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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

MONTANA LAND AND MINERAL OWNERS ASSOCIATION, INC., *et al.*, *Plaintiffs,* vs. DEVON ENERGY CORPORATION, DEVON LOUISIANA CORPORATION, and DEVON GAS SERVICES, L.P., *Defendants.*	NO. CV-05-30-H-DWM-RKS **PLAINTIFFS' PETITION FOR FEES AND COSTS**

Plaintiffs, the Montana Land and Mineral Owners Association, Inc. ("MLMOA"), Arnold Hokanson, Lou Lucke, The Lucke Company, Julie Strausser, Cathy Bessette, Harry Olson, Donald Boyce and Marla Boyce (collectively, "the plaintiffs"), by their counsel, submit this Petition for Fees and Costs in accordance with the Court's order of June 15, 2007 and the Court's request during the hearing on June 8, 2007 in which it granted plaintiffs' Motion for Preliminary Approval of the settlement. At that time, the Court stated that it was inclined to approve a contingency fee for class counsel based on the value of the common fund and the injunctive relief achieved in this settlement. The Court requested that plaintiffs' counsel submit affidavits setting out their fees and costs so that the Court and class members would be adequately informed concerning possible alternative methods of calculating fees. Plaintiffs

therefore submit this Petition and affidavits from each of the four firms representing the plaintiffs and class.

I. AWARDING A CONTINGENCY FEE IS APPROPRIATE IN THIS CASE.

Class counsel and the plaintiffs have achieved a settlement of great value to the class, which includes a monetary payment of $5 million to compensate royalty owners for past deductions and injunctive relief that is valued in excess of $10 million (based on data produced by defendants in discovery). The total value of the settlement, then, is at least $15 million.

Class counsel undertook this case on a wholly contingent basis, entering into contingency fee agreements with each of the named plaintiffs (attached as Exhibit A). Each plaintiff agreed, by his or her signature, "to pay attorneys' fees in an amount equal to one-third (33 1/3%) of whatever you receive in the resolution of any claims you have against the lessees for underpayment under your oil and gas leases or other claims related to such leases, by way of settlement, judgment, or otherwise (including any recovery of attorneys' fees and expenses)." *Id.* Class counsel's decision take this case on a contingent basis was based upon the risk involved and the difficulty of the issues to be litigated.

At the time plaintiffs entered into the fee agreements, class counsel consisted of three firms (Christian, Samson, Jones & Chisolm PLLC, Mudd Nelson P.C. (f/k/a Mudd Law Firm, P.C.), and Meites, Mulder, Mollica & Glink), and the fee agreement among the firms was disclosed in the plaintiffs' retainer agreements (Exhibit A). In early January 2006, class counsel amended their internal fee agreement slightly, and plaintiffs were informed of this change by letter on January 6, 2006 (Exhibit B). As the case moved toward trial, in January of 2006, the firm of Goetz, Gallik & Baldwin joined as co-class counsel. Plaintiffs were consulted by telephone and consented to this addition to the plaintiffs' team. Class counsel's initial and amended internal fee agreements are appended as Exhibits C and D.

At the Preliminary Approval Hearing, the Court stated that the award of attorneys' fees may be considered a procedural matter governed by federal law under *Erie v. Tompkins,* 304

U.S. 64 (1938). Because federal and Montana law coincide on the relevant points, the issue need not be resolved here; in this petition, plaintiffs present both Montana and federal precedent. The Montana Supreme Court has repeatedly held that where a reasonable contingency fee agreement exists, the award of attorneys fees should be based on that agreement. *Stimac v. State* (1991), 248 Mont. 412, 416, 812 P.2d 1246, 1248 (1991). For example, in *Cochran v. State* (2003), 2003 MT 318, 318 Mont. 282, 80 P.3d 423, the Montana Supreme Court affirmed a District Court's award of a contingency fee where the plaintiffs had sued for certain wages that they believed were owed, and prevailed in the trial court. The defendant stipulated to a "reasonable fee," which plaintiffs contended was 1/3 of the amount recovered, pursuant to their contingency fee agreement. The defendant, however, contended that the reasonable fee was the time spent multiplied by an hourly rate. The District Court agreed with the plaintiffs, and the Supreme Court affirmed, stating:

> [T]he District Court held that the Workers were legally entitled to attorney fees pursuant to their contingent fee agreements with their lawyers. We conclude that the court's decision is well supported in the record, and that the court did not abuse its discretion in reaching this decision.

Id. at 286. Similarly, in *Worts v. Hardy Construction Company* (1991), 249 Mont. 477, 817 P.2d 231, the Montana Supreme Court explained that, where a contingency fee agreement exists, the judge must begin consideration with a presumption that the agreement controls the award of attorneys fees:

> In considering ... [the claimant's] contingent fee contract with his attorney, the Workers' Compensation judge should accept the approved contract as having a strong presumption in its favor. If the judge does not set a fee in accordance with the contingent fee contract, he shall state with particularity his reasons in writing, based upon strong countervailing evidence, why the contingent fee contract is not followed by him, and precisely what weight he accorded to the contingent fee contract.

Id., 249 Mont. at 482, 817 P.2d at 235 (internal quotation omitted).

The U.S. Supreme Court has indicated that common fund fees like this case are appropriately measured by the percentage method, *Blum v. Stenson*, 465 U.S. 886, 886 n. 16

(1984), and this Circuit has long applied the percentage method to common funds in class settlements. *See, e.g.*, *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir. 1993); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir.1989).

The percentage of fees awarded in class action settlements is typically based on the actual value of the settlement to the class – including both monetary and nonmonetary value. *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (district court "should have calculated their fee as one-third of the entire $4.5 million settlement fund, for a fee of about $1.5 million, rather than calculating it as one-third of the class members' claims against that fund, for a fee of only $3,300"); *Waters v. International Precious Metals Corp*., 190 F.3d 1291, 1297 (11th Cir. 1999) (district court did not abuse its discretion in awarding one-third of $40 million settlement to class counsel in fees comprised of $10 million in cash and the rest in notes: "[w]hen a lump sum has been recovered for a class, that sum represents the common fund benchmark on which a reasonable fee will be based"). Here, class counsel seeks attorneys fees in line with the contingency fee agreement they entered with the plaintiffs of one-third of the value of the compensatory relief of $5,000,000. As discussed above, the actual value of the settlement, taking into account prospective relief, is approximately $15 million, so class counsel's request for its contingency fee of $1,666,666 represents approximately eleven percent (11%) of the actual value of the settlement.

In *Stimac*, 248 Mont. at 417, 812 P.2d at 1249, the Montana Supreme Court delineated eight factors to be examined in determining the reasonableness of a contingency fee agreement, each of which supports a contingency fee award in this case, as follows:

1. The novelty and difficulty of the legal and factual issues involved: The legal issues in this case are issues of first impression in Montana, and the level of complexity is high. In bringing this case, the plaintiffs sought to define an area of law that has challenged courts and legislatures throughout the country for the past several years: the proper scope of deductions from royalty owners' payments under oil and gas leases.

2. The time and labor required to perform the legal service properly: The case required significant outlays of time and resources to prepare. In the two years of active litigation, plaintiffs took extensive discovery. Thousands of pages of documents and hundreds of electronic data files were exchanged and analyzed. Plaintiffs' counsel also took six depositions of defendants' fact witnesses and corporate representatives and defended the depositions of each of the plaintiffs. In terms of motion practice, paintiffs prepared and briefed a Motion for Class Certification, defended a motion to compel, and prepared an amended complaint based on their analysis of discovery produced by defendants. Plaintiffs also retained an expert witness to assist with both the development of the case and mediation. The mediation process itself was time-consuming and complex, including two separate mediation sessions (one in June 2006 without a mediator and one in October 2006 with two mediators) and a lengthy drafting period for the Settlement Agreement and related documents. All of the fees and costs incurred in this case were reasonable and necessary to prosecute it, as detailed in the affidavits appended as Exhibit E (Affidavit of James H. Goetz), Exhibit F (Affidavit of Thomas R. Meites), Exhibit G (Affidavit of John J. Mudd) and Exhibit H (Affidavit of Calvin T. Christian).

3. The character and importance of the litigation: As stated above, the question of whether oil and gas producers can legally withhold certain types of fees from royalty owners' checks is an important one, and one that both courts and legislatures throughout the country have taken up in a variety of ways. The management of natural gas resources in Northeastern Montana is of great importance and interest to the landowners, the production companies, and the local economy of the area, and plaintiffs believe that by bringing this case and entering into this settlement, they have served the interests of all Devon royalty owners in the state.

4. The result secured by the attorney: Plaintiffs' counsel believes that they have secured an excellent result for the class by litigating this case aggressively and crafting a settlement that provides royalty owners with a total value of $15 million, including both a one-time cash payment and extensive future relief, and removes all future litigation risks.

5. The experience, skill, and reputation of the attorney: All four firms engaged by the plaintiffs in this case are experienced, skilled litigators of excellent reputation, as detailed in their respective affidavits appended as Exhibits E-H.

6. The fees customarily charged for similar legal services at the time and place where the services were rendered: The contingency fee requested by plaintiffs' counsel totals eleven percent (11%) of the value of the settlement, which is well within the customary award for contingency fees. *See Vizcaino v. Microsoft Corporation*, 290 F.3d 1043, 1050 (9th Cir. 2002) (multiplier of 3.65 was appropriate). Furthermore, the lodestar information provide in the affidavits appended as Exhibits E-H and summarized below show that each firm representing the class expended reasonable and necessary efforts in prosecuting this case. The firms' hourly rates are all consistent with their normal billing rates and are reasonable, given the experience and reputation of the firms. *Id.*

7. The ability of the client to pay for the legal services rendered: The plaintiffs have achieved a result that benefits all Devon royalty owners in the state, yet the value of each individual's claim is not high enough to pay an attorney to prosecute such a case. Furthermore, the MLMOA and the individual plaintiffs were not in a financial position to make such a commitment. The only way this case could have been prosecuted was via a contingent fee arrangement.

8. The risk of no recovery: Plaintiffs faced a significant risk of no recovery in this case. At the outset, it is notable that royalty owners in Montana, through their advocacy group, the MLMOA, had been searching for an attorney for an extended period of time before this case was brought, but none of the attorneys they consulted would agree to take on the oil and gas companies on behalf of royalty owners. Exhibit I, Deposition of Herb Vasseur, 103:15-104:5, 106:22-108:2. It was not until class counsel agreed to bring this case on a contingent basis that the state's royalty owners were able to litigate a question that had concerned them for a considerable period of time – the scope of deductions under their oil and gas leases. The risk of no recovery remained high throughout the case, which, as noted above, focused almost

exclusively on questions of law that were unresolved in the Montana courts. Furthermore, defendants were aggressively represented by two firms skilled in litigation and oil and gas royalty matters and who defended this case vigorously.

As shown, each of the *Stimac* factors militates in favor of awarding a contingency fee in this case. Should the Court wish to hear testimony on these factors at the Final Approval Hearing on August 22, 2007, plaintiffs' counsel will be prepared to present it. Plaintiffs' counsel will make this Petition for Fees and Costs available on their website at www.mmmglaw.com so that class members may review it before the hearing date.

II. THE "CROSS-CHECK" PROVIDED BY THE LODESTAR SUPPORTS PLAINTIFFS' FEE PETITION.

The lodestar calculations provided in class counsel's affidavits confirm that the fees sought here are reasonable. *Vizcaino v. Microsoft Corporation*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("the lodestar method is merely a cross-check on the reasonableness of a percentage figure"). As set forth in the affidavits, plaintiffs' counsel have incurred the following fees and costs to date in this matter:

Firm	**Fees for professional services incurred to date**	**Costs of litigation incurred to date**	**Administrative costs of the settlement incurred to date**
Goetz, Gallik & Baldwin, P.C.	$79,594.00	$5,317.76	0
Meites, Mulder, Mollica & Glink	$432,202.75	$106,610.38	$12,719.17
Mudd Nelson, P.C.	$41,426.50	$5,845.60	0
Christian, Samson, Jones & Chisolm, P.L.L.C.	$21,036.50	0	0
Totals	$574,259.75	$117,773.74	$12,719.17
		Total of all fees and costs	**$704,752.66**

Class counsel seek $1,666,666 in fees as compared to their lodestar of $574,259.75. The resulting multiplier – 2.9 – is well in the range of what is considered reasonable under the case law of this Circuit. *Vizcaino*, 290 F.3d 1050 (multiplier of 3.65 was appropriate). As such, the lodestar calculation supports plaintiffs' request for a contingency fee award.

III. CONCLUSION

For all the reasons presented above, plaintiffs respectfully request that the Court approve their one-third contingency fee in the amount of $1,666,666 and award them their reasonable litigation and administrative costs.

DATED this 27th day of July, 2007

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CERTIFICATE OF SERVICE

I certify that on July 27, 2007, a copy of the foregoing document was served on the following persons by the following means:

1, 3, 4, 6 CM/ECF
2, 5 U.S. Mail

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