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

MCKNIGHT REALTY CO., on behalf of itself and all others similarly situated, Plaintiff, v. BRAVO ARKOMA, LLC, and BRAVO NATURAL RESOURCES, Defendants.	Case No. 17-CV-00308-KEW

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR APPROVAL OF CLASS COUNSEL FEES AND EXPENSES, AND ADMINISTRATION EXPENSES

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I. SUMMARY OF THE ARGUMENT

Plaintiff Class Representative McKnight Realty Company respectfully moves the Court for an award of attorneys' fees in the amount of forty percent of the Settlement Proceeds of $1,299,886.16 (adjusted for the Monies Payable to Opt-Outs),[1] for reasonable and necessary litigation and administration expenses of approximately $99,000.00, and a class representative award of two percent of the Settlement Proceeds, for its leadership in this action. The going rate for fees is 40% and for a class representative award is between 1%-2%. *See* Joint Declaration of Class Counsel in Support of Class Representative's Motion for Final Approval of Class Action Settlement and Motion for Approval of Class Counsel Fees and Expenses and Administration Expenses at ¶¶26-60, filed as **Exhibit 3** to the Combined Exhibit Index ("Joint Counsel Decl.").[2] As set forth in the Notice of Settlement and the Settlement Agreement, the requested awards will be paid from the gross Settlement Proceeds.

The amount recovered was substantial, as Bravo paid back more than 83% of its deductions. Declaration of Daniel T. Reineke at ¶2, filed as **Exhibit 2** to the Combined Exhibit Index ("Reineke Decl.") For the reasons set forth in this memorandum, the requested awards—in the amounts set forth in the Settlement Agreement and Class Notice—are fair and reasonable, and therefore should be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of brevity, McKnight Realty will not recite the background of this Class Lawsuit again herein. Instead, it respectfully refers the Court to the Preliminary Approval

[1] Capitalized terms have the same meanings given to them in the Amended Settlement Agreement (Dkt. No. 50-1) unless otherwise indicated.

[2] Because many exhibits support both the motion for final approval and the motion for fees and expenses, which are filed contemporaneously, Class Representative files the exhibits attached to a Combined Exhibit Index.

Memorandum (Dkt. No. 50), the Joint Declaration of Class Counsel (Exhibit 3), the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated fully herein.

III. ARGUMENT

Class Representative sets forth below his arguments in support of the Fee Request, Expenses Request, and Request for Class Representative Fee. For the reasons set forth in each section below, those requests should be granted.

A. The Parties Have Agreed Federal Common Law Controls the Right to and Reasonableness of the Requests for Attorneys' Fees, Expenses, and Case Contribution Award.

The Parties contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the right to and reasonableness of attorneys' fees, reimbursement of expenses, and 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.

Settlement Agreement, Dkt. No. 50-1 at ¶2.6. This contractual language removes any doubt regarding which body of law applies to certification, notice, and overall evaluation of the fairness and reasonableness of the Settlement and the associated requests for fees, expenses, and class representative contribution award.[3] Such an agreement directly aligns with the principles of the

[3] *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017) is inapplicable because, unlike in *EnerVest*, the Parties here contractually agreed to a choice of law provision, selecting federal common law to control the right to and reasonableness of the attorneys' fee award. *See also*, Ex. 3.I, Gensler Decl. at ¶41, n.5.

Class Action Fairness Act ("CAFA"), which was passed with the intent to provide certainty, uniformity, and confidence in the application of the class device to cases involving interstate commerce. *See, e.g.*, 28 U.S.C. §1711(a)-(b). Federal Rule of Civil Procedure 23 governs the certification of the action as a class action. 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 issues of fees, expenses, and class representative awards. The Parties' contractual choice of law—the well-developed and consistent body of federal common law that applies to common fund class action settlements where no fee shifting occurs—should be given effect as written. *See Cecil v. BP America Production Co.*, No. 16-CV-410-KEW (E.D. Okla. Nov. 19, 2018), Order Awarding Attorneys' Fees (Dkt. No. 260) at ¶¶12-13; *Chieftain Royalty Co. v. XTO Energy Inc.*, No. 11-cv-29-KEW (E.D. Okla. Mar. 27, 2018), Order Awarding Attorneys' Fees (Dkt. No. 231) ("*Chieftain* Fee Order") at ¶¶6(d)-(e), attached to the Combined Exhibit Index as Exhibit 15; *see also Leritz v. Farmers Ins. Co*., 2016 OK 79, ¶1, 385 P.3d 991, 992 ("Generally, '[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ..'"); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939).

B. The Fee Request is Reasonable Under Federal Common Law.

The forty percent fee request for Class Counsel is reasonable. The going rate is 40%, as reflected in myriad federal and state court royalty underpayment class actions[4] and as reflected in

[4] *See* Ex. 3, Joint Counsel Decl. at ¶¶27-35; Ex. 3.N, *Cecil v. BP America Prod. Co*, No. 16-CV-410-KEW (E.D. Okla. Nov. 19, 2018), Order Awarding Attorneys' Fees, Reimbursement of Litigation Expenses, and Case Contribution Award (Dkt. No. 260) ("*Cecil* Fee Order") at ¶¶25-26; Ex. 3.E, Gensler Decl. in *Reirdon* at ¶45; Ex. L, Table of Oklahoma cases awarding 40% attorneys' fees from common fund.

the contingent fee agreement in this case, executed before Plaintiff and Plaintiff's Counsel knew what would befall them in the uncertainty of litigation.[5]

Under Federal Rule of Civil Procedure 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Ex. 3.N, *Cecil* Fee Order at ¶14. An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *Id.*; *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988). Such an award will only be reversed for abuse of discretion. *Brown*, 838 F.2d at 453; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). Here, the requested fees are authorized by an express agreement of the Parties.[6] The ultimate standard for awarding a fee under federal common law is whether the fee is reasonable. The Fee Request is fair and reasonable under federal law and should be approved.

1. Attorneys' Fees are Calculated as a Percentage of the Fund under Tenth Circuit Law.

"The court's authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Wright & Miller § 1803. Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the fund method in determining the award of attorneys' fees in common-fund cases. *See Gottlieb*, 43 F.3d at 483; *Brown*, 838 F.2d at 454; *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993). This methodology

[5] *See* Ex. 1, McKnight Decl. at ¶7; Ex. 3, Joint Counsel Decl. at ¶¶42-43; *see also CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at *8 (E.D. Okla. Oct. 25, 2012) ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of [the] [a]ction.").

[6] Class Representative and Class Counsel agreed to a 40% contingency fee at the beginning of this matter. Ex. 1, McKnight Decl. at ¶7; Ex. 3, Joint Counsel Decl. at ¶27.

calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454. This Court has acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *Cecil* Fee Order at ¶15; *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at *8 (E.D. Okla. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A. G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)). Other Oklahoma federal district courts agree. *See, e.g., Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520, 2014 WL 12014020, at *3, n.1 (W.D. Okla. July 31, 2014) ("The Court is not required to conduct a lodestar assessment of the hours versus a reasonable hourly rate."); *see also Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319, 2015 WL 2254606, at *3 (W.D. Okla. May 13, 2015) ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method."); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R, (W.D. Okla. Oct. 5, 2012) (Dkt. No. 329).

Professors Gensler and Fitzpatrick also agree that the percentage of the fund approach is the correct approach in these types of cases. Ex. 3.I, Declaration of Steven S. Gensler at ¶42, *Cecil v. BP America Prod. Co.*, No. 15-CV-410-KEW ("Gensler Decl.")[7]; Ex. 3.K, Declaration of Brian T. Fitzpatrick at ¶¶11-12 ("Fitzpatrick Decl."). Professor Gensler teaches Civil Procedure and related classes at the University of Oklahoma College of Law and is the author of a leading treatise

[7] To save expenses to the Settlement Class in this case, Class Representative relies upon the declarations of renowned experts in *Cecil v. BP America Production Co.*, No. 16-CV-410-KEW and other royalty underpayment class action settlements, as the legal principles guiding the Court's analysis in awarding attorneys' fees here and in these other cases are the same. *See* Exhibits 3.C through 3.K to the Combined Exhibit Index.

on federal procedure, FEDERAL RULES OF CIVIL PROCEDURE RULES AND COMMENTARY (Thomson Reuters), and a wide range of articles on federal practice and procedure. Gensler Decl. at ¶1. He also serves as the Consultant to the U.S. Judicial Conference Committee on Federal-State Jurisdiction. *Id.* Professor Fitzpatrick is also well-qualified on federal practice and procedure, especially when it comes to class actions. Among his many accomplishments are graduating from Harvard Law School, serving as a law clerk to The Honorable Antonin Scalia on the Supreme Court of the United States and to The Honorable Diarmuid O'Scannlain on the United Court of Appeals for the Ninth Circuit, and teaching at Vanderbilt University and Harvard Law School. Fitzpatrick Decl. at ¶ 1. His teaching and research have focused on class action litigation and he has authored several articles on class action litigation which have been cited by numerous courts. *Id.* at ¶¶ 2-3. He has also published an empirical study on class action settlements and fee awards and will be publishing a book entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS next year. *Id.* at ¶¶4-6. Both Professors Gensler and Fitzpatrick analyze fee requests under the governing *Johnson* factors. Ex, 3.I, Gensler Decl. at ¶¶4, 43-65; Ex. 3.K, Fitzpatrick Decl. at ¶¶13, 15-25. Former Chief Justice of the Supreme Court of Oklahoma Steven W. Taylor concurs. Ex. 3.J, Declaration of Steven W. Taylor at ¶¶12-15, *Cecil v. BP America Prod. Co.,* No. 16-CV-410-KEW.

2. The Fee Request Is Reasonable under the Johnson Factors.

When determining attorneys' fees under the preferred percentage-of-the-fund method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55; Ex. 3.N, *Cecil* Fee Order at ¶16. Not all factors apply in every case, and some deserve

more weight than others depending on the facts at issue. *Brown*, 838 F.2d at 456; Ex. 3.N, *Cecil* Fee Order at ¶16.

The twelve *Johnson* factors are: (l) the time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorneys 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 attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Gottlieb*, 43 F.3d at 482 n.4.

The *Johnson* factor that should be entitled to the most weight in this common fund case is the eighth factor—the amount involved in the case and the results obtained. *See Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."); Fed. R. Civ. P. 23(h) adv. comm. note (explaining for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point").[8]

Here, the cash benefit of the Settlement represents a significant, concrete, immediate, monetary benefit to the Settlement Class. And, as Professor Gensler aptly opined in *Cecil*, settlements with self-executing benefit distribution provisions like the settlement in *Cecil* and in this case, as opposed to claims-made settlements in which the recovery to absent class members

[8] It is well-established that the fee award should be based on the total economic benefit bestowed on the class. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member" obtained through the "entire judgment fund"). Here, the benefit is all cash.

depends on their submission of information or completion of a complicated claims process, have real value to the absent class members:

> Importantly, this is a cash recovery that will be distributed to Class Members automatically. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members need to do is not opt out and wait for their checks to be distributed after the Court grants final approval of the Settlement.

Ex. 3.I, Gensler Decl. at ¶51; *See* Ex. 3.N, *Cecil* Fee Order at ¶21. In this case, the benefits are ***guaranteed*** and automatically bestowed upon the Settlement Class. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members must do is remain in the Class, *i.e.*, not opt out, and wait for distribution of their checks after the Court grants final approval of the Settlement and the Settlement becomes Final and Non-Appealable. Settlement Agreement. Dkt. No. 50-1, ¶¶1.7, 1.9. Accordingly, the "results obtained" factor strongly supports a fee award of approximately $520,000 to be paid from the cash portion of the Settlement.

The other *Johnson* factors also support approval of the fee request. Although these factors do not merit as much weight as the results obtained factor, the Joint Declaration of Class Counsel, Exhibit 3, incorporated by reference, addresses each of them. *See also* Ex. 3.I, Gensler Decl. at ¶¶39-47, 50-51, 57-63, which places the *Johnson* factors in perspective. To summarize:

1. **Time and Labor**. This is important in statutory fee shifting lodestar cases, but only important here to show the case was not a lay down winner. The Joint Declaration of Class Counsel shows the law firms invested substantial time in researching, investigating, prosecuting, and resolving this case. Ex. 3, Joint Counsel Decl. at ¶¶4-20, 38.

2. **Novelty and Difficulty**. Class actions are known to be complex and vigorously contested. The claims involve difficult and highly contested issues of Oklahoma oil and gas law and class certification law that are currently being litigated in multiple forums. Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel. Moreover, Bravo asserted a number of defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Despite these hurdles, Class Counsel obtained a significant recovery for the Settlement Class. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, support the Fee Request. *See* Ex. 3, Joint Counsel Decl. at ¶39.
3. **Skill required.** Only a few firms handle royalty class litigation because of the nuanced intersection of class action and oil and gas law and the expense of funding such a large and potentially long-lasting endeavor. Ex. 3, Joint Counsel Decl. at ¶40. Defendant is represented by skilled class action defense attorneys who could spare no effort or expense in the defense of their client. This Litigation could have raged for years. Without the experience, skill, and determination displayed by *all* counsel involved and the Court, the Settlement would not have been reached. These factors strongly support the Fee Request.
4. **Preclusion of Other Cases**. Counsel has only a finite number of hours to invest in class action cases and must turn away other opportunities to pursue cases in which they have already accepted representation. Ex. 3, Joint Counsel Decl. at ¶41.
5. **Customary Fee.** McKnight Realty and Class Counsel negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* Ex. 1, McKnight Decl. at ¶7;

Ex. 3, Joint Counsel Decl. at ¶27. *See* Ex. 3.I, Gensler Decl. at ¶¶58-61; Ex. 3.K, Fitzpatrick Decl. at ¶16-21; Ex. 3.J, Taylor Decl. at ¶¶12-14. This fee represents the market rate and is in the range of the "customary fee" in oil and gas class actions in Oklahoma state courts over the past 15 years. *See* Exhibit 3 attached to the Gensler Declaration (Exhibit 3.I); *see also* Ex. 3.N, *Cecil* Fee Order at ¶25; *see also, e.g.*, *Fitzgerald Farms, LLC v. Chesapeake Operating, LLC*, No. CJ-2010-38, 2015 WL 5794008, at *3 (Okla. Dist. Ct., Beaver County, July 2, 2015) (collecting Oklahoma cases to find in "the royalty underpayment class action context, the customary fee is a 40% contingency fee" and awarding 40% fee of $119 million common fund). This factor supports the Fee Request.

6. **Fixed Hourly or Contingent Fee**. As set forth above, Class Counsel undertook this Class Lawsuit on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Ex. 3, Joint Counsel Decl. at ¶¶27, 43; *see also* Ex. 3.K, Fitzpatrick Decl. at ¶22. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See, e.g., Cecil* Fee Order at ¶26. As Professor Gensler aptly notes, "Plaintiff's Counsel invested significant time and money over the years of litigation with no guarantee of reimbursement or recovery." Ex. 3.I, Gensler Decl. at ¶63; *see also* Ex. 3, Joint Counsel Decl. at ¶43. Indeed, plaintiff's counsel have expended thousands of hours litigating royalty underpayment class actions where the courts denied class certification and, thus, plaintiff's counsel received no remuneration or

reimbursement of expenses whatsoever despite their diligence and expertise.[9] Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates. Ex. 3, Joint Counsel Decl. at ¶29. *See* Ex. 3.N, *Cecil* Fee Order at ¶26. The agreed-upon contingent fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See* Ex. 3.N, *Cecil* Fee Order at ¶26(x); *CompSource*, 2012 WL 6864701, at *8; *Chieftain v. Laredo Petro., Inc.*, 2015 WL 2254606, at *2. If Class Counsel had not been successful, they would have received zero compensation (not to mention no reimbursement for expenses). Ex. 3, Joint Counsel Decl. at ¶29; *see also* Ex. 3.N, *Cecil* Fee Order at ¶26; *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶¶11 & 15-23, 77 P.3d 1042. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in class actions. *See* Ex. 3.K, Fitzpatrick Decl. at ¶16. *See, e.g.*, Ex. 3.N, *Cecil* Fee Order at ¶26. Accordingly, this factor strongly supports the Fee Request.

7. **Time Limitations**. This was not a factor in this case and should not influence the Court one way or the other. Ex. 3, Joint Counsel Decl. at ¶44.

8. **Amount in Controversy and Result Obtained**. Amount in controversy was approximately $1.56 million. Ex. 2, Reineke Decl. at ¶2. The recovery was about 83% of the total. *Id.* As detailed above, this is the most significant factor in awarding

[9] *See, e.g., Schell v. Oxy USA, Inc.*, 814 F.3d 1107, 1112 & 1125-26 (10th Cir. 2016) (despite winning summary judgment in favor of plaintiff class after seven years of litigation, no attorney's fee was awarded). *See also*, Ex. 3.I, Gensler Decl. at ¶6 (listing the three prior putative class actions in which BP defeated certification); Ex. 3.K, Fitzpatrick Decl. at ¶6 (same); Ex. 3.J, Taylor Decl. at ¶5 (skepticism toward class actions generally and denial of certification in many cases).

attorneys' fees in the class action context and strongly supports the Fee Request here. Ex. 3, Joint Counsel Decl. at ¶¶45-46.

9. **Experience, Reputation, and Ability of Counsel**. Class counsel has extensive experience, stellar reputations, and demonstrated ability. Ex. 3, Joint Counsel Decl. at ¶¶40, 47.

10. **Undesirability**. Most class counsel will not touch a smaller case such as this. Ex. 3, Joint Counsel Decl. at ¶¶4, 49; *see also,* **Exhibit 3.M**, Decl. of Kimberly Hamilton, *Freebird, Inc. v. Merit Energy, Inc.*, No. 10-1154-KHV-JPO (D. Kan. Jan. 15, 2013) (Dkt. No. 199-3) (p. 2, describing a royalty owner's challenge to find an attorney to prosecute royalty underpayment lawsuits). Few law firms would be willing to risk investing the time and expenses necessary to prosecute this Litigation for multiple years with only an uncertain prospect of recovery. *See* Ex. 3, Joint Counsel Decl. at ¶49; Ex. 3.N, *Cecil* Fee Order at ¶27. Further, Defendants are worthy adversaries that will fight in bitter, adversarial litigation. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming, and arduous undertaking. Indeed, in another complex royalty class action that Rex Sharp settled, the Oklahoma state court explained:

> Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels.

Fitzgerald Farms, 2015 WL 5794008, at *8. The same principle holds true here. This factor also supports the Fee Request. Ex. 3, Joint Counsel Decl. at ¶49. *See also* Ex.

3.I, Gensler Decl. at ¶57; Ex. 3.K, Fitzpatrick Decl. at ¶22; *see generally*, Ex. 3.J, Taylor Decl.

11. **Nature and Length of Professional Relationship with Client.** Although of little relevance in a case where the client does not engage regularly in litigation to warrant a discounted hourly rate, this factor supports the requested fee. Class Counsel met and worked with Mr. McKnight many times throughout the Class Lawsuit, including before the lawsuit was filed, to prosecute the claims. Ex. 3, Joint Counsel Decl. at ¶50. McKnight Royalty zealously represented the Class. *See* Ex. 1, McKnight Decl. And, McKnight Royalty supports the Fee Request. Ex. 1, McKnight Decl. at ¶¶15-16.
12. **Awards in Similar Cases**. One-third to forty percent is the usual fee award and supports the Fee Request in this case. *See* #5, *supra*; Ex. 3, Joint Counsel Decl. at ¶51; *see also*, Ex. 3.L, Table of Oklahoma Cases awarding 40% contingency fee.

The analysis of the *Johnson* factors under federal common law strongly demonstrates approval of the Fee Request is warranted.

C. The Request for Reimbursement of Litigation Expenses is Reasonable Under Federal Common Law.

In connection with approval of the Settlement of the Class Lawsuit, and in accord with the Notice to the Class, Dkt. No. 58-1 at ECF 11, Class Representative respectfully moves the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Class Lawsuit (the "Expense Request"). As described above, Class Counsel has obtained an excellent recovery for the benefit of Class Members, which necessitated incurring expenses that Class Counsel paid. To date, Class Counsel have advanced almost $90,000.00 in prosecuting and resolving this case. Ex. 3, Joint Counsel Decl. at ¶¶54, 55. Class Counsel will incur additional expenses between now and the Settlement Fairness Hearing on December 21, 2018. *See id* at ¶¶56-

59. As such, at the hearing, Class Counsel will seek reimbursement for expenses incurred after the date of this filing. Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted.

1. The Request for Reimbursement of Litigation Expenses Is Reasonable Under Federal Common Law.

"As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred…in addition to the attorney fee percentage." *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (citing *Blum*, 465 U.S. at 573); FED. R. CIV. P. 23(h) (authorizing the Court to reimburse counsel for "non-taxable costs that are authorized by law."). *See* Ex. 3.N, *Cecil* Fee Order at ¶30. As set forth above and as set forth in the Notice to the Class, Dkt. No. 58-1 at 11, McKnight Realty respectfully requests reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Class Lawsuit. All of these expenses were reasonably and necessarily incurred and are directly related to the prosecution and resolution of this Class Lawsuit. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, document production and review, and settlement administration, which are typical of large, complex class actions such as this. As such, this request is fair and reasonable and should be approved.

2. Reimbursement of Settlement Administration Expenses.

Included in the Expense Request is Class Counsel's payment of $50,000 as Administration Expenses, which relate to the provision of Notice of Settlement by direct mail and publication, to the maintenance of the Settlement website and call-center, to the implementation of the Plan of Allocation and Distribution, to costs incurred to establish and maintain the McKnight Settlement

Account, to distribution of the Net Settlement Amount, to tax-reporting, and to payment of the Settlement Administrator for its services. The Settlement Agreement provides that the costs of administering the Settlement will be reimbursed to Class Counsel from the Settlement Proceeds upon the Court's approval. Dkt. No. 50-1 at ¶1.1. Where a settlement agreement calls for the costs of administration to be borne by the settlement fund, the court should approve same. *See, e.g., In re High–Tech Emp. Antitrust Litig*., No. 11–CV–2509–LHK, 2013 WL 6328811, at *5 (N.D.Cal. Oct. 30, 2013) (permitting all costs incurred in disseminating notice and administering the settlement to shall be paid from the settlement fund, pursuant to the terms of a settlement agreement"). These Administration Expenses, incurred and anticipated, are reasonable in light of the number of Class Members involved and the amount of money to be distributed and will be presented to the Court at the Settlement Fairness Hearing. Ex. 3, Joint Counsel Decl. at ¶59.

D. The Case Contribution Award is Reasonable Under Federal Common Law.

The incentive award of two percent is reasonable. This award was included in the Class Notice (Dkt. No. 58-1 at ECF 11) and is reasonable under the case law.

Federal courts regularly give incentive awards to compensate named plaintiffs. Ex. 3.N, *Cecil* Fee Order at ¶34 (incentive awards are meant to compensate class representatives for "the work they performed – their time and effort invested in the case and the risks they take."); *see also, 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."); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.,* No. 12-cv-1319-D, 2015 WL 2254606, at *4-5 (W.D. Okla. May 13, 2015) (awarding 1% of the settlement amount and finding,

"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 WL 4867715, at *3 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling $100,000); *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 among 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 for the benefit of the entire class."); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) ($215,000 in incentive awards); *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 . . . .").

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." *Cecil* Order at ¶35 (quoting Newberg § 17:3). The award should be proportional to the contribution of the plaintiff. *Id.* (citing *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).

McKnight Realty seeks an award based on its demonstrated risk and burden as well as compensation for time and effort. *See* Ex. 1, McKnight Decl. at ¶¶18-20. *See also* Newberg § 17:12 (evidence might be provided through "affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award."). *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 (Okla. Dist. Ct., Stephens Cnty.) (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150 (Okla. Dist. Ct., Caddo Cnty.) (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739 (Okla. Dis. Ct., Garfield Cnty.) (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."). Having worked with McKnight in the investigation, filing, prosecution, and settlement of this Class Lawsuit, Class Counsel fully supports the request. Ex. 3, Joint Counsel Decl. at ¶ 60. As such, McKnight Realty's request for an incentive award of two percent of the Settlement Proceeds is fair and reasonable and supported by the same evidence of reasonableness.

IV. CONCLUSION

For the reasons set forth in this memorandum, Class Representative respectfully moves the Court to grant the Motion for Approval of Class Counsel Fees and Expenses and to enter an Order approving the following, in accord with the Settlement Agreement and Section IV of the Class Notice, to be deducted from the Settlement Proceeds before distribution checks are mailed to the class from the remaining Net Settlement Amount: (1) Class Counsel Fees in the amount of $519,954.46; (2) Class Representative Award in the amount of $25,997.72; and (3) Litigation Expenses in the amount of $87, 483.73 to-date, and a reserve of up to $11,000 for future expenses through the Settlement Fairness Hearing and implementation of the Settlement, if finally approved.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, a true and correct copy of the above and foregoing document was served in accordance with the Local Rules on all counsel of record via the Court's electronic filing system.

/s/Rex A. Sharp
Rex A. Sharp