this factor. **Substantial litigation risks existed in this case, both at the certification stage and on the merits.**

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

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

5. **The customary fee.** The "customary fee" in cases of this nature is a contingency fee in the range of the fee agreed to by the Class Representatives and requested by Class Counsel, as discussed in detail above. Such a contingency fee is the preferred method of compensation to the attorneys. "These types of cases (oil and gas class action cases[])] are



handled on a contingent fee. **The fee percentage in these types of cases is typically 40% of the gross fund.**” [Emphasis added.] Honorable Richard Perry, *Continental Resources v. Conoco*, p. 8.

6. **Whether the fee is fixed or contingent.** Counsel entered into a contingency fee agreement with the named Plaintiffs which provides that attorneys would be compensated at a 40% contingency fee. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in a class action. Class actions are never prosecuted under a fixed or hourly fee, only under a contingent fee. In *Sholer v. State of Oklahoma*, 1999 OK CIV APP 100, 990 P.2d 294, ¶¶ 13-14, the court explained:

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

7. **Time limitations imposed by client or circumstances.** Though not a significant factor in this case, time limitations have been imposed on Class Counsel throughout the course of the proceedings. The schedules of the courts, witnesses and clients were also accommodated on a regular basis by Class Counsel.

8. **The amount in controversy involved and the results obtained.** Clearly, there can be no doubt that at the outset, Class Counsel had no assurance of any recovery. Cases brought against operators on behalf of royalty interest owners are riddled with tenuous issues. Considering all involved, the amount and terms of the settlement reflect the quality of the result and the outstanding benefits provided by Class Counsel to the Class. As demonstrated above, but for the efforts of Counsel, no Common Fund would exist.

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

10. **The undesirability of the case.** Compared to most civil contingent fee litigation attracting counsel to represent Plaintiffs, this Litigation clearly fits the "undesirable" test. Few law firms are willing to litigate cases which require review of thousands of pages of detailed contracts and accounting records, consulting and hiring expert witnesses and which require risking a substantial investment of time, trouble and expense necessary to prosecute a case with such uncertainty. Defendant is well-financed and well represented. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. The risk of success was uncertain and the potential exposure for failure was significant. The investment by Class Counsel of their time, treasure and effort, coupled with the attendant potential for non-recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. As such, but for the efforts of Class Counsel, the Class would not have recovered anything from Devon.

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

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

12. **Awards in similar cases.** The "awards in similar cases" factor was demonstrated in Section I above. The requested award of a 40% contingency fee in this case is entirely in line with other similar class action fee awards in oil and gas related cases in Oklahoma.

13. **The risk of recovery in the litigation.**

The risk of recovery in the litigation was high. Class certification can be and many times is, denied, and even if granted, the Class can lose on the merits on summary judgment, at trial, or on appeal.

E. REQUEST FOR COURT APPROVAL OF CLASS REPRESENTATIVE FEE

The rationale for awarding fees from the Common Fund, as discussed above, is that the efforts of Counsel have resulted in the creation of the Common Fund (or establishing, preserving, protecting, increasing and bringing the Common Fund into court) for the benefit of others. Other important participants who were absolutely critical in establishing, preserving, protecting, increasing and bringing into this Court the Common Fund, and who must not be overlooked, are the named Plaintiffs/Class Representatives, Philip J. Cornett and Ashcraft Group, LLC. Both Philip J. Cornett and Gaylene Ashcraft, acting on behalf of Ashcraft Group LLC, brought their royalty underpayment concerns to Class Counsel's attention and those concerns and underpayment issues were discussed with Class Counsel who further investigated the claims and proceeded with the lawsuit. The Class Representatives were involved in the litigation, produced and reviewed documentation and consulted with Class Counsel. *See e.g. Continental Resources, Inc. v. Conoco, Inc.*, consolidated cases CJ-95-739 and CJ-2000-356 (District Court of Garfield County, Aug. 22, 2005: "Court awards to Class Representatives of 1% of the common fund"; *Fazekas v. ARCO*, Case No. C-98-65, Latimer County, OK awarding 6.40% as class representative fee. The requested fee of 1% each in this case is reasonable and appropriate.

## F. REQUEST FOR LITIGATION EXPENSES

Class Counsel also seek reimbursement of litigation expenses, in the amount not to exceed \$286,700.00, incurred in the prosecution of this case on behalf of the Class. Class Counsel will supplement this motion at the time of the hearing on this matter detailing the litigation expenses incurred and expected to be incurred through the conclusion of this case.

## **IV. CONCLUSION**

The percentage fee has important advantages to the beneficiaries of the common fund 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 approach, the interests of the Common Fund and Counsel are consistent and aligned.

An attorneys' fee award of 40% of the Common Fund,( as adjusted by paragraph 5.2 of the Settlement Agreement), is a fair and reasonable amount of compensation to Class 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 Class who will share the benefit of Class Counsel's efforts. Furthermore, an award to the named Plaintiffs/Class Representatives of 1% each of the Common Fund (as adjusted for paragraph 5.2 of the Settlement Agreement), is a fair and reasonable amount to compensate Class Representatives for their contributions. Class Counsel also is entitled to reimbursement of litigation expenses incurred in the prosecution of this case on behalf of the Class, said expenses in an amount not to exceed \$286,700,00.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF AND  
CLASS COUNSEL

### **CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of November, 2013, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

James A. Kirk  
James M. Chaney  
Matthew L. Standard  
KIRK & CHANEY  
101 Park Ave., Suite 800  
Oklahoma City, O 73102

ATTORNEYS FOR DEFENDANT