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

PAULA PARKS MCCLINTOCK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 6:17-cv-00259-JAG**
	)	
CONTINUUM PRODUCER SERVICES, L.L.C.,	)	
	)	
	)	
Defendant.	)	

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

Class Representative Paula Parks McClintock (hereinafter "Ms. McClintock" or "Class Representative"), by and through her counsel of record, submits the following Memorandum of Law in Support of her Motion for Approval of Case Contribution Award.

I. SUMMARY OF ARGUMENT

In connection with Class Representative's request for approval of the Settlement in the above-captioned Litigation,[1] Ms. McClintock respectfully moves the Court for a Case Contribution Award of $2,500.00 from the Gross Settlement Fund, as compensation for her valuable time, effort and assistance throughout this Litigation, which culminated in a Settlement with a total value of $900,000.00. This award is proportionate to the contribution of Ms. McClintock and is supported by her declaration, which demonstrates her time, effort, and the risk and burden she incurred. *See*

[1] All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated August 20, 2019 (hereinafter 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. 39).

Declaration of Paula Parks McClintock ("McClintock Decl."), attached to the Final Approval Memorandum as Exhibit 1.

II. FACTUAL AND PROCEDURAL SUMMARY

In the interests of time and judicial economy, Ms. McClintock will not recite the factual and procedural background of this Litigation. Instead, Ms. McClintock respectfully refers the Court to the Memorandum of Law in Support of Class Representative's Motion for Final Approval, the Declaration of Bradley E. Beckworth, Patrick M. Ryan and Robert Barnes 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. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 702 n. 21 (10th Cir. 2009) (court may take judicial notice of its own files and records).

III. ARGUMENT

In recognition of the time, effort, risk and burden Ms. McClintock incurred to produce such a significant result for the Settlement Class, she seeks a case contribution award of $2,500.00 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 That 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 its nationwide application, this Settlement Agreement hall be governed *solely by federal law*, both substantive and procedural, as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, *Case Contribution Award*, the right to and reasonableness of Plaintiff's Attorneys' Fees and Litigation Expenses, and all other matters for which there is federal procedural or common law, including federal law

> regarding federal equitable common fund class actions.

See Settlement Agreement at ¶11.8 (Dkt. No. 39-1) (emphasis added). The Parties' decision to contractually agree that federal common law controls the case contribution award should be enforced, as it has been in recent analogous cases. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co*., No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co*., No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126); *Chieftain Royalty Co. v. XTO Energy, Inc*., No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 230); *Cecil v. BP America Production Co*., No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260). Further, 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 Restatement 2d of Conflict of Laws, § 187, cmt. e (Am. Law Inst. 1988) (the *Restatement*)); *Yavuz v. 61 MM, Ltd*., 465 F.3d 418, 428 (10th Cir. 2006). Further expanding on this freedom to contract, the *Restatement* 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.

Restatement 2d of Conflict of Laws § 187, cmt. e (Am. Law Inst. 1988); *see also Williams v. Shearson Lehman Bros*., 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (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 Rule 23 of the Federal Rules of Civil Procedure, 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 award.

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

Federal courts routinely grant incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case. In fact, this Court and other Oklahoma federal courts have awarded case contribution awards to class representatives in similar oil and gas class actions. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co*., No. 17-cv-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co*., No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Chieftain Royalty Co. v. XTO Energy, Inc*., Case No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 230); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., Case No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (Dkt. No. 52); *Chieftain Royalty Co. v. QEP Energy Co*., Case No. CIV-11-212-R (W.D. Okla. May 31, 2013) (Dkt. No. 182); *see also, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp*., 352 F. App'x 232, 235 (10th Cir. 2009) (unpublished) ("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.");[2] *Cobell v. Salazar*, 679 F.3d 909, 922-23, (D.C. Cir. 2012) (holding 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 . . . ."); *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); *In re Marsh ERISA Litig*., 265 F.R.D. 128, 150 (S.D.N.Y. 2010) (awarding case contribution award of $15,000 to three named representatives, holding "[c]ase law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation.") (citing *Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001)); *Allapattah Servs., Inc. v. Exxon Cor*p., 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*., MDL No. 1261, 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

[2] In *Newmont*, the Tenth Circuit held the district court did not abuse its discretion in denying an incentive award to a pro se objector because: (1) his objections did not confer a benefit on the class, (2) 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 (3) his objections to class counsel's attorneys' fees were "general and lacking in meaningful analysis" (*id.* at 237).

are not uncommon in class action litigation and particularly where . . . a common fund has been created 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).

In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017), a two-judge panel of 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%. Regardless of the decision 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, Ms. McClintock seeks a flat dollar award based on her hours spent times a reasonable rate, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*. Indeed, this Court noted such distinction in awarding case contribution awards in similar oil and gas class action settlements. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co*., No. 17-cv-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co*., No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126).

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." *See* 5 *Newberg on Class Actions* § 17:3 (5th ed) ("*Newberg*"). The award should be proportional to the contribution of the plaintiff. *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (noting that 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"); *see also Newberg* at § 17:18.

Here, Ms. McClintock seeks a modest, dollar-based award of $2,500.00. This request is supported by the abundant evidence submitted by Ms. McClintock, including her own Declaration, representations by Class Counsel, and other evidence in the record. *See Newberg* at § 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 Ms. McClintock is seeking payment at a reasonable hourly rate of $50.00 for reasonable time expended on services that were helpful and non-duplicative to the litigation.

Ms. McClintock's education and work history background more than justify this hourly rate. *See* McClintock Decl. at ¶¶4-5. Ms. McClintock attended Tulsa University where she obtained a Bachelor of Science degree in 1975. After college, she worked for Merrill Lynch and in retail. During the 1990s, she produced two fishing books along with her husband: Flywater and Watermark. She continues to manage investments in commercial real estate and several royalty interests. Indeed, she has both owned, and previously managed a trust that owned, multiple royalty interests in Oklahoma for several years. *Id.*

As demonstrated by her Declaration, both the rate and efforts of Ms. McClintock are reasonable. Specifically, Ms. McClintock has dedicated approximately 30 hours to this Litigation.

McClintock Decl. at ¶19. These hours were spent collecting documents for discovery, reviewing emails, draft pleadings, briefs and other court documents from Class Counsel, consulting and/or meeting with Class Counsel, 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. Furthermore, Ms. McClintock 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. *Id.* This will add at least an additional 40 hours that Ms. McClintock will dedicate to this Litigation, as she intends to travel to Muskogee from her home in Wyoming to attend the Final Fairness Hearing. She will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. *Id.* Thus, Ms. McClintock will work at least 170 hours total in this Litigation, amounting to $50.00 an hour and comports with the awards given in similar oil and gas class actions. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co*., No. 17-cv-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co*., No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126).

Indeed, Ms. McClintock was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition on May 23, 2017. *See* McClintock Decl. at ¶8. She actively and effectively fulfilled her obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon her during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *Id*. at ¶19. Ms. McClintock has worked with Class Counsel since before the inception of this Litigation, and her active participation has contributed significantly to the prosecution and resolution of this case. *Id*. In addition, Ms. McClintock

produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, and actively participated in the negotiations that led to the settlement of this Action. *Id*.

Ms. McClintock was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See* McClintock Decl. at ¶20. In fact, if the Court determines that no award is appropriate, Ms. McClintock 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 her request. *Id*. In other words, Ms. McClintock fully supports the Settlement as fair, reasonable and adequate, even if she is awarded no case contribution award at all. *Id*. Ms. McClintock has no conflicts of interest with Class Counsel or any absent class member. *Id*. Finally, several absent Class Members executed affidavits support Ms. McClintock's request for a Case Contribution Award. *See* Exhibits 6-7 to Final Approval Memorandum.

Because Ms. McClintock has dedicated her time, attention and resources to this Litigation, Ms. McClintock respectfully requests the Court award a Case Contribution Award of $2,500.00 to reflect the important role that she played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

IV. CONCLUSION

For the foregoing reasons, Ms. McClintock respectfully requests the Court enter an order granting approval of a Case Contribution Award of $2,500.00.

DATED: January 15, 2020.

Respectfully submitted,

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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: January 15, 2020.

/s/ Bradley E. Beckworth
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Subject: Activity in Case 6:17-cv-00259-JAG McClintock v. Continuum Producer Services, L.L.C. Brief in Support of Motion

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Filer: Paula Parks McClintock

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