UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HENRY SEELIGSON, JOHN M. SEELIGSON, SUZANNE SEELIGSON NASH, and SHERRI PILCHER, Individually And On Behalf Of All Others Similarly Situated, *Plaintiffs*, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., *Defendant*.	Case No. 3:16-cv-00082-K

CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS TO NAMED PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Rules

Pursuant to Federal Rule of Civil Procedure 23(h), Class Counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz");[1] Wick Phillips Gould & Martin, LLP ("Wick Phillips"); Seidel Law Firm, P.C. ("Seidel Law"); and Mattingly & Roselius, PLLC ("Mattingly & Roselius") (together, "Class Counsel"), on behalf of plaintiffs' counsel,[2] hereby respectfully move for: (i) an award of attorneys' fees in the amount of one-third of the Settlement Fund; (ii) payment of Class Counsel's Litigation Expenses in the amount of $614,210.75; and (iii) service awards for Named Plaintiffs Henry Seeligson, John M. Seeligson, Suzanne Seeligson Nash, and Sherri Pilcher in the aggregate amount of $80,000, to be divided evenly among Named Plaintiffs.

I. PRELIMINARY STATEMENT

After six years of dedicated litigation efforts, Class Counsel have successfully negotiated a settlement of this class action. The proposed Settlement, if approved by the Court, will resolve the Action in its entirety in exchange for $28 million in cash. Based on Class Counsel's thorough understanding of the significant litigation risks Plaintiffs would have faced had the Action continued, the Settlement is an excellent result. Notably, the recovery obtained for the Class

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated December 30, 2020, (the "Settlement Agreement"), attached as Ex. A [App. 1-40] to the Appendix to (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Named Plaintiffs (the "Appendix"), or in the Declaration of Joseph H. Meltzer in Support of: (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Named Plaintiffs (the "Meltzer Declaration" or "Meltzer Decl."), filed herewith. Citations to "¶ __" refer to paragraphs in the Meltzer Declaration and citations to "Ex. __" refer to exhibits to the Appendix. Unless otherwise noted, all internal citations and quotations have been omitted and emphases have been added.

[2] Additional plaintiffs' counsel litigated the Action with Class Counsel and will receive a portion of any Court-approved fees.

represents *close to 50%* of the Class's alleged damages and likely verdict amount (i.e., approximately $58.6 million) based on estimates provided to Plaintiffs by their damages experts.

The merits of the Settlement are clear when weighed against the risk that the Class might recover less than the Settlement Amount—or nothing at all—after further litigation. Throughout the course of the Action, Defendant vigorously contested liability and damages and would continue to do so through trial and post-trial proceedings. And, even before reaching trial, Plaintiffs would have had to overcome Defendant's anticipated motion for summary judgment and *Daubert* challenges, as well as Defendant's pending counterclaim that threatened to completely diminish Plaintiffs' recovery as an offset. An adverse decision with respect to any of the foregoing could have altered the litigation landscape of the Action and the amount of recoverable damages. The Settlement avoids the risks of prolonged and uncertain litigation and achieves an excellent result for the Class.

In the face of these substantial risks, Class Counsel prosecuted the Action on a fully contingent basis and devoted substantial resources against highly skilled and heavily funded opposing counsel in order to achieve the Settlement. As detailed in the Meltzer Declaration, Class Counsel vigorously prosecuted this Action through two complaints, a motion to dismiss, two rounds of motions for class certification, and multiple rounds of briefing before the Fifth Circuit Court of Appeals. Class Counsel also participated in heavy fact and expert discovery, including reviewing more than 125,010 pages of documents, taking and/or defending 13 depositions, and consulting with industry experts.

The Settlement was reached only after the Fifth Circuit denied Defendant's second attempt to appeal this Court's ruling on class certification and the Court imposed a mediation deadline of October 16, 2020. The Settlement was reached following hard-fought, arm's-length settlement

negotiations facilitated by retired United States District Chief Judge David Folsom ("Judge Folsom") that involved the preparation of detailed mediation statements by both sides, attendance at a full-day mediation via videoconference, and continuing negotiations by the Parties following formal mediation.

As compensation for these efforts and their commitment to bringing the Action to a successful conclusion with a cash payment to Class Members, Class Counsel request a fee of one-third the Settlement Fund, or $9,333,332. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *9 (N.D. Tex. Apr. 25, 2018) ("[O]ne-third of the fund . . . is within the range of percentage fees awarded in the Fifth Circuit in other complex cases."). Unlike many cases in which plaintiffs' counsel seek a fee that exceeds their lodestar by a factor of two or more, *see, e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 333 (W.D. Tex. 2007) (noting multipliers range from at least 2.26 to 4.5 in large and complicated class actions), Class Counsel's fee request here is only slightly higher than the lodestar value of the time that Class Counsel devoted to the investigation, prosecution, and resolution of the Action through April 23, 2021—i.e., $7,990,358.25. ¶ 84. In fact, the roughly $9.3 million fee sought here would result in a modest multiplier of 1.17 of the total lodestar contributed by Class Counsel.

Class Counsel also request payment from the Settlement Fund of $614,210.75 in Litigation Expenses. Both the requested one-third fee and the request for Litigation Expenses are authorized by and made pursuant to agreements between Class Counsel and Plaintiffs that were reached at the outset of the Action. Finally, Class Counsel also request on behalf of Named Plaintiffs services awards in the amount of $20,000 each, for an aggregate of $80,000, for their efforts in representing the Class throughout the course of the Action. *See* Exs. H-K, Declarations of Named Plaintiffs ("Pls.' Decs.") [App. 296-319].

All four Named Plaintiffs have approved of and support the requested fees and expenses. *Id*. The reaction of the Class to date also supports these requests. Pursuant to the Court's Preliminary Approval Order, all Class Members have been notified of the Settlement via mail and/or e-mail, and the Summary Notice was published in the *Denton Record*, the *Fort Worth Star*, the *Dallas Morning News*, and the *Wise County Messenger*. The Summary Notice, together with the long form Notice posted on the Settlement Website, advised Class Members that Class Counsel would seek fees in an amount not to exceed one-third of the Settlement Fund plus the Litigation Expenses they advanced on behalf of the Class. Although the deadline for Class Members to object to the requested fees and expenses has not yet passed, to date, there have been no objections to the fee or expense amounts set forth in the long-form Notice, and notably, no opt-outs.

For all of the reasons set forth below, Class Counsel respectfully request that the Court approve their motion for attorneys' fees, litigation expenses, and service awards in full.

II. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Counsel Is Entitled to a Reasonable Fee Award from the Common Fund

It is well established that Plaintiffs' Counsel are entitled to attorneys' fees from the common fund obtained by the Settlement. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *see also Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981). Courts have recognized that attorneys' fees from a common fund serve the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 306 (S.D. Miss. 2014). In addition to providing just compensation, courts

have also recognized that awards of fair fees from a common fund ensure that "competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000).

B. The Requested Fee Is Reasonable Under Either the Percentage-of-the-Fund Method or the Lodestar Method

Courts in the Fifth Circuit award fees to counsel from a common fund under either the percentage-of-the-fund method or the lodestar method. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) ("*Dell*") (district courts have "the flexibility to choose between the percentage and lodestar methods in common fund cases"). Class Counsel's request for one-third of the Settlement Fund—which, if approved, would yield a *modest* "multiplier" of 1.17 on Plaintiffs' Counsel's lodestar—is fair and reasonable and warrants approval by the Court.

1. The Fee Request Is Reasonable Under the Percentage-of-the-Fund Method

Class Counsel respectfully submit that the Court should award a fee based on a percentage of the common fund obtained. The Fifth Circuit has approved the percentage method for awarding fees, finding that it "brings certain advantages . . . because it allows for easy computation" and "aligns the interests of class counsel with those of the class members." *Id.* at 643 ("[D]istrict courts in this Circuit regularly use the percentage method"); *see also Schwartz v. TXU Corp.*, 2005 WL 3148350, at *26 (N.D. Tex. Nov. 8, 2005) ("[T]here is a strong consensus in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery.").[3]

[3] Numerous other circuits have endorsed the percentage method. *See, e.g.*, *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Brown v. Phillips Petrol. Co.*, 838 F.2d 451, 454-56 (10th Cir. 1988). The Eleventh and District of Columbia Circuits require the use of the percentage method in common fund cases.

Class Counsel's request for one-third of the Settlement Fund is well within the range of percentage fees awarded in the Fifth Circuit and this District. *See Schwartz*, 2005 WL 3148350, at *27 ("[C]ourts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the percentage-of-the recovery method"); *Shaw Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("[B]ased on the opinions of other courts and the available studies of class action attorneys' fees awards . . . this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to [33%] have been routinely awarded in class actions"); *The Erica P. John Fund, Inc.*, 2018 WL 1942227, at *17 (awarding 33.3% of $100 million fund); *Singh v. 21Vianet Grp., Inc.*, 2018 WL 6427721, at *1 (E.D. Tex. Dec. 7, 2018) (awarding 33.3% of $9 million fund); Order, *Casso's Wellness Store & Gym, LLC v. Spectrum Lab. Prods., Inc.*, No. 17-cv-2161 (E.D. La. Apr. 1, 2019), ECF No. 97 (awarding 33% fee award based on contingency); Order, *Davis v. Mindshare Ventures LLC*, No. 19-cv-1961 (S.D. Tex. Nov. 30, 2020), ECF No. 56 (approving counsel's request for attorneys' fees in the amount of one-third of the settlement fund); Order, *Singh v. 21Vianet Group, Inc, et al.*, No. 14-cv-00894 (E.D. Tex. Dec. 7, 2018), ECF No. 63 (same).

In sum, the one-third fee request is reasonable and well-supported by precedent within this Circuit and this District.

2. The Fee Request Is Reasonable Under the Lodestar Method

Class Counsel's fee request is also reasonable when considering counsel's lodestar, which courts in this Circuit routinely utilize to cross-check the reasonableness of the requested percentage

Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 773-74 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the "common fund doctrine" a reasonable fee may be "based on a percentage of the fund bestowed to the class."

fee. *See Erica P. John Fund, Inc.*, 2018 WL 1942227, at *13 ("A court is to apply a lodestar calculation as a cross-check of the percentage method."). In this case, the lodestar method—whether used directly or as a "cross-check" on the percentage method—strongly demonstrates the reasonableness of Class Counsel's fee request.

When utilizing the lodestar method "the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier." *Dell*, 669 F.3d at 642-43. In complex class actions with substantial contingency risks, fees representing multipliers above the lodestar are typically awarded to reflect contingency risks and other relevant factors. *See, e.g.*, *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 680 (N.D. Tex. 2010) (awarding fee representing a 2.5 multiplier and noting that "[m]ultipliers in this range are not uncommon in class action settlements" and that the 2.5 multiplier was "warranted due to the risks entailed in this lawsuit and the zealous efforts of the attorneys that resulted in a significant recovery for the class").

Through April 23, 2021, Class Counsel have spent over 13,548 hours of attorney and other support staff hours, and Class Counsel's lodestar is $7,990,358.25. *Id.*; *see also* Exs. C-G [App. 212-295]. This lodestar is a function of the vigorous prosecution of the case as described in the Meltzer Declaration, which included a detailed investigation, full briefing on Defendant's motion to dismiss, two motions for class certification, several rounds of briefing and two appeals to the Fifth Circuit, extensive discovery, including 13 depositions and the review of over 125,010 pages of documents, and a successful settlement reached following a full-day mediation. ¶¶ 3, 10-11, 28-29, 81. Accordingly, the one-third fee request represents a *modest* "multiplier" of approximately 1.17 on the lodestar value of Class Counsel's time. ¶¶ 83-84.

Moreover, in conducting a lodestar analysis, the appropriate hourly rates to use are those rates that are the current prevailing market rates.[4] *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1087 (S.D. Tex. 2012) (an attorney's hourly rates should be judged in relation to "prevailing market rates for lawyers with comparable experience and expertise in complex class-action litigation" and "[a]n attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates[,] and the rate is not contested") (alteration in original). In this respect, Class Counsel's current hourly rates, or similar hourly rates, have been approved in numerous cases throughout the country, including cases in this Circuit. *See, e.g.*, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, 2019 WL 6043440, at *1 (S.D. Tex. Feb. 13, 2019); Order Granting Motion for Attorneys' Fees and Litigation Expenses, *Oklahoma Law Enforcement Retirement System v. Adeptus Health Inc*., No. 17-cv-00449 (E.D. Tex. May 20, 2020), ECF No. 289.

In sum, whether calculated utilizing the percentage or lodestar method, the requested fee is reasonable and well within the range of fees awarded by courts in these actions. As discussed below, each *Johnson* factor also weighs in favor of finding the requested fee fair and reasonable.

C. The *Johnson* Factors Confirm the Requested Fee Is Fair and Reasonable

An analysis of the factors identified by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717-19 (5th Cir. 1974) ("*Johnson*") confirms that a one-third fee award is fair and reasonable in this case. The *Johnson* factors are:

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[4] The use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment was approved in this Circuit, *see Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) ("[C]urrent rates may be used to compensate for inflation and delays in payment"), even before the Supreme Court adopted this approach in *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

> (1) The time and labor required…[;] (2) The novelty and difficulty of the questions…[;] (3) The skill requisite to perform the legal service properly…[;] (4)The preclusion of other employment by the attorney 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 involved 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.[5]

Id.; *see also Dell*, 669 F.3d at 642 n.25 (reiterating *Johnson* factors); *Billitteri v. Secs. Am., Inc.*, 2011 WL 3586217, at *3 (N.D. Tex. Aug. 4, 2011) (same). In addition, courts may consider other factors, such as (i) public policy considerations, (ii) plaintiffs' approval of the fee, and (iii) the reaction of the class. Consideration of these factors here provides further confirmation that the fee requested is reasonable.

1. The Time and Labor Expended

Plaintiffs' Counsel spent substantial time and effort prosecuting this Action over the last six years and achieving the significant Settlement and this time and efforts supports the requested fee. As detailed in the Meltzer Declaration, Class Counsel, among other things:

- Conducted a significant legal and factual investigation into the Class's claims (¶¶ 3, 81);
- Consulted with experts in the oil and natural gas, and energy industries, as well as damages experts (¶¶ 3, 81);
- Drafted the initial complaint and operative First Amended Class Action Complaint ("FAC") (¶¶ 21-23);
- Opposed and defeated Defendant's motion to dismiss the FAC (¶¶ 23-27);

[5] Two of the *Johnson* factors—the "time limitations imposed by the client or the circumstances" and the "nature and length of [counsel's] professional relationship with the client"—are not relevant in this case. *See Klein*, 705 F. Supp. 2d at 676 ("not every factor need be necessarily considered"); *Schwartz*, 2005 WL 3148350, at *28 ("The relevance of each of the *Johnson* factors will vary in any particular case, and, rather than requiring a rigid application of each factor, the Fifth Circuit has left it to the lower court's discretion to apply those factors in view of the circumstances of a particular case.").

- Engaged in document discovery, which included reviewing over 125,000 pages of documents from Defendant and third parties and meet and confers regarding numerous discovery disputes (¶¶ 3, 28-29, 81);

- Took or defended 13 depositions, including depositions of DEPCO employees, two of the Named Plaintiffs, and several experts (¶¶ 28-29);

- Fully briefed motions for class certification and successfully obtained certification of the Class (¶¶ 32-33);

- Fully briefed two appeals taken by Defendant before the Fifth Circuit, including participating in oral argument, and defeating Defendant twice on appeal (¶¶ 35-46);

- Engaged in hard-fought, arms'-length settlement negotiations facilitated and supervised by Judge Folsom, including briefing a mediation statement prior to the mediation and a formal mediation session which took place on October 7, 2020 (¶¶ 54-56); and

- Negotiated the final terms of the Settlement with Defendant and drafted, finalized, and filed the Stipulation and related Settlement documents (¶¶ 56-58).

As noted above, Class Counsel have expended over 13,548 hours prosecuting this Action with a lodestar value of $7,990,358.25. This time and effort was critical in obtaining the excellent result represented by the Settlement and confirms that the fee request here is reasonable.

2. The Novelty and Difficulty of the Issues

The difficulty of questions presented by the litigation is also considered in determining the reasonableness of the requested fee. *See Johnson*, 488 F.2d at 718. While there was a prior litigation, *Shoop, et al. v. Devon Energy Prod. Co., L.P.*, No. 3:10-cv-00650-P (N.D. Tex.), which asserted similar claims to those asserted by the Class here, Class Counsel worked vigorously to prosecute this Action by performing its own investigation into the Class's potential claims, drafting both the initial complaint and the operative FAC, and fully briefing the Defendant's motion to dismiss, motions for class certification, and appeals before the Fifth Circuit. ¶ 81. Class Counsel

also poured over pages of discovery and worked extensively with their experts to understand the complexity of the issues involved in this Action. *Id.*

In addition to the risks and difficulties of litigation already encountered by Plaintiffs' Counsel during the pendency of the Action, Plaintiffs and Class Counsel also faced substantial risks of continuing to litigate this Action through summary judgment, trial and the inevitable post-trial proceedings. Plaintiffs faced substantial challenges to establishing Defendant's liability and damages, as well as overcoming Defendant's asserted counterclaim. Notwithstanding these difficulties and uncertainties, Class Counsel zealously prosecuted this Action in order to secure the best result for the Class. Accordingly, this factor weights in favor of the requested fee.

3. The Amount Involved and the Results Achieved

Courts have consistently recognized that the result achieved is a significant factor to be considered in awarding attorneys' fees. *See Roussel v. Brinker Int'l, Inc.*, 2010 WL 1881898, at *3 (S.D. Tex. Jan. 13, 2010), *aff'd*, 441 F. App'x 222 (5th Cir. 2011) (considering "overall degree of success achieved" in awarding fees). Here, Class Counsel achieved a $28 million cash Settlement that will provide payment to Class Members in the near term while avoiding the serious risks of continued litigation.

To start, the recovery represents nearly 50% of the amount of damages Class Counsel would have sought at trial. As estimated by Plaintiffs' damages expert, the theoretical class-wide damages in the Action are approximately $58.6 million. Thus, the $28 million Settlement represents a recovery of approximately 47.8% of those conceivable damages.

Moreover, this damages estimate assumes that Plaintiffs would be able to prove both liability and damages at trial. Plaintiffs and Class Counsel faced substantial risks in proving the elements of their claims. If Defendant had succeeded on any one of the multitude of defenses it pursued (or succeeded on one of its defenses at summary judgment or trial), the Class's recovery

could have been substantially reduced or even zero. Further, Defendant asserted an overpayment counterclaim against Plaintiffs, and while Plaintiffs were confident that Defendant's counterclaim was without merit, there was still a risk that it could have completely diminished Plaintiffs' recovery as an offset. Plaintiffs and Class Counsel agree that $28 million is an excellent recovery considering the risks of continued litigation.

4. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys

Johnson also asks courts to consider the skills required to litigate an action and "the experience, reputation and ability of the attorneys" involved. *See Johnson*, 488 F.2d at 718-19. Here, Class Counsel vigorously prosecuted the Action, provided high-quality legal services, and obtained a favorable result for the Class. Together, Class Counsel's experience in both complex class actions and oil and gas law, along with their effort and skill in surviving Defendant's motion to dismiss, certifying a class, succeeding on both appeals brought by Defendant to the Fifth Circuit, digesting over 125,010 pages of documents in discovery, and presenting a strong case at mediation was essential to achieving a meaningful resolution to this Action.[6]

Courts have also recognized the quality of opposing counsel in assessing plaintiffs' counsel's efforts. *See, e.g.*, *Schwartz*, 2005 WL 3148350, at *30 ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation"). In this Action, Defendant was represented by a top-notch defense firm, Thompson & Knight LLP, that aggressively litigated this Action at every step of the way. In the face of this formidable opposition, Class Counsel were able to persuade Defendant to settle the case at both a point in the Action and on terms that were favorable to the Class. This factor supports the requested fee.

[6] *See* Exs. C-G [App. 212-295].

5. The Preclusion of Other Employment

Class Counsel dedicated substantial time and effort to the Action despite the very significant risks of no recovery and while deferring any payment of their fees and expenses until a settlement was reached. This curtailed their ability to assign their attorneys and professionals to simultaneously perform substantial work on other matters. Accordingly, this *Johnson* factor also supports the requested fee. *See, e.g.*, *Johnson*, 488 F.2d at 718; *Burford v. Cargill, Inc.*, 2012 WL 5471985, at *3 (W.D. La. Nov. 8, 2012); *Shaw*, 91 F. Supp. 2d at 970.

6. The Customary Fee and Awards in Similar Cases

As set forth above, Class Counsel's fee request is well within the range of fees awarded in similar cases on a percentage or lodestar basis. *See supra* § II.B. This factor strongly supports the reasonableness of the requested fee. *See Johnson*, 488 F.2d at 717-19.

7. The Contingent Nature of the Fee

Class Counsel undertook this Action on a contingent fee basis, assuming a substantial risk that the Action would yield no recovery and leave counsel uncompensated. Courts have consistently recognized that "the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees." *Schwartz*, 2005 WL 3148350, at *31; *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.").

Even with the most vigorous and competent of efforts, success in contingent-fee litigation is never assured.[7] Thus, any fee award has always been at risk, and completely contingent on the

[7] There have been many hard-fought lawsuits where excellent professional efforts produced no fee for counsel. *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011), *aff'd on other grounds*, 688 F.3d 713 (11th Cir. 2012) (granting defendants' judgment as a matter of law following plaintiff's jury verdict); *Robbins v. Koger Props. Inc.*, 116

result achieved. Here, there were substantial risks to proving liability and damages. Accordingly, the contingent risk also supports the requested fee.

8. The Undesirability of the Case

While Class Counsel did not consider this Action an "undesirable" case, there were risks in financing this Action on a contingent basis and prosecuting it for six years. Class Counsel devoted significant time and money to ensure that they could generate a successful outcome for the Class, all while facing the risk that they may not be compensated for their efforts. *See, e.g.*, *Billitteri*, 2011 WL 3585983, at *8 (where a case "raised particularly difficult issues," including the risk of "no recovery whatsoever," this factor supported an increase in the fee); *Braud v. Transp. Serv. Co. of Ill.*, 2010 WL 3283398, at *13 (E.D. La. Aug. 17, 2010) (given the "risk of non-recovery" and the burdens of "undertaking expensive litigation against . . . well-financed corporate defendants on a contingent fee," the Court found that "undesirability in this case warrants an increase in the fee award"). This factor supports the requested fee.

9. Other Factors Considered by Courts

In addition to the *Johnson* factors, courts in this Circuit often consider certain other factors in determining an appropriate fee in a class action, such as public policy considerations, approval by the representative plaintiffs, and the class's reaction.

F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against accounting firm reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities class action jury verdict for plaintiffs' in case filed in 1973 and tried in 1988); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994), *aff'd sub nom.*, *Herman v. Legent Co.*, 50 F.3d 6 (4th Cir. 1995) (directed verdict after plaintiffs' presentation of its case to the jury); *In re Apple Comput. Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (after jury rendered a verdict for plaintiffs following an extended trial, the court overturned the verdict); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (affirmed directed verdict for defendants after five years of litigation). Indeed, even judgments initially affirmed on appeal by an appellate panel are no assurance of a recovery. *See, e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (after eleven years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an *en banc* decision and plaintiffs recovered nothing).

First, a strong public policy interest favors rewarding firms that bring successful class action claims. Here, that public policy was advanced, as Class Counsel were able to certify a Class and achieve a meaningful recovery for the Class. *See Jenkins*, 300 F.R.D. at 309 ("Public policy concerns—in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims—support the requested fee.").

Second, Plaintiffs played an active role in the prosecution and resolution of the Action. As such, each of the Plaintiffs has a sound basis for assessing the reasonableness of the fee request and supporting its approval. *See* Pls.' Decs., Exs. H-K [App. 296-319]. Further, the requested fee of one-third of the recovery is made pursuant to pre-litigation fee agreements negotiated at arm's-length between Plaintiffs and Class Counsel. ¶ 79. Plaintiffs, after considering the extensive time and effort dedicated to the case by Class Counsel and the considerable risks of the litigation, have endorsed the requested fee as fair and reasonable. *See* Pls.' Decs., Exs. H-K [App. 296-319]; *see, e.g.*, *In re Bear Stearns Cos., Inc. Sec., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) (considering lead plaintiff's endorsement of the arm's-length settlement negotiations and attorneys' fees when grating final approval of the class action settlement).

Third, the reaction of the Class to date also supports the requested fee. As of April 23, 2021, a total of 7,836 Summary Notices have been mailed and/or emailed to Class Members informing them of, among other things, Class Counsel's intention to apply to the Court for an award of attorneys' fees and Litigation Expenses. *See* Summary Notice at 9; *see also* long form

Notice at ¶ 17. To date, no objections to these amounts have been received, and notably, there have been no opt-outs. ¶ 92.[8]

III. CLASS COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

In addition to being entitled to reasonable attorneys' fees from a common fund, it is well-settled that the prevailing plaintiffs' attorneys are also entitled to reimbursement of their litigation expenses. *See Erica P. John Fund, Inc*., 2018 WL 1942227, at *14 ("Expenses and administrative costs expended by class counsel are recoverable from a common fund in a class action settlement."). Accordingly, Class Counsel request payment of $614,210.75 from the Settlement Fund for expenses that Class Counsel reasonably incurred in prosecuting and resolving this Action. These expenses are properly recovered by counsel. *See id*; *Billitteri*, 2011 WL 3585983, at *10; *Faircloth v. Certified Fin. Inc.*, 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (awarding costs in addition to the percentage fee). Class Counsel's expenses are set forth by category in Exhibit C [App. 212-265].[9]

The largest component of Class Counsel's expenses was the cost of Plaintiffs' experts and consultants in the total amount of $382,029.46, or approximately 62% of total expenses. ¶ 86. As detailed in the Meltzer Declaration, Class Counsel utilized experts at each stage of the Action, and these experts were absolutely critical to the prosecution and resolution of the Action. For example, Class Counsel worked extensively with Plaintiffs' oil and natural gas industry experts, Rick Harper, Daniel T. Reineke, and Carter Tannehill, in connection with class certification and in developing their damages methodology. In furtherance of the Motion to Certify, Mr. Reineke and

[8] Class Counsel will address any objections that may be received after this submission in their reply papers to be filed with the Court on June 8, 2021.

[9] *See also* Exs. D-E [App. 266-271] for expenses by category for Seidel Law Firm and Mattingly & Roselius.

Mr. Tannehill both submitted multiple expert reports and sat for a deposition. Class Counsel also worked closely with consulting damages experts, Jane Kidd and James Gray, who calculated potential damages and helped formulate the proposed Plan of Allocation after the Parties reached their agreement in principle to resolve the Action. ¶ 73.

Two other large components of Class Counsel's expenses were the costs of document review and document hosting, totaling $138,616.41, or approximately 23% of total expenses and the costs for court reporters and transcripts, totaling $30,736.07.

In addition, Class Counsel incurred the cost of formal mediation with Judge Folsom ($17,370.60) and the cost of out-of-town travel, meals, and lodging required to prosecute the Action ($28,870.45). The other expenses for which Class Counsel seek payment are the types of expenses necessarily incurred in litigation and routinely charged to clients billed by the hour, including, among others, court fees, process servers, document-production costs, and postage and delivery expenses. The foregoing expense items are not duplicated in the firms' hourly rates.

The Summary Notice and long-form Notice informed Class Members that Class Counsel would apply for Litigation Expenses. The total amount of expenses requested by Class Counsel is $614,210.75, and to date, there has been no objection to the request for expenses.

IV. NAMED PLAINTIFFS' SERVICE AWARD REQUESTS SHOULD BE APPROVED

Each of the four Named Plaintiffs has been committed to pursuing the Class's claims since the outset of the litigation and their efforts were instrumental in achieving the Settlement on behalf of the Class. Service awards encourage individuals to undertake the responsibility of becoming a class representative. Here, Plaintiffs benefitted the Class as a whole and their contribution to this Action was invaluable. Plaintiffs provided a necessary and valued service to the Class by: (i) providing information and input in connection with drafting the complaints; (ii) participating in

discovery and preparing for depositions; (iii) maintaining communication with Class Counsel throughout the litigation; (iv) reviewing the appeal proceedings related to the class certification rulings; and (v) attending a mediation and class certification hearing. *See* Pls.' Decs., Exs. H-K [App. 296-319]. A $20,000 service award for each Named Plaintiff in recognition of their services throughout this six-year litigation is appropriate and well deserved. *See, e.g.*, *Klein*, 705 F. Supp. 2d at 682 (awarding $75,000 service awards to lead plaintiffs, noting the seven-year length of the litigation and plaintiffs' personal participation); *Jenkins*, 300 F.R.D. at 306 (awarding $5,000 each to seven named plaintiffs to be paid from the settlement fund); *Izzio v. Century Golf Partners Mgmt., L.P.*, 2019 WL 10589568, at *12 (N.D. Tex. Feb. 13, 2019).

V. CONCLUSION

Accordingly, for the reasons set forth above, Plaintiffs and Class Counsel respectfully request that this Court grant Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Named Plaintiffs.

Dated: April 27, 2021

Respectfully submitted,

/s/ Joshua L. Hedrick

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CERTIFICATE OF SERVICE

On April 27, 2021, I caused to be electronically submitted the foregoing document with the clerk of court for the U.S. District court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Joshua L. Hedrick
Joshua L. Hedrick