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

IN RE ANADARKO BASIN OIL AND GAS LEASE ANTITRUST LITIGATION	Case No. CIV-16-209-HE

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS

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I. INTRODUCTION

Following nearly three years of highly complex litigation, Co-Lead Counsel have achieved a settlement of $6.95 million on behalf of Plaintiffs and the proposed Settlement Class (the "Class").[1] Class Counsel, experts in this field, have vigorously litigated this complex matter on a purely contingent basis. Having expended thousands of hours in the Class's interests and reached positive results, Plaintiffs and Class Counsel now move for a reasonable attorneys' fee award. All of the relevant factors considered by Tenth Circuit courts—counsel's time and labor litigating the case; any risks accompanying the litigation; the novelty and difficulty of the questions and consequent skill required to litigate the case; the preclusion of other employment due to acceptance of the case; the fees and awards in similar cases; results obtained on behalf of the class; and the experience, reputation, and ability of the attorneys—support Plaintiffs' requested fee. Indeed, a lodestar crosscheck indicates Plaintiffs' fee request represents a *negative* multiplier on their time spent litigating on behalf of the Class, underscoring the reasonableness of the requested award and counseling in favor of the request.

Plaintiffs additionally request reimbursement of Class Counsel's reasonably-

[1] On December 18, 2018, the Court granted preliminary approval of the Settlement, certified the Class (defined below) for purposes of settlement, and appointed Burns Charest LLP, Cohen Milstein Sellers & Toll PLLC, Susman Godfrey LLP, and Schneider Wallace Cottrell Konecky Wotkyns, LLP (collectively, "Co-Lead Counsel")—whom the Court had previously appointed as Interim Co-Lead Class Counsel, *see* ECF No. 163—as Class Counsel for the Settlement Class. *See* Am. Order Granting Plaintiffs' Mot. for Prelim. Approval of Class Action Settlement and Class Cert. for Settlement Purposes, ECF No. 231 (the "Preliminary Approval Order"), at ¶ 4(d). Other experienced antitrust firms, acting under the direction of Class Counsel, have served as counsel for the Class. All Plaintiffs' counsel are collectively referred to as "Class Counsel."

incurred expenses. These costs consist of those that would typically be billed to a fee-paying client and that were incurred for the benefit of the Class. Plaintiffs' request for reimbursement of costs should thus likewise be granted.

Finally, the Class Representatives have steadfastly pursued this case on behalf of the Class, dedicating their personal time to seeking classwide relief even as other members of the Class entered into individual settlements. Their efforts on behalf of the Class deserve to be incentivized and rewarded, and the requested $10,000 awards are well within the reasonable range for similar awards.

Co-Lead Counsel therefore respectfully request that the Court enter an order: (i) awarding attorneys' fees in the amount of one-third of the amount of the settlement—$2,316,666.67; (ii) reimbursing Class Counsel for reasonably incurred litigation expenses in the amount of $326,591.33; and (iii) approving incentive awards of $10,000 for each of the six Class Representatives.[2]

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[2] The Court appointed named Plaintiffs Edward Clark, Inc. ("Edward Clark"), Curtis Crandall, Amy Herzog, Mahony-Killian, Inc. ("Mahony-Killian"), Ida Powers, and Brian Thieme (collectively, "Plaintiffs") as Class Representatives on behalf of the Settlement Class. *See* Preliminary Approval Order at ¶ 4(d). The Settlement Class is defined as:

> All persons and entities who sold, leased or otherwise assigned or transferred to Chesapeake or SandRidge, or any of their respective predecessors, subsidiaries, agents (such as landmen) or affiliates, mineral rights and/or working interests on lands within the Mississippi Lime Play, at any time between December 27, 2007 and April 1, 2013. For purposes of this Settlement Class, the Mississippi Lime Play includes all depths and formations within the Oklahoma counties of Alfalfa, Blaine, Creek, Dewey, Ellis, Garfield, Grant, Harper, Kay, Kingfisher, Logan, Lincoln, Major, Noble, Osage, Pawnee, Payne, Tulsa, Washington, Woods, and Woodward, and the Kansas counties of Barber, Butler, Chase, Chautauqua, Cheyenne,

II. BACKGROUND

Plaintiffs' initial Complaint, as well as their subsequently filed Consolidated Amended Complaint, alleged that Chesapeake Energy Corp., Chesapeake Exploration, L.L.C. (together, "Chesapeake"), Tom L. Ward, and SandRidge Energy Corp. ("SandRidge") conspired to fix lease bonuses in the Mississippi Lime Play of the Anadarko Basin Region, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. The first hurdle came almost immediately: Shortly after Plaintiffs filed their initial Complaint, SandRidge filed for Chapter 11 bankruptcy. The resulting stay substantially delayed Plaintiffs' ability to pursue their claims, creating uncertainty as to their ability to ultimately obtain relief, and significantly reducing the amount of treble damages recoverable by the Class. Nevertheless, Class Counsel diligently pursued the case on behalf of the Class, moving to reopen the matter in October 2016 and vigorously litigating it thereafter, ultimately achieving a successful settlement in August 2018.

Had this case proceeded to summary judgment or trial, it would have faced significant obstacles. Chesapeake would have continued to argue, as it has all along, that the conspiracy consisted of a small number of isolated bid-rigs, and nothing more. SandRidge's bankruptcy and its purported limited document maintenance would have

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Clark, Coffey, Comanche, Cowley, Dickinson, Edwards, Elk, Finney, Ford, Gove, Grant, Gray, Greenwood, Harper, Harvey, Haskell, Hodgeman, Keamy, Kingman, Kiowa, Lane, Logan, Lyon, Marion, McPherson, Meade, Montgomery, Morris, Ness, Pawnee, Pratt, Rawlins, Reno, Rice, Rush, Saline, Scott, Sedgwick, Seward, Sheridan, Sherman, Stafford, Stevens, Sumner, Thomas, Trego, Wallace, Wichita, Wilson, and Woodson.

See id. at ¶ 3.

undermined Plaintiffs' ability to obtain critical evidence needed to support their claims. Chesapeake's CEO and the central figure in the alleged conspiracy, Aubrey McClendon, passed away around the time Plaintiffs filed suit and left a seemingly minimal paper trail, hampering Plaintiffs' ability to discover the full scope of Defendants' misconduct. Chesapeake, had it satisfied its cooperation obligations to Class Counsel under the federal amnesty program, would have only faced single damages (not treble damages) exposure for its own commerce (and not that of its co-conspirators).

Rather than assisting Plaintiffs' case, a Department of Justice investigation with which Chesapeake cooperated simply allowed Chesapeake to identify Plaintiffs' key large class members and obtain releases from them, making it more difficult for Plaintiffs to acquire evidence from those potential class members and significantly reducing Defendants' monetary exposure to the Class. Added to these issues were the inherent challenge of proving a conspiracy that inflicted widespread harm on the Class, the complex nature of oil and gas law, and the necessary risk of taking a case on a purely contingent basis. Given all these hurdles, the successful settlement of this case is in the best interests of the Class.

During the course of the case, Class Counsel spent a total of 10,146 hours actively prosecuting Plaintiffs' claims. Class Counsel has received no compensation for their work in these hours, which they were unable to spend on other matters. Class Counsel further expended $163,319.76 on expert fees to ensure Plaintiffs and the Class would have the evidence needed to support their claims, as well as $343,595.90 in other necessary litigation expenses.

Class Counsel has received no reimbursement for any of these costs. As one court has explained, "anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation." *In re Southeastern Milk Antitrust Litig*., No. 08-MD-1000, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013). Thus, "failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases." *Id*.

Those principles are especially applicable here. Despite conducting an investigation that yielded substantial evidence of wrongdoing—including Chesapeake's own admission to potentially anticompetitive conduct—the Department of Justice declined to bring formal charges against Defendants. Thus, absent Plaintiffs' suit, Defendants' actions would go unaccounted for, and the injury to the Class entirely unredressed. Therefore, the significant time and effort spent by Class Counsel should be compensated. As all the relevant consideration make clear, an award of one-third of the settlement fund after payment of expenses is fair and reasonable compensation.

For all of these reasons and as detailed below, Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Costs, and Incentive Awards should be granted.

III. ARGUMENT

A. Plaintiffs Request a Reasonable Amount of Attorneys' Fees.

Class Counsel's fee request satisfies all applicable legal and factual requirements and is justified in the circumstances of this case. The U.S. Supreme Court has "recognized consistently that . . . 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As courts have further explained, in order "[t]o make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *City of Providence v. Aeropostale, Inc.*, No. 08-MD-1000, 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (citation omitted), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Here, Plaintiffs seek an award of $2,316,666.67, which equals one-third (33.33%) of the settlement. The relevant facts and legal precedent both show that this request is reasonable.

1. Calculating the Award as a Percentage of the Fund Award Is Reasonable.

Attorneys' fees in a common fund case may be calculated as either a percentage of the common fund or by using a lodestar calculation. The Tenth Circuit favors the common fund approach, as opposed to the lodestar method, "because a percentage of the common fund is less subjective than the lodestar plus multiplier approach, matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis." *Shaw v. Interthinx, Inc.*, No. 13-CV-01229, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015) (internal quotations, citation omitted); *see In re Sandridge Energy, Inc.*, No. CIV-13-102-W, 2015 WL 11921422, at *2 (W.D. Okla. Dec. 22, 2015), *aff'd sub nom. In re SandRidge Energy, Inc.*, 875 F.3d 1297 (10th Cir. 2017) (percentage-of-the-fund method is the "preferred" method for awarding class counsel fees

in the Tenth Circuit); *In re: Urethane Antitrust Litig. (Urethane III)*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016) (same); *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-CV-01543, 2010 WL 5387559, at *2 (D. Colo. Dec. 22, 2010) (recognizing the "prevailing trend in awarding attorney fees in common fund cases is to award fees based on a percentage of the common fund obtained for the benefit of the class"). Furthermore, the percentage method best aligns the interests of class counsel with the represented class. *Vaszlavik v. Storage Corp*., No. 95-B-2525, 2000 WL 1268824, at *1 (D. Colo. Mar. 9, 2000). Thus, using a percentage of the settlement fund to calculate the award accords with prevailing practice in this Circuit and is reasonable.

2. All Relevant Factors Confirm That an Award of One-Third of the Settlement Fund Is Reasonable.

To evaluate the reasonableness of a percentage-of-the-fund fee request, the Tenth Circuit considers the following so-called *Johnsons* factors in common fund cases:

> (1) the time and labor involved; (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) any prearranged fee—this is helpful but not determinative; (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.

See Brown v. Phillips Petroleum Co., 838 F.2d 451, 454-55 (10th Cir. 1988) (citing *Johnson v. Georgia Hwy. Expr., Inc*., 488 F.2d 714, 717-19 (5th Cir. 1974)). Rarely do all of the *Johnson* factors apply to a common fund case. *Id*. at 456.

Here, all relevant factors weigh in favor of Class Counsel's request for an award of attorneys' fees amounting to one-third of the settlement fund.

*a) The Exceptional Results Obtained on Behalf of the Class Justify the Award (*Johnson *Factor Eight).*

When assessing a fees award in a common fund case, courts generally afford the greatest weight to the results achieved for the benefit of the class; indeed, "this factor is often 'decisive.'" *Lucken*, 2010 WL 5387559, at *3 (quoting *Brown*, 838 F.2d at 456). Here, Class Counsel obtained an efficient and certain resolution to this action in the face of complex factual issues, numerous practical and legal obstacles, and Defendants that aggressively opposed Plaintiffs' claims. In light of the many challenges Plaintiffs faced in vindicating their rights, the economic benefit to the Class resulting from the settlement constitutes an exceptional result for the Class.

As a consequence of the settlement negotiated by Class Counsel during multiple mediation sessions before a retired federal judge, Defendants will pay $6,950,000 for the benefit of the Class. The immediate certainty and finality of settlement is, itself, greatly to the Class's benefit: "The class . . . is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *Childs v. Unified Life Ins. Co*., No. 10-CV-23-PJC, 2011 WL 6016486, at *13 (N.D. Okla. Dec. 2, 2011); *see Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW, 2018 WL 2296588, at *5 (E.D. Okla. Mar. 27, 2018) ("[T]he immediacy and certainty of this recovery, when considered against the very real

risks of continuing to a difficult trial and possible appeal, weighs in favor of the Fee Request.").

Furthermore, following dissemination of notice to more than 13,000 potential class members, not a single member has objected to the settlement or requested to opt out of the settlement class as of the filing of this brief—further demonstrating the reasonableness of the settlement as well as Counsel's requested fee award. *See In re Crocs, Inc. Sec. Litig.*, No. 07-CV-02351, 2014 WL 4670886, at *5 (D. Colo. Sept. 18, 2014) (lack of objections weighs in favor of requested award); *Anderson v. Merit Energy Co*., No. 07–cv–00916, 2009 WL 3378526, at *4 (D. Colo. Oct. 20, 2009) (same); *In re Prudential Sec. Inc. Ltd. P'ships Litig*., 985 F. Supp. 410, 416 (S.D.N.Y. 1997) (lack of objections is "one of the most important" factors in determining reasonableness); *see also In re Blech Sec. Litig*., No. 94 CIV. 7696, 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002) (no objections and *de minimis* opt-outs supported one-third-of-the-fund attorneys' fee award).

Certainty is a benefit regardless of the risks of continued litigation because it provides an immediate remedy to injured Class members. In the instant case, however, as explained further below, the risks of continued litigation were many, rendering the $6.95 million recovery negotiated by Class Counsel a significant achievement warranting an award of attorneys' fees amounting to one-third of the settlement fund.

*b) The Difficulty of the Legal and Factual Questions and the Risks Involved in Bringing this Matter Justify the Award (*Johnson *Factors Two, Three, and Ten).*

Conspiracies like that alleged by Plaintiffs are, by their very nature, difficult to prove. *See, e.g., Hamilton v. Arnold*, 29 F. App'x 614, 616 (1st Cir. 2002) (observing "the *sine qua non* of a conspiracy, the agreement, is exceedingly difficult to prove directly"). This difficulty is particularly present here, where Plaintiffs would have to prove an overarching conspiracy impacting lease prices across a wide geographic area over a number of years based on a small number of discrete bid-rigs and additional circumstantial evidence. Accordingly, even if Plaintiffs were able to get a litigation class certified and survive summary judgment, at trial Plaintiffs would have to sway a jury based only on circumstantial evidence of the wider scope of Defendants' anticompetitive scheme. Proving the conspiracy would be made even more difficult (and costly) by the facts that none of the Chesapeake employees whom Plaintiffs interviewed (pursuant to Chesapeake's cooperation obligations) gave information supporting the existence of a wider conspiracy, and that SandRidge and Mr. Ward—who were not charged by the Justice Department—vehemently denied their participation in the alleged conspiracy.

From an evidentiary standpoint, as Plaintiffs learned during discovery, SandRidge does not maintain an electronic database that identifies each bonus payment it made to individual lessors, much less one that identified the lessors' contact information. Burns Decl. ¶ 7 n.3. These bonuses are at the heart of Plaintiffs' price-fixing claim and would have been needed as circumstantial proof of a larger conspiracy, as well as class-wide damages. Consequently, amassing even the circumstantial evidence Plaintiffs needed to

prove Defendants' conduct would at best be time consuming and expensive, and at worst extremely difficult.

Plaintiffs' evidentiary challenges were amplified by the fact that SandRidge declared Chapter 11 bankruptcy shortly after Plaintiffs filed their Complaint, leading to SandRidge's ultimate dismissal as a defendant in this case. *See* ECF No. 95. With SandRidge no longer a party, Plaintiffs' ability to obtain discovery from this key alleged co-conspirator was significantly limited. SandRidge's bankruptcy therefore further increased the risk that the Class would not be able to recover the full extent of its injuries.

Additionally, Defendants' efforts to undermine Plaintiffs' prosecution of their claims further compounded the challenges to successful recovery at trial. Chesapeake openly admitted to contacting *more than 100* members of the proposed Class, including six large corporate members whose leases and producing properties up for bid were the subject of collusive communications between Chesapeake and Sandridge. *See* Plfs.' Mot. for PO, ECF No. 172, at 3. Chesapeake also admitted to sending letters and checks to 135 individuals and entities from Waynoka, Oklahoma who "may have been affected" by a 2008 Lease Sharing Agreement between SandRidge and Chesapeake in exchange for releasing any potential claims they might have. *Id*. Chesapeake's communications with potential Class members—which Class Counsel moved to restrain, *see id*.—made it more challenging for Plaintiffs to collect evidence efficiently in support of their claims and significantly reduced Defendants' financial exposure to the Class.

Chesapeake's admission, in response to an investigation by the Department of Justice, to a limited number of anticompetitive agreements created a further challenge for

the prosecution of Plaintiffs' claims. Having admitted to ten isolated anticompetitive transactions, Chesapeake vehemently contended its wrongdoing was limited to *solely* the ten agreements uncovered in the DOJ investigation, and that no broader wrongdoing occurred and no broader class-wide injury existed. *See, e.g.,* ECF No. 181 ¶¶ 1-4.

Finally, with the best evidence of Defendants' collusion exposed by the DOJ, Chesapeake entered into individual settlements and releases with each of the relatively small number of identified victims of Defendants' conspiracy, making it more difficult for Plaintiffs to rely on these instances of anticompetitive conduct to provide support for Plaintiffs' theory of a wider conspiracy.

Moreover, Class Counsel took on significant risk simply by accepting this case on a purely contingent basis. A contingent fee shifts the "risk of loss from plaintiff to plaintiff's counsel," and awarding counsel one-third of the common fund appropriately compensates for the assumption of that substantial risk. *Nieberding v. Barrette Outdoor Living, Inc*., 129 F. Supp. 3d 1236, 1250 (D. Kan. 2015) (awarding one-third of the common fund) (citation omitted); *see Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2006 WL 2729260, at *6 (D. Colo. July 27, 2006) ("Given the risk of non-recovery, this factor weighs heavily in favor of the requested fee.") (citation omitted); *In re Stanley v. U.S. Steel Co.*, No. 04-cv-74654, 2009 WL 4646647, at *3 (E.D. Mich. Dec. 8, 2009) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.") (internal quotations and citation omitted). Given the many difficulties facing successful prosecution of this suit and the very real resulting risks, *Johnson* factors two, three, and ten each support the requested award.

*c) An Award of One-Third Is Justified by the Customary Fee and Awards in this Circuit (*Johnson *Factor Twelve).*

In the Tenth Circuit, a "contingency fee of one-third is relatively standard in lawsuits that settle before trial." *Lewis v. Wal-Mart Stores, Inc.,* No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding fee of one-third of settlement fund). This standard is borne out by a multitude of decisions from district courts within this Circuit approving awards in the amount of one-third of the settlement fund. *See, e.g., Urethane III*, 2016 WL 4060156, at *8 (one-third of common fund out of $835 million settlement); *McNeely v. Nat'l Mobile Health Care, LLC,* No. CIV-07-933-M, 2008 WL 4816510, at *15 (W.D. Okla. Oct. 27, 2008) (awarding 33% and noting "[f]ees in the range of at least one-third of the common fund are frequently awarded"); *Shaulis v. Falcon Subsidiary LLC*, No. 18-CV-00293, 2018 WL 4620388, at *2 (D. Colo. Sept. 26, 2018) (approving one-third of the fund award as "consistent with the rule followed by District Courts in the Tenth Circuit."); *Anderson v. Merit Energy Co.*, No. 07-cv-00916, 2009 WL 3378526, at *3 (D. Colo. Oct. 20, 2009) ("The customary fee to class counsel in a common fund settlement is approximately one-third of the economic benefit bestowed on the class."); *see also Bollenbach Enterprises Ltd Pshp. v. Okla. Energy Acq. LP*, No. 5:17-CV-00134-HE, at *2-3 (W.D. Okla. March 12, 2018) (awarding one-third of the settlement fund); *Lucken*, 2010 WL 5387559, at *5 (customary fee in common fund settlement is one-third the total economic benefit to the class); *Cimarron Pipeline Construction, Inc. v. Nat'l Council on Compensation Ins.*, 1993 WL

355466, at *2 (W.D. Okla. June 8, 1993) (fees of 30-40% of recovery are common in contingency cases).[3]

Awards granted in similar class action cases make clear that a one-third-of-the-fund fee award is well-within the common range, and indeed is "presumptively reasonable." *Vaszlavik*, 2000 WL 1268824, at *4. Such an award is reasonable here.

d) *The Experience, Reputation, and Ability of Class Counsel Justify the Award (*Johnson *Factor Nine).*

In light of the many obstacles facing successful prosecution of the Class's claims, Class Counsel had to exercise considerable skill, ingenuity, and determination to resolve this case successfully. As well-respected leaders in the fields of antitrust and class action litigation, Co-Lead Counsel were well-equipped to do so, as detailed below.

Burns Charest LLP

Burns Charest has significant experience managing complex antitrust class actions. Courts have routinely appointed Burns Charest to leadership positions in antitrust class actions that involve price-fixing, bid-rigging, and market allocation in different

[3] *See also Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, 2015 WL 2254606, at *3 (W.D. Okla. May 13, 2015) (40% of common fund); *Campbell v. C.R. England, Inc.*, 2015 WL 5773709, at *7 (D. Utah Sept. 30, 2015) (33.3% of common fund); *Whittington v. Taco Bell of Am., Inc.*, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (awarding fees and costs totaling 39% of settlement amount); *In re Urethane Antitrust Litig.* (*Urethane II*), No. 04-md-1616 (D. Kan. Dec. 13, 2011), ECF No. 2210 (awarding one-third of settlement fund); *In re Urethane Antitrust Litig.* (*Urethane I*), No. 04-md-1616 (D. Kan. July 22, 2009), ECF No. 995 (awarding one-third of settlement fund); *Williams v. Sprint/United Mgmt. Co.*, 2007 WL 2694029, at *6 (D. Kan. Sept. 11, 2007) (35% of settlement fund); *In re United Telecommc'ns Sec. Litig*., 1994 WL 326007, at *3 (D. Kan. June 1, 1994) (33.3% of settlement fund).

Additionally, "[t]he typical fee award" in "royalty underpayment class actions in Oklahoma state court is 40%," and federal courts in Oklahoma similarly regularly award fees amounting to 40% in such actions. *Chieftain Royalty*, 2018 WL 2296588, at *7.

industries, including: *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices, and Antitrust Litig.*, MDL 2785 (D. Kan.), *In re German Automotive Manufacturers Antitrust Litig.*, MDL 2796 (N.D. Cal.), *In re Vehicle Carrier Services Antitrust Litig.*, MDL 2471 (D.N.J.); *In re Crude Oil Commodity Futures Litig.*, No. 11-cv-03600 (S.D.N.Y.); *In re Domestic Airline Travel Antitrust Litig.*, MDL 2656 (D.D.C.), and *In re Dental Supplies Antitrust Litig.*, No. 16-cv-696 (E.D.N.Y.). Burns Decl. Ex. 3 ¶ 5.

In addition to its expertise in antitrust actions in different industries, Burns Charest is also highly experienced in oil and gas litigation, and has previously recovered significant sums in unpaid royalties—including previously from Defendant Chesapeake—on behalf of its clients. *Id.* ¶ 6. Burns Charest's experience with price-fixing antitrust cases and in oil and gas litigation give Burns Charest significant insight into the industry's business practices, terms, and litigation strategies, which it brought to bear in successfully pursuing Plaintiffs' claims here.

Cohen Milstein Sellers & Toll PLLC

For over 45 years, Cohen Milstein has litigated some of the nation's most complex class cases and has recovered billions of dollars in damages for injured plaintiffs. Burns Decl. Ex. 6 ¶ 3. With over 90 lawyers and offices in Washington, D.C. and six other cities, Cohen Milstein is one of the largest, most successful, and most respected plaintiffs' class action firms in the country. *Id*. Notable recent successes as lead or co-lead counsel include negotiating an $835 million settlement with Dow Chemical after convincing a jury to award the largest price-fixing verdict in U.S. history (more than $1

billion after trebling) in *In re Urethane Antitrust Litigation*; achieving $566 million in settlements in *In re Electronic Books Antitrust Litigation* (nearly twice the damages suffered by the class); and recovering over $1.5 billion in settlements in residential mortgage-backed securities class actions. *Id*.

The Trial Lawyer has named Cohen Milstein as one of "America's 25 Most Influential Law Firms," the firm has been ranked by *Legal 500* as a "Leading Plaintiff Class Action Antitrust Firm" for the past eight years, and *Law360* has named it one of the "Most Feared Plaintiff's Firms" for the past three years. *Id*. ¶ 4. *The National Law Journal* has repeatedly selected the firm to its Plaintiffs' Hot List, including for 2015 and 2016, and Law360 named Cohen Milstein a "Competition Group of the Year" in 2014 – the first time the publication ever included a plaintiff-side firm amongst its honorees – as well as a "Class Action Group of the Year" in 2015. *Id*.

Susman Godfrey LLP

Since the firm's founding in 1980, Susman Godfrey has served as lead counsel in hundreds of antitrust class actions and other complex commercial disputes in courts throughout the country. Burns Decl. Ex. 29 ¶ 5. The firm has represented clients in some of the largest and most complex cases ever litigated and earned a reputation for handling those cases effectively and efficiently. In recognition of its successes, Susman Godfrey has been recognized as "Litigation Boutique of the Year" by *The American Lawyer*, listed as one of "America's Elite Trial Lawyers" by *The National Law Journal*, and named one the "Most Feared" litigation firms in the nation by *Law360*. *Id*.

Susman Godfrey has tried more than a dozen significant antitrust cases to a jury, yielding over $1 billion in verdicts, and has been appointed to serve as lead or co-lead counsel in numerous antitrust class actions and other class actions, including: *In re Qualcomm Antitrust Litig.*, MDL 2773 (N.D. Cal.,); *In re Automotive Parts Antitrust Litig.*, MDL 2311 (E.D. Mich.); *In re Toyota Motor Corp. Unintended Acceleration Marketing Sales Practices, and Product Liability Litig.*, MDL 2151 (C.D. Cal.); *In re Vitamin C Antitrust Litig.*, MDL 1738 (E.D.N.Y.); *In re Crude Oil Commodity Futures Litig.*, No. 11-cv-3600 (S.D.N.Y.); *White v. Nat'l Collegiate Athletic Ass'n*, No. 06-cv-0999 (C.D. Cal.); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, MDL 2262 (S.D.N.Y.); *In re Ready-Mixed Concrete Antitrust Litig.*, 05-cv-00979 (S.D. Ind.); *In re Municipal Derivatives Antitrust Litig.*, MDL 1950 (S.D.N.Y.); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, MDL 1468 (D. Kan.); *In re Lease Oil Antitrust Litig.*, No. 10-40119 (S.D. Tex.); *In re Korean Air Lines Co. Antitrust Litig.*, No. 08–56385 (C.D. Cal.); *In re Vitamins Antitrust Litig.*, MDL 1285 (D.D.C.); *In re Processed Egg Products Antitrust Litig.*, MDL 2002 (E.D. Pa.); and *In re Commercial Explosives Antitrust Litig.*, MDL 1093 (D. Utah). *Id.* ¶ 6.

Schneider Wallace Cottrell Konecky Wotkyns, LLP

Schneider Wallace is experienced and successful in complex federal class actions. Among other things, it has recently obtained a $75 million settlement on behalf of a class of retirement investors in *In re JP Morgan Stable Value Fund ERISA Litigation* (final approval pending). Burns Decl. Ex. 25 ¶ 3. It has achieved settlements of two related class actions against Northern Trust Corp. for a total of $60 million, and recently

obtained a class settlement with relief valued at $1.367 billion against the City of Los Angeles. *Id.*

In the antitrust field, Schneider Wallace is actively involved in many of the most significant matters currently pending in federal court. It represents a putative class of indirect purchasers in *Contant v. Bank of America Corp.* (S.D.N.Y.). a case alleging price fixing in the foreign exchange market and has preliminarily obtained settlements from two defendants. Schneider Wallace also represents major corporations as individual plaintiffs in antitrust matters, including one of the nation's largest health plans in multidistrict litigation alleging price fixing in the generic pharmaceuticals market and three major industrial aluminum purchasers bringing price fixing claims. *Id.* ¶ 4.

* * *

The experience, reputation, and ability of Class Counsel were essential to the success in this litigation. From the outset, Class Counsel used their expertise and skill to obtain maximum relief for the Class given the particular factual and legal complexities of this case. *Cf. In re Qwest Commc'ns Int'l, Inc. Sec. Litig*., 625 F. Supp. 2d 1143, 1150 (D. Colo. 2009) (noting "lead counsel should be rewarded for their successful application of their skill and expertise" and affording this factor "significant weight").

Had the parties not reached a settlement, Class Counsel would have continued to litigate these complex issues before this Court. Defendants have vigorously denied any classwide wrongdoing, the appropriateness of certification other than for settlement purposes, or the existence of damages to the Class. Given the significant risks and uncertainty associated with this highly disputed action, it is a testament to Class

Counsel's skill and experience that they were able to negotiate a settlement providing substantial economic benefit to the Class.

*e) The Time and Labor Involved in Bringing this Case More than Justify the Award (*Johnson *Factor One).*

This litigation has spanned three years and has involved motion practice, substantial fact discovery, expert analysis, multiple days of mediation, and arduous arms-length settlement negotiations. Class Counsel has drafted and filed motions and pleadings; taken and defended depositions of key witnesses and Class Representatives; interviewed Chesapeake's most knowledgeable witnesses; attended a full-day proffer outlining Chesapeake's knowledge of collusive conduct; reviewed millions of pages of documents produced by Defendants; and served and responded to numerous requests for written and documentary discovery. Burns Decl. ¶¶ 6–8.

Counsel for Plaintiffs further briefed and attended mediation on behalf of the Class on two separate occasions, each of which lasted a full day, and which lead to extended further negotiations—and ultimately to successful settlement on behalf of the Class. Burns Decl. ¶¶ 6–8. The substantial time and effort required to achieve recovery for the Class warrants the fee award requested by Plaintiffs. Burns Decl. ¶¶ 9–11.

A lodestar crosscheck against the requested award amount confirms the reasonableness of the request: The value of the time Class Counsel devoted to the case represents a *significantly greater* amount than they seek as a fee award. *See, e.g., Lucken*, 2010 WL 5387559, at *3 (using lodestar crosscheck to assess reasonableness of a one-third-of-the-fund fee request). This crosscheck involves calculating counsel's lodestar,

and typically adding an "additional percentage to compensate for [the] risk" of taking a case on contingency without assured compensation. *Vaszlavik*, 2000 WL 1268824, at *1.

The crosscheck demonstrates the reasonableness of the fee request here, as Class Counsel would receive a "*negative* multiplier," i.e., only 46% of the total lodestar spent litigating this case, assuming the Court grants the one-third fee request. Class Counsel spent a combined 10,146 hours litigating this action. Burns Decl. ¶ 35 & Exs. 1-31. Counsels' time is reasonable given the length of the action, the hard-fought nature of the litigation, and the complexity of the issues involved. The total lodestar, derived by multiplying the hours worked by each firm's attorneys and professional staff by each firm's historical hourly rates, equals $ 4,991,713.25.[4] *Id*.

While courts typically apply a multiplier ranging from one to four to the lodestar amount in common fund cases, *see* NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when

[4] "Historical rates" refers to the billable rates of Class Counsel at the time the relevant services were performed, as opposed to using current attorney rates, even for time spent previously when those rates may have been lower. Class Counsel have used the more conservative, historical rate method even though courts within this Circuit have approved the use of current rates when calculating lodestar to account for inflation and delayed payment. *See, e.g., Cook v. Rockwell Int'l Corp*., 2017 WL 5076498, at *4 (D. Colo. Apr. 28, 2017) (approving rate with lodestar crosscheck based on current rates); *Black Gold, Ltd. v. Rockwool Indus.*, 529 F. Supp. 272, 276 (D. Colo. 1981) (courts will "use current hourly rates as a rough adjustment for the effects of delay and inflation" and collecting cases). Class Counsel's use of historical rather than current rates therefore reflects the conservative nature of Class Counsel's calculated lodestar, which further supports the reasonableness of the requested fee.

Plaintiffs have included the necessary hours spent by both attorneys and paralegals in their lodestar calculation, as "[t]ime spent by paralegals and other professionals frequently is billed to clients by the hour. The assistance of such professionals is mandatory" in a large class action. *In re Qwest Commc'ns Int'l*, 625 F. Supp. 2d at 1149.

the lodestar method is applied"), the award requested here is *less* than Plaintiff's Counsel's lodestar—as explained above, a "negative multiplier."

Accordingly, a lodestar cross-check confirms that the amount requested under the percentage method is "inherently reasonable." *See Hapka v. CareCentrix, Inc*., No. 2:16-CV-02372-KGG, 2018 WL 1879845, at *2 (D. Kan. Feb. 15, 2018) (a fee award of negative multiplier on Class Counsel's lodestar is "inherently reasonable"); *Barr v. Qwest Commc'ns Co.*, No. 1:01-CV-00748, 2013 WL 141565, at *5 (D. Colo. Jan. 11, 2013) (negative multiplier on counsels' lodestar showed fee award was "far from excessive").

*f) The Contingent Nature of Recovery, Precluding Other Employment and Requiring the Outlay of Resources Justifies the Award (*Johnson *Factors Four and Six).*

The fourth and sixth *Johnson* factors—the extent to which Class Counsel was precluded from other employment, and whether the fee is fixed or contingent—also support the requested attorneys' fees. As noted above, Class Counsel assumed significant risk by taking this action on a purely contingent basis. "The contingent nature of counsel's compensation has long been recognized as justifying a larger fee." *In re King Res. Co. Sec. Litig*., 420 F. Supp. 610, 632 n.8 (D. Colo. 1976); *see supra*, § III.A.2.b. If Defendants successfully opposed certification of the class, or ultimately won on summary judgment or at trial, the contingent nature of this case would leave Plaintiffs' Counsel entirely uncompensated for their significant efforts and litigation expenses.

Moreover, as is generally the case with class action litigation, dedicating thousands of hours to this action necessarily precluded Class Counsel from working on other matters. *See Lucas*, 2006 WL 2729260, at *6 ("Large-scale class actions . . .

necessarily require a great deal of work, and a concomitant inability to take on other cases."). And the substantial amount of money Class Counsel advanced to fund this litigation was unavailable to them to use for other purposes. These factors likewise support the reasonable fee requested by Plaintiffs.

B. Plaintiffs' Expenses Are Reasonable and Were Necessarily Incurred.

It is well established that in common fund cases, expenses that would normally be billed to a private client may be recovered from the common fund. *See* 5 NEWBERG ON CLASS ACTIONS §16:5 (5th ed.) (all "reasonable expenses normally charged to a fee paying client" are compensable) (collecting cases). "As with attorneys' 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." *Vaszlavik*, 2000 WL 1268824, at *4.

To date, Class Counsel have incurred $326,591.33 in unreimbursed litigation expenses while prosecuting this action. *See* Burns Decl. ¶¶ 43 and Exs. 1-31 (expense summaries by firm and category). A substantial portion of the litigation expenses, $163,319.76, were for expert work, Burns Decl. ¶ 41, which courts consider "essential to the litigation and invaluable to the Class." *See In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) ("Courts routinely award [expert] costs."); *In re Crocs*, 2014 WL 4670886, at *5 (noting that fees for experts being among the "largest expenditures" is an "appropriate use of resources" in class action case).

Plaintiffs' expert economist in this case was necessary to the case's effective prosecution and successful resolution, particularly in light of the nature of Plaintiffs' claims. Because Defendants concealed their conspiracy and documentary discovery

provided little direct evidence of their anticompetitive collusion, Plaintiffs relied on the analysis performed by its expert to support their claims with respect to violation and damages and relied on this analysis during both of its mediation sessions.

Class Counsel also incurred significant expenses to establish and maintain databases for the documents and data produced in this litigation. Burns Decl. ¶ 41. Finally, Class Counsel incurred other expenses that would typically be billed to fee-paying clients, including: (i) mediator fees; (ii) court fees; (iii) online factual and legal research; (iv) court reporters and transcripts; (v) travel and meals; and (vi) other necessary expenses, such as postage and delivery. Burns Decl. ¶ 41.[5] These collective expenses were reasonably incurred and expended for the direct benefit of the Class and should therefore be reimbursed. *See, e.g., Yang v. Focus Media Holding Ltd*., No. 11-cv-9051-CM, 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (approving mediator fees, expert fees, computer research, photocopying, postage, meals, and filing fees). Class Counsel's request for reimbursement of litigation costs should thus be granted.

C. Plaintiffs Request Reasonable Incentive Awards of $10,000.

Courts have long held that private class action suits are critical in enforcing the antitrust laws. *See, e.g., Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp*., 456 U.S. 556, 573 n.10 (1982) (noting "private suits are an important element of the Nation's antitrust enforcement effort"). Accordingly, "[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the

[5] Class Counsel paid an assessment into a general litigation fund (the "Litigation Fund") from which various necessary expenses were paid. Burns Decl. ¶ 36. The largest of these disbursements from the Litigation Fund was for expert fees. *Id*. ¶ 42.

class." 5 NEWBERG ON CLASS ACTIONS § 17:1 (5th ed.). These awards "encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Lachney v. Target Corp*., No. CIV-03-1685-HE, 2010 WL 11509187, at *2 (W.D. Okla. Sept. 16, 2010) (citation omitted); *Lucken*, 2010 WL 5387559, at *6 ("[I]ncentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class.").

Here, the requested service awards are well-deserved. Named Plaintiffs Edward Clark, Curtis Crandall, Amy Herzog, Mahony-Killian, Ida Powers, and Brian Thieme, each expended their time and efforts to facilitate this litigation: They were required to search for, collect, and provide documents in discovery, propound interrogatory responses, and sit for interviews with Counsel. Burns Decl. ¶¶ 45–46. Mahony-Killian, Ida Powers, and Brian Thieme sat for depositions, which required hours for the deposition itself and additional time spent preparing, and the remaining representatives' depositions were in the process of getting scheduled when settlement occurred. *See In re Universal Serv. Fund Tel. Billing Practices Litig*., No. 02-MD-1468, 2011 WL 1808038, at *2 (D. Kan. May 12, 2011) (awarding $10,000 incentive award where contribution included providing documents, testifying, and consulting with counsel). Moreover, the Class Representatives continued to pursue the rights of the Class while other Class members withdrew and entered into individual settlements; without their persistence, classwide relief could not have been achieved.

The requested incentive awards are also reasonable in light of the amounts typically awarded in common fund class action cases. *See, e.g., Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 WL 4867715, at *3 (W.D. Okla. Oct. 12, 2012) (granting awards up to $40,000); *McNeely*, 2008 WL 4816510, at *16 (preliminarily approving $15,000 award); *Lucken*, 2010 WL 5387559, at *6 ($10,000 award).[6] In recognition of the efforts of the Class Representatives, the Court should grant the $10,000 requested incentive awards.

IV. CONCLUSION

For the reasons stated above, Plaintiffs and Class Counsel respectfully request that the Court approve Plaintiffs' Motion and enter an order awarding (i) attorneys' fees in the amount of one-third of the $6.95 million Settlement Fund, $2,316,666.67; (ii) reimbursement of reasonably incurred expenses of the firms acting as Class Counsel in this litigation in the amount of $326,591.33; and (iii) incentive awards of $10,000 for each of the six Class Representatives.

Dated: March 21, 2019

Respectfully submitted,

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[6] *See also Childs*, 2012 WL 13018913, at *8 ($10,000 award); *Ryskamp v. Looney*, No. 10-CV-00842, 2012 WL 3397362, at *6 (D. Colo. Aug. 14, 2012) ($50,000 incentive award paid out of $4 million pre-trial settlement); *In re Universal*, 2011 WL 1808038, at *2 ($10,000 award); *Rausch v. Hartford Fin. Servs. Grp.*, No. 01-CV-1529-BR, 2007 WL 671334, at *3 (D. Or. Feb. 26, 2007) ($10,000 award).

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was duly served electronically on all known counsel of record through the Court's Electronic Filing System on March 21, 2018.

By: */s/ Warren Burns*
Warren Burns