DISTRICT COURT, GARFIELD COUNTY, COLORADO
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IVO LINDAUER, SIDNEY and RUTH LINDAUER, and DIAMOND MINERALS, LLC, on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

TEP ROCKY MOUNTAIN LLC, f/k/a/ WPX ENERGY ROCKY MOUNTAIN LLC, F/K/A WILLIAMS PRODUCTION RMT COMPANY

Defendant.

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COURT USE ONLY

Case Number: 2006 CV 317

Div. B Courtroom:

CLASS COUNSEL'S MOTION FOR ALLOWANCE OF LITIGATION EXPENSES INCLUDING ATTORNEY FEES

Pursuant to C.R.C.P. 121, undersigned counsel has conferred with opposing counsel about the relief sought in this Motion. Opposing counsel does not take a position regarding the relief requested.

Counsel for Plaintiffs and the Plaintiff Class ("Class Counsel") respectfully petition the Court for an allowance of reasonable attorneys' fees and expenses, in the amount of twenty percent (20%) of the funds to be disbursed pursuant to the Court's Order granting final approval of same, which includes reimbursement of their out-of-pocket litigation expenses and administrative expenses.

INTRODUCTION

In this action, filed in 2009, the representative Plaintiffs, on behalf of the Plaintiff Class, brought several claims against Williams Production RMT Company ("Williams") alleging underpayment of royalties for natural gas. One of those claims was settled in 2009 before trial, and this Court certified the Plaintiff Class herein and awarded attorney fees of twenty-five percent (25%) of the net amount recovered, after reimbursement of certain expenses. This Court also retained continuing jurisdiction over that settlement and over this case. Two claims were reserved and excluded from that partial settlement ("the Reserved Claims"). One of the Reserved Claims (the "Gross Proceeds Claim") was later decided adversely to the Plaintiffs and Plaintiff Class on summary judgment in 2010, which ruling was upheld on appeal, and Class Counsel received no fees regarding that claim.

The other Reserved Claim, referred to as "the Enhancement Claim," was tried to the Court in December 2013. After the trial, the Court entered Judgment in favor of the Plaintiffs and Plaintiff Class, and awarded Class Counsel attorneys' fees of thirty-three and one-third percent (33 1/3%) plus reimbursement of expenses, and fees of forty percent (40%) upon successful resolution of any appeals. That Judgment was subsequently reversed by the Colorado Court of Appeals. As a result,

Class Counsel received no fees or reimbursement of expenses regarding their work on the Enhancement Claim.

Thereafter, it was discovered that Williams, now known as TEP Rocky Mountain LLC, had breached the terms of the 2009 Settlement Agreement. Accordingly, Class Counsel and the Class Representatives filed a motion to enforce that settlement and protect the interests of the Plaintiff Class. Class Counsel also appeared in a related lawsuit in federal court, *Sefcovic v. TEP*, and are continuing to attempt to protect those interests. Class Counsel recovered an additional $3 million by the Plaintiff Class under the firm portion of that settlement, and the potential future recovery of an additional $7.7 million under the contingent portion of the settlement.

The Plaintiff Class in this case has been represented by counsel who successfully negotiated the 2009 settlement in this case, litigated the Reserved Claims, and litigated the first enforcement action. These same lawyers also successfully prosecuted the *Savage v. Williams* and *Clough v. Williams* cases in this district, as well as the *Parry v. Amoco Production Co.*, *Groblebe v. BP America Production Co.*, and *Burkett v. J. M. Huber Corp. and XTO Energy, Inc.* class actions in La Plata County. The testimony to be presented at the hearing on this application will demonstrate that the Plaintiff Class in this lawsuit has benefitted greatly from the reputation, expertise, experience, knowledge, insights and negotiating skills gained by such counsel as the result of their participation in those cases and other lawsuits brought against gas producers on behalf of classes of royalty owners.

Based on the result obtained, the expertise required, the risk undertaken by Class Counsel, and this Court's previous awards in this case of attorney fees ranging from twenty-five percent (25%) to forty percent (40%), depending on the state of the proceedings at the time of settlement, Class Counsel's request for a fee equal to twenty percent (20%) of the gross amount of the recovery

(i.e., Class Counsel's twenty-percent fee includes reimbursed for all costs and expenses advanced on behalf of the class) is fair and reasonable under the applicable standards and surrounding circumstances, as discussed below.

I. THE STANDARDS GOVERNING APPLICATIONS FOR ATTORNEYS FEES IN COMMON FUND CASES

The Common Fund Doctrine has been recognized and approved by the Colorado Supreme Court, particularly in class action cases.

> The common fund doctrine has enjoyed long term and widespread use. In class action lawsuits where a fund is created for the benefit of the class, either through settlement or judgment on the merits, the common fund doctrine is widely adhered to as a method for proportionately spreading the attorneys fees among the class members. *See* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1803 (1986), and cases cited therein; *County Workers Compensation Pool v. Davis*, 817 P.2d 521, 526 (Colo. 1991). In fact, adherence to the common fund doctrine is so prevalent that the justification for awarding interim fees after a fund has been created, in part, "lies in the certainty that counsel will ultimately receive a fee award . . . . The only unanswered question is the size of the award, not its propriety." 3 Herbert Newberg, *Newberg on Class Actions* § 6975 at 1267 (1977).

Kuhn v. State, 924 P.2d 1053, 1060 (Colo. 1996).

The Common Fund Doctrine is based on fundamental principles of equity. *E.g., Kuhn,* 924 P.2d at 1059 ("An attorney's right to fees from the common fund derives from equitable principles of fairness that combine aspects of both unjust enrichment and *quantum meruit*."); *Hawes v. Colorado Division of Insurance*, 65 P.3d 1008, 1015 (Colo. 2003)("The common fund doctrine is an equitable remedy that affords fees to attorneys for their advocacy for the benefit of others."). *See also, e.g.*, 1 ALBA CONTE, ATTORNEY FEE AWARDS §§2.1, 2.5, at 49-50, 66-68 (3d ed. 2004).

Consistent with the equitable foundations of the Common Fund Doctrine, fees are awarded from the common fund on the theory "that persons who obtain the benefit of a lawsuit without

contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L.Ed.2d 676, 682, 100 S.Ct. 745, 749 (1980).

As the Colorado Supreme Court explained in *Kuhn*:

> The common fund doctrine applies where a suit involving an individual or representative plaintiff results in the creation of a monetary fund for a class of people situated similarly to the plaintiff. The common fund doctrine is considered an exception to the American rule because the individual or representative plaintiff is not required to compensate his or her attorney out of pocket. Instead, the fees are paid out of the monetary fund that the litigation has produced. "Fees in common fund cases are extracted from the predetermined damage recovery rather than obtained from the losing party . . . ."

924 P.2d at 1057 (quoting *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988)).

More recently, the Colorado Court of Appeals approved an award of attorney fees of 30 percent (30%) of the common fund recovered in a class action that was settled prior to trial, noting:

> Colorado recognizes the common fund doctrine. *Kuhn v. State*, 924 P.2d 1053, 1060 (Colo. 1996). In class actions lawsuits where a fund is created for the benefit of the class, either through settlement or judgment on the merits, the doctrine is widely adhered to as a method for proportionately spreading attorney fees among the class members. Kuhn v. State, supra, 924 P.2d at 1060 (citing 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1803 (1986)). Because a class action lawsuit benefits all class members, and because at least one class member contracts with an attorney to pursue this benefit, "the remaining class members should pay what the court determines to be the reasonable value of the services benefitting them." *Kuhn v. State, supra*, 924 P.2d at 1058 (quoting *Lindy Bros Builders, Inc. v. Am. Radiator & Standard Sanitary Corp*., 487 F.2d 161, 165 (3d Cir. 1973)).

Brody v. Hellman, 167 P.3d 192, 198 (Colo. App. 2007).

Thus, in contrast to "fee-shifting" statutes that require the losing party to pay the attorney fees of the prevailing party by means of a mathematical calculation based on hours and rates, fees in common fund cases are typically awarded as a percentage of the fund created.[1]

> In contrast to a statutory fee determination, payable by the defendant depending on the extent of success achieved, a ***common fund is itself the measure of success***. While the common fund recovered may be more or less than demanded or expected, the common fund represents the benchmark from which a reasonable fee will be awarded. .... Thus, a reasonable fee will be largely based on a fair percentage of the common fund.

4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §14.6, at 577-579 (4th ed. 2002)(emphasis added). "While other criteria in determining reasonable attorney fees are legitimate considerations, the amount of the recovery, and end result achieved, is of primary importance." *Oppenlander v. Standard Oil Co. (Indiana)*, 64 F.R.D. 597, 605 (D. Colo. 1974).

The appellate courts of Colorado have consistently recognized the important differences between common fund percentage fees and statutory fee awards. *E.g.*, *Kuhn*, 924 P.2d at 1058 (holding that "statutory fee shifting arguments" are "inapposite" in a common fund class action); Brody, 167 P.3d at 204.

The percentage fee approach under the Common Fund Doctrine enables the Court to readily apportion the fees and expenses of litigation to each class member "in the exact proportion that the value of his claim bears to the total recovery." *Van Gemert*, 444 U.S. at 479, 62 L. Ed. 2d at 682,

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[1] *See, e.g., Gisbrecht v. Barnhart*, 535 U.S.789, 806, 152 L.Ed.2d 996, 1010, 122 S.Ct. 1817, 1827 (2002)("the lodestar method was designed to govern imposition of fees on the losing party," not fees payable from the successful party's recovery); *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 79 L.Ed. 2d 891, at 903 n.16, 104 S.Ct. 1541, 1550 n.16 (1984)("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [42 U.S.C.] section 1988 reflects the amount of attorney time reasonably expended on the litigation."); *Commonwealth of Puerto Rico v. Heckler*, 745 F.2d 709, 714 (D.C. Cir. 1984)("[o]ther indicia of overall reasonableness . . . control 'under the "common fund doctrine."'").

100 S. Ct. at 750. The flexibility and ease of application afforded by a percentage approach is especially advantageous in cases such as this, where the individual amounts recovered will vary substantially. Under a percentage approach to attorney fees, each recipient will bear a proportionate share of the fees. "Historically, the amount of a common fund fee award was determined in the exercise of the court's discretion based on a standard of reasonableness under the circumstances involved." 1 CONTE, *supra*, §2.2, at 58. The use of a percentage fee even without regard to hours expended or hourly rates is reasonable in order to encourage counsel to obtain a successful result as quickly and economically as possible. *Id.*, §2.5 at 68. Many commentators agree that the award of attorney fees on the basis of a percentage of the fund recovered is the only sensible method of awarding fees in common fund cases, because it relies on incentives rather than costly monitoring. *E.g.*, John C. Coffee, *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of the Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 724-25 (1986); Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here,* 74 TUL. L. REV. 1809, 1820 (2000)("The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad."). "[T]he more recent trend has been toward using the percentage method in common fund cases." *Brody*, 167 P.3d at 201.[2]

[2] Although the Court of Appeals in *Brody* also observed that some courts use the percentage method and then perform a "lodestar" calculation of hours times rate times multiplier as a "cross-check," 167 P.3d at 201, the Colorado Supreme Court has not mandated consideration of a lodestar calculation in common fund cases. Indeed, the use of a mechanical calculation in this case would necessarily be incapable of recognizing the benefits that resulted directly from counsel's unique experience and expertise. In any event, "there is no requirement that the plaintiffs or the court scrutinize billing records." *Brody*, 167 P.3d at 204.

As former Chief Judge Sherman Finesilver of the U. S. District Court for the District of Colorado explained:

> The practice of compensating class counsel in Common Fund cases on a percentage of the recovery basis makes sense. It is consistent with practices in the private marketplace; when an attorneys' fees is [sic] entirely contingent upon the recovery achieved, a percentage fee is customary if not universal.

Consumers Gas & Oil, Inc. v. Farmland Industries, 863 F. Supp. 1357, 1361 (D. Colo. 1993).

It has been observed that "courts have traditionally awarded fees in the 20% to 50% range in class actions." *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 319, 737 P.2d 18, 28 (1987) (citing *Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985)). "Although courts have granted fee awards ranging between 15 and 50 percent of the entire settlement fund in class actions, 30 percent of the fund is often seen as presumptively reasonable, subject to adjustment upward or downward in extraordinary circumstances." 5 J. Moore, MOORE'S FEDERAL PRACTICE §23.85[7], at 23-358 (3d ed. 2002). "[M]any courts have awarded between 20% and 30%, with very few awarding more than 50%." *Brody*, 167 P.3d at 202. "[A]ttorney fees in the range of 25 - 33% have been routinely awarded in class actions." *Id.*, at 203 (citing *Shaw v. Toshiba Am. Info Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000)). Only in cases involving "megafunds," such as those in excess of $300 million, are percentage fees in a lower range prevalent. *Brody*, 167 P.3d at 202.

Quantitative studies of attorney fees in class actions have demonstrated that "fees in class actions have recently ranged from twenty to forty percent of the total recovery and averaged around thirty-two percent." Silver, *supra,* at 1840. "Empirical studies show that . . . fee awards in class actions average around one-third of the recovery." 4 CONTE & NEWBERG, *supra*, §14.6, at 551. *See also, e.g.,* Fred Misko & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts,* 48 BAYLOR L. REV. 1001, 1059-62 (1996) (citing Frederick C. Dunbar, *Recent Trends*

III: What Explains Settlements in Shareholder Class Actions? (National Economic Research Associates 1995)(mean or average class action fee was 31.71 percent, and median or middle fee was 33.3 percent)).

II. THE REQUESTED FEE IS REASONABLE

Class Counsel seeks an allowance for attorney fees equal to twenty percent (20%) of the gross recovery, which is substantially less than the average class action fee of one-third. At the hearing on their application, petitioners will present evidence which places such a request in the context of the relevant factors which generally govern the reasonableness of attorney fees in Colorado, as recited in *Mau v. E.P.H. Corp.*, 638 P.2d 777, 779 (Colo. 1981), and now codified in Rule 1.5 of the Colorado Rules of Professional Conduct:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Mau, 638 P.2d at 779. Under all of these factors, the requested fee is reasonable.

The claim in this case was resolved only after an external accounting was prepared by the Class Representatives' expert, a motion to enforce was prepared by Class Counsel, a demand was made by Class Counsel on TEP, information was exchanged between the parties, and a resolution was negotiated and reached. This claim involves complex factual issues requiring an expert witness. Counsel for the Plaintiffs and Plaintiff Class expended considerable time, energy, and effort, and advanced all expenses in seeing that this claim was fully and effectively resolved. Class Counsel prepared a complete Second Motion for an Order to Show Cause with accompanied affidavit from the expert.

In common fund class actions, Colorado courts have also recognized that the contingent nature of the attorney's compensation (and the associated risk) are important considerations when awarding reasonable attorney fees:

> The size of the contingent fee is designed to be greater than the reasonable value of the services, or the hours worked multiplied by the hourly rate, to reflect the fact that attorneys will realize no return for their investment in cases they lose. *In re Combustion, Inc.*, *supra*, 968 F. Supp. at 1132 (citing F. McKinnon, *Contingency Fees for Legal Services* 28, (1964)). Thus, ***because payment is contingent upon receiving a favorable result for the class, attorneys should be compensated both for services rendered and for the risk of loss or nonpayment assumed by following through with the case***.

Brody, 167 P.3d at 201 (emphasis added). [3]

[3] The special significance of a contingent fee in determining reasonableness of attorney fees in a class action has been explained as follows:

> The reasons for the contingency award are (1) the plaintiffs' lawyer will not receive any compensation until the lawsuit is concluded and then only if he has been successful in securing a judgment for his clients, (2) unless both of these conditions are met the attorney will receive nothing for his efforts and will not be reimbursed for his expenses, and (3) lawyers who actively litigate class action cases largely depend on court-awarded fees for their economic survival.

Shutts v. Phillips Petroleum Co., 235 Kan. 195, 224, 679 P.2d 1159, 1182 (1984)(citing 7A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE: Civil §1803, at 274-75 (1983 Supp.)). "In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'" *Vizcaino v. Microsoft*, 290 F.3d 1042, 1051 (9th Cir. 2002)(quoting *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300-01(9th Cir. 1994)).

Here, the risks and uncertainty of contingent fees are amply demonstrated in this case by the resolution of the two Reserved Claims herein, on which plaintiffs did not recover and for which counsel received no fees for their efforts, even after winning at trial on the Enhancement Claim. The history of these Reserved Claims amply demonstrate that Class Counsel bear a very real and significant risk of non-payment and are compensated only when their efforts result in the creation of a common fund from which the members of the Plaintiff Class receive a monetary recovery.

When determining the reasonableness of a fee, courts have consistently recognized that economy of effort should not be penalized and may be rewarded. In *In re King Resources Co. Securities Litigation*, 420 F. Supp. 610, 631 (D. Colo. 1976), the court quoted the following passage with approval:

> Where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.

(citing Hornstein, *Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 660 (1956)).[4] "The percentage of the fund method rewards efficiency, not inefficiency, because inefficiently expended hours only serve to reduce the per hour compensation of the attorneys working on them." *Brody*, 167 P.3d at 204.

In addition, the Colorado Supreme Court has recognized that the expectations of counsel are relevant when considering a fee in a common fund class action. "The expected fee recovery is one of the key incentives for plaintiffs' attorneys to litigate class actions." *Kuhn*, 924 P.2d at 1060. The terms of a fee agreement between class counsel and the named plaintiffs may also be

[4] Professor Hornstein's article was also cited with approval by the United States Supreme Court in *Mills v. Electric Auto-Light Co.*, 396 U.S. 375, 394 n. 18, 24 L.Ed. 2d 593, 607, 90 S.Ct. 616, 626 (1970).

considered, although not controlling, and a court determining a reasonable fee in a class action is not required to review such an agreement. *Brody,* 167 P.3d at 200.

Consistent with the foregoing law and ethical considerations, petitioning counsel will present the following testimony at the hearing:

(1) The request for twenty percent (20%) of the gross recovery, is below the amount set forth in the written agreement between Class Counsel and representative plaintiffs.

(2) Class Counsel assumed the risks of this litigation based on the expectation that such a fee would be awarded in the event of a successful resolution of the case at this stage.

(3) The Plaintiff Class benefitted from the experience, reputation and ability of Class Counsel.

(4) Class Counsel possessed the skills necessary to deal efficiently and effectively with the novel and complex issues that were litigated to conclusion in this case.

Class Counsel respectfully submit that the risks they assumed and the benefits they achieved in spite of such risks leave no doubt that the fee they seek here is reasonable.

CONCLUSION

For all of the reasons set forth above, petitioners hereby request that this Court enter an order awarding them attorneys' fees consisting of twenty percent (20%) of the amount that TEP has agreed to reimburse to the Plaintiff Class, which is the full amount retained by TEP for that purpose as previously ordered by this Court.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of ***CLASS COUNSEL'S MOTION FOR ALLOWANCE OF LITIGATION EXPENSES INCLUDING ATTORNEY FEES*** was served this 26th day of June, 2020 via ICCES on:

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Pursuant to C.R.C.P. 121 §1-26(7), the signed original of this document is maintained at the offices of the filing attorney and will be made available for inspection by other parties or the court upon request.