

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

DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:16-cv-113-KEW
	)	
CIMAREX ENERGY CO.,	)	
	)	
Defendant.	)	

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

Class Representative Dorsey J. Reirdon (hereinafter “Mr. Reirdon” or “Class Representative”), by and through his counsel of record, submits the following memorandum of law in support of his 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,<sup>1</sup> Mr. Reirdon respectfully moves the Court for a Case Contribution Award of up to \$15,000 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 \$20.5 million. *See* Affidavit of Barbara Ley, ¶ 3 (“Ley Aff.”), attached to the Final Approval Memorandum as Exhibit 3. This award is proportional to the contribution of Mr. Reirdon and is supported by his declaration, which demonstrates his time, effort, and the risk and

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<sup>1</sup> All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated September 5, 2018 (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 [Doc. No. 52].

burden he incurred. *See* Declaration of Dorsey J. Reirdon (“Reirdon Decl.”), attached to the Final Approval Memorandum as Exhibit 1; *see also* Declaration of Mediator Bradley A. Gungoll (“Gungoll Decl.”) [Doc. No. 62].

## **II. FACTUAL AND PROCEDURAL SUMMARY**

In the interests of time and judicial economy, Mr. Reirdon will not recite the factual and procedural background of this Litigation. Instead, Mr. Reirdon 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 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. *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 Mr. Reirdon incurred to produce such a significant result for the Settlement Class, Mr. Reirdon seeks a case contribution award of up to \$15,000 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 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 shall 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 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.

See Settlement Agreement, ¶ 11.8 [Doc. No. 52-1] (emphasis added). The Parties' decision to contractually agree that federal common law controls the case contribution award should be enforced as it was in an analogous case by this Court. See Order Awarding Case Contribution Award [Doc. No. 126] in *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) at 3-4. 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)); *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 recently awarded Mr. Reirdon a Case Contribution Award of \$30,000 for his time, effort, and contribution in a similar case. *See* Order Awarding Case Contribution Award [Doc. No. 126] in *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018); *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.”);<sup>2</sup> *Cobell v. Salazar*, 679 F.3d 909, 922-23, (D.C. Cir. 2012) (holding district court did not err in

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<sup>2</sup> 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).

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 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.*, 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 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%. The plaintiff-appellee in *EnerVest* has filed a Petition for a Writ of Certiorari in the United States Supreme Court, which remains pending as of the date of this filing. 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, 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*. Indeed, this Court noted such distinction in awarding Mr. Reirdon a case contribution award in the *XTO Energy* litigation. See Order Awarding Case Contribution Award [Doc. No. 126] in *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018).

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, Mr. Reirdon seeks a modest, dollar-based award of up to \$15,000. This request is supported by the abundant evidence submitted by Mr. Reirdon, including his 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 Mr. Reirdon is seeking payment at a reasonable hourly rate of approximately \$100.00 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. *See* 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 serving as 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 approximately 141 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. Furthermore, 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. *Id.* 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. *Id.* Thus, Mr. Reirdon will work at least 166 hours total in this Litigation, and the request of \$15,000 is easily justifiable and amounts to less than the \$100/hour that was approved by this Court for Mr. Reirdon in *XTO Energy Inc.*

Indeed, Mr. Reirdon was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition on March 11, 2016 [Doc. No. 3-1]. *See* Reirdon Decl. 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.*

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* Exhibits 6-13 to Final Approval Memorandum.

Because Mr. Reirdon has dedicated his time, attention and resources to this Litigation, he is entitled to the requested Case Contribution Award. Mr. Reirdon respectfully requests the Court award him a Case Contribution Award of up to \$15,000 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.

As such, Mr. Reirdon's request for an incentive award of \$15,000 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.

#### **IV. CONCLUSION**

For the foregoing reasons, Mr. Reirdon respectfully requests the Court enter an order granting approval of a Case Contribution Award of up to \$15,000.

**DATED:** November 20, 2018

Respectfully submitted,

*s/Patrick M. Ryan*

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 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 through the Court's CM/ECF filing system.

*s/Patrick M. Ryan*

\_\_\_\_\_  
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Eastern District of Oklahoma

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