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

DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 6:16-cv-00087-KEW**
	)	
XTO ENERGY INC.,	)	
	)	
Defendant.	)	

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

I. SUMMARY OF THE ARGUMENT

In connection with Class Representative Dorsey J. Reirdon's request for approval of the Settlement[1] in the above-captioned Litigation, Class Representative ("Mr. Reirdon") respectfully moves the Court for a Case Contribution Award of $30,000 from the Gross Settlement Fund, as compensation for his valuable time, effort and assistance throughout this Litigation, which culminated in a Settlement with a total value of at least $40.750 million.[2] This award is proportional to the contribution of Mr. Reirdon and is supported by the declaration submitted by him, demonstrating his time and effort and also the risk and burden he incurred. *See* Declaration of Dorsey J. Reirdon ("Reirdon Decl."); Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, Class Representative's Request for Case Contribution Award, and Notice Of Proposed Settlement ("Miller Decl."); Affidavits of Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust), Earl Dwayne Sager, and Robert Lovelace.

Therefore, and for the reasons below, Mr. Reirdon respectfully requests the Court grant his Motion for Approval of Case Contribution Award (the "Motion").

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[1] All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated October 9, 2017 (the "Settlement Agreement"), a copy of which was attached as Exhibit 1 to Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (Dkt. No. 76).

[2] *See* Affidavit of Barbara Ley ("Ley Affidavit"), attached as Exhibit 3 to Class Representative's Memorandum of Law in Support of Class Representative's Motion for Final Approval, at ¶3.

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of brevity, Mr. Reirdon will not recite the factual and procedural background of this Litigation again herein. Instead, Mr. Reirdon respectfully refers the Court to the Final Approval Memorandum, the Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein.

III. ARGUMENT

In recognition of the time, effort, risk and burden Mr. Reirdon incurred to produce such a significant result for the Settlement Class, Mr. Reirdon seeks a case contribution award of $30,000 from the Gross Settlement Fund. As demonstrated below, this request is fair, reasonable and adequate and, therefore, should be granted.

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

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

> ***To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and nationwide application***, the Parties agree that this Settlement Agreement shall be ***governed solely by any federal law*** as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, ***case contribution award***, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions. For any such matters where there is no federal common law, Oklahoma state law will govern.

Settlement Agreement at ¶11.8.

The Parties' decision to contractually agree that federal common law controls the case contribution award should be enforced. *See* Miller Decl. at ¶30. Indeed, the Tenth Circuit has

recognized parties' freedom to contract regarding choice of law issues and also the fact that courts typically honor the parties' choice of law:

> Absent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.

Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)). Further expanding on this freedom to contract, the Restatement of Conflict of Laws states:

> These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988); *see also Williams v. Shearson Lehman Bros*., 917 P.2d 998, 1002 (Okla. Ct. App. 1995) (concluding that parties' contractual choice of law should be given effect because it does not violate Oklahoma's constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) ("Parties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity.").

Put simply, litigants are free to select the choice of law that will govern decisions regarding interpretation and enforcement of a settlement agreement and all matters relating to thereto. Here, in light of the fact that this is a multi-state class action, governed by Federal Rule of Civil Procedure 23, and a case over which this Court has jurisdiction because of the application of the Class Action Fairness Act, the parties contractually chose to apply federal common law to all matters regarding the reasonableness and fairness of the settlement, including but not limited to, the issue of any Class Representative incentive award.

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

Federal courts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp*., 352 Fed. Appx. 232 (10th Cir. 2009) ("Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.");[3] *Laredo* Fee Order at 9 (case contribution awards are meant to "compensate class representatives for their work on behalf of the class, which has benefited from their representation.") (*citing In re Marsh ERISA Litig*., 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling $100,000 from $37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (1.5% of $1.06 billion fund, equaling $15,900,000 to be split amongst nine class representatives and stating "[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action."); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (finding "ample authority in this district and in other circuits" for total incentive awards of $125,000); *In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369, 400 (D.D.C. 2002) ("Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created

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

for the benefit of the entire class."); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding $300,000 to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.,* 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) ($215,000 in incentive awards from $18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23, (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff's "singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award"); *Rodriguez v. West Publ'g Corp.,* 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class . . . .").

Earlier this year, the Tenth Circuit issued an opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative to be paid out of the common fund, finding that the record did not contain sufficient evidence to support the percentage incentive award in that case of 0.5%. The plaintiff-appellee in *EnerVest* has filed a Petition for Rehearing *En Banc*, which remained pending as of the date of this filing. The Petition for Rehearing *En Banc* was overwhelmingly supported by seven *amici* briefs filed by: (1) The Chickasaw Nation and the Choctaw Nation; (2) Arthur R. Miller, co-author of the leading treatise, Wright & Miller; (3) the Oklahoma Law Enforcement Retirement System; (4) Provident Energy, Ltd.; (5) the Honorable Richard G. Van Dyck and Drew Edmondson; (6) absent class members Kelsie Wagner, trustee of the Kelsie Wagner Trust; Patrick Cowan, owner of CSW 2003 Exploration Limited Partnership and Trustee of the Asa R. Maley Revocable Living Trust; Roger Brown, owner of Omega Royalty Company, LLC; and (7) Professor Charles Silver of the

University of Texas Law School.

Regardless of the ultimate outcome in *EnerVest*, the opinion is wholly inapplicable here because that case dealt with the application of state law choice of law principles while the parties here, unlike in *EnerVest*, contractually agreed that federal common law controls the case contribution award. Moreover, although incentive awards can be percentage-based or dollar-based,[4] Mr. Reirdon seeks a flat dollar award based on his hours spent times a reasonable rate, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*.[5]

The services for which incentive awards are given typically include "monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant."

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[4] *EnerVest* noted that "the weight of authority apparently disfavors percentage-based awards." 861 F.3d at 1196. However, Oklahoma federal and state courts routinely award percentage-based incentive awards. *See, e.g., Laredo* Fee Order at 10 (finding a 1% case contribution award "to be fair and reasonable"); Miller Decl. at ¶80; *EnerVest*, 861 F.3d at 1196 (recognizing that a percentage calculation can be used to check an award for excessiveness by reference to the percentage of the fund it represents).

[5] Moreover, even under *EnerVest*—which cited and relied upon studies by Mr. Reirdon's expert here, Professor Geoffrey P. Miller—incentive awards are still viable, and in fact, are "not uncommon." 861 F.3d at 1192 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006)). There, the Tenth Circuit (1) rejected a claim that incentive awards evidence a conflict of interest (*id.* at 1196, n.7) and (2) rejected the idea that a relationship with counsel evidences some type of impermissible conflict (*id*. at 1191, n.5). Also, even though the Tenth Circuit applied Oklahoma state law to determine the appropriate amount of the incentive award, it recognized a "marked increase in the frequency of incentive awards, with the rate approaching 80% by 2011." *Id.* at 1192 (citing Newberg § 17:7). The Tenth Circuit further noted the average award was $11,697 and the median award was $5,250 in a study of cases from 2006 to 2011. *Id.* (citing Newberg § 17:8). In applying Oklahoma state law in *EnerVest*, the Tenth Circuit did not find that the amount awarded by the district court was unsupportable on its face; instead, it simply held that more evidence of the class representative's time and rate was required. *Id.* at 1196-97. Moreover, the Tenth Circuit did not hold that percentage-based incentive awards are never allowed. And, the Tenth Circuit relied on federal common law (e.g., *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) because the Court found "Oklahoma Supreme Court has not addressed incentive awards nor have we been directed to or found any opinions by lower courts of that state." *Id.* at 1195-96. As such, the result under federal common law or Oklahoma state law is likely the same.

Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff's services are greater, her incentive award likely will be greater); *Rodriguez,* 563 F.3d at 960 (incentive award should not be "untethered to any service or value [the lead plaintiff] will provide to the class"); Newberg § 17:18.

Here, Mr. Reirdon seeks a modest, dollar-based award of $30,000. This request is supported by the abundant evidence submitted by Mr. Reirdon, including his own declaration, the Miller Declaration, and the affidavits of numerous absent class members. *See* Newberg § 17:12 (evidence might be provided through "affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award."). This evidence demonstrates Mr. Reirdon is seeking payment at a reasonable hourly rate of $100 for reasonable time expended on services that were helpful and non-duplicative to the litigation.

Mr. Reirdon has an extensive education and work history background justifying this hourly rate. Reirdon Decl. at ¶¶4-5. Mr. Reirdon attended Oklahoma State University, and obtained a B.A. and a Master's degree in Education and a Master's Degree in Education from Southeastern Oklahoma State University. *Id.* at ¶4. Mr. Reirdon spent several years teaching all levels of students and undergoing further postgraduate studies. *Id.* Further, Mr. Reirdon was a member of numerous professional associations, including being the Charter President of the Oklahoma Track Coaches Association. *Id.*

As demonstrated by his Declaration, both the rate and efforts of Mr. Reirdon are reasonable. Specifically, Mr. Reirdon has dedicated 275 hours to this Litigation. Reirdon Decl. at ¶19. These hours were spent collecting documents for production, reviewing emails and draft

pleadings from Class Counsel, consulting and/or meeting with Class Counsel, traveling to and from meetings, hearings and mediation, attending mediation, and reviewing and discussing settlement documents, preliminary approval documents, and final approval documents. *Id*. All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id*. And, Mr. Reirdon will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the Final Fairness Hearing and, if approved, assisting with administration of the Settlement. This will add at least an additional 25 hours that Mr. Reirdon will dedicate to this Litigation. He will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Mr. Reirdon never worked another hour on this case after the Final Fairness Hearing, he will have dedicated at least 300 hours to this Litigation, and the request of $30,000 would come out to a reasonable and modest hourly rate of $100.

Indeed, Mr. Reirdon was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition in January 2016. *Id*. at ¶¶8-9. He actively and effectively fulfilled his obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon him during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *Id*. at ¶19. Mr. Reirdon has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed significantly to the prosecution and resolution of this case. *Id*. In addition, Mr. Reirdon produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended the formal mediation session in person, and actively participated in the negotiations that led to the settlement of this Action. *See id.*; *see also* Joint Class Counsel Declaration at ¶¶86-91. Mr. Reirdon also has communicated with one of Class Counsel's

experts regarding the settlement and approval process and procedure. Miller Decl. at ¶¶55, 79.

Mr. Reirdon was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. Reirdon Decl. at ¶20. In fact, if the Court determines that no award is appropriate, Mr. Reirdon understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on his request. *Id*. In other words, Mr. Reirdon fully supports the Settlement as fair, reasonable and adequate, even if he is awarded no case contribution award at all. *Id*. Mr. Reirdon has no conflicts of interest with Class Counsel or any absent class member. *Id*. Finally, several absent Class Members executed affidavits supporting Mr. Reirdon's request for a Case Contribution Award. *See* Affidavits of Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust), Earl Dwayne Sager, and Robert Lovelace.

Because Mr. Reirdon has dedicated his time, attention and resources to this Litigation, he is entitled to the requested Case Contribution Award. *See* Joint Class Counsel Decl. at ¶¶86-91. Mr. Reirdon respectfully requests the Court award him a Case Contribution Award of $30,000 to reflect the important role that he played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

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

Even if this Court decided not to enforce the Parties' express agreement that federal common law controls the case contribution award and apply Oklahoma state law instead, Oklahoma law strongly supports incentive awards, particularly in royalty underpayment class actions such as this. In fact, Oklahoma state courts routinely grant percentage-based incentive awards to class representatives, which historically are much larger than the modest flat amount

sought here. *See, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *9 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) ("The incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . . [Collecting cases] . . ."); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc*. No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) ("Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.").

As such, Mr. Reirdon's request for an incentive award of $30,000 is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See generally* Reirdon Decl.; Miller Decl.; Affidavits of Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust), Earl Dwayne Sager, and Robert Lovelace; Joint Class Counsel Decl. at ¶¶86-91.

IV. CONCLUSION

For the foregoing reasons, Mr. Reirdon respectfully requests the Court enter an order granting approval of a Case Contribution Award of $30,000.

Dated: December 27, 2017

Respectfully submitted,

s/ Bradley E. Beckworth

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CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: December 27, 2017.

s/ Bradley E. Beckworth
Bradley E. Beckworth