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IN THE TWENTY-SIXTH JUDICIAL DISTRICT
DISTRICT COURT, STEVENS COUNTY, KANSAS
CIVIL DEPARTMENT

JOHN STEPHEN ALFORD and)
JOE LARRABEE, individually and on)
behalf of Plaintiff Class as more fully)
described in the First Amended Petition,)
)
Plaintiffs,)
)
vs.)
)
PIONEER NATURAL RESOURCES)
USA., INC.,)
)
Defendant.)

Case No. 93 CV 37

**MEMORANDUM IN SUPPORT OF PETITION
FOR ALLOWANCE OF REASONABLE ATTORNEY FEES
AND LITIGATION EXPENSES**

I. INTRODUCTION

John Stephen Alford and Robert Larrabee (now deceased), brought this class action against Mesa Inc. and its affiliated companies (now Pioneer Natural Resources USA., Inc.) on November 13, 1993. Thirteen years later, the parties reached a settlement. The Court will be asked to approve this settlement at the Fairness Hearing scheduled to take place on December 15, 2006.

Under the terms of the proposed settlement, Pioneer has agreed to pay approximately \$34.5 million to settle claims for wrongful deductions allegedly taken by it and Mesa from the Plaintiff Class during the period from November 1, 1994, through December 31, 2005. In addition, effective

January 1, 2006, Pioneer has agreed to change the method it uses to calculate the royalties which it pays to the Plaintiff Class.¹

The testimony to be presented on behalf of the plaintiffs at the Fairness Hearing will show that the present value of the increased royalties to be received by the Plaintiff Class under the settlement subsequent to January 1, 2006, is estimated to be worth approximately \$30.2 million. This represents a 42% increase in royalty payments over what the Plaintiff Class would receive if Pioneer continued calculating royalties in the manner challenged by plaintiffs in this litigation.

There can be little doubt that the settlement, which is estimated to be worth a total of \$64.7 million (\$34.5 million for the past plus \$30.2 million for the future), is fair and reasonable and should be approved by the Court on December 15, 2006.

Petitioners are requesting an award of attorney fees in the amount of one-third of the sum (\$34.5 million)² paid by Pioneer to settle claims through December 31, 2005. They are not, however, asking for any percentage of the value of the increased royalties to be received by the class members after December 31, 2005 (\$30.2 million) under the settlement. For this reason, the requested attorney fees will actually constitute less than eighteen percent (18%) of the entire benefit realized by the class as the result of this litigation.

This Memorandum sets forth the law and ethical considerations associated with the allowance of attorney fees by the Court in a class action. As is shown below, when the legal work performed

¹After the settlement becomes effective, Pioneer will make a retroactive adjustment to royalty payments back to January 1, 2006.

²The amount against which this percentage is applied will be reduced by (1) the litigation expenses advanced by plaintiffs counsel on behalf of the class are reimbursed and (2) the portion of the settlement funds attributable to any class members who may elect to opt out of the settlement.

by class counsel generates a Common Fund for the benefit of the class, the value of the legal services which they have rendered is best measured in terms of that result, especially since they bore the entire risk of the litigation and would have received nothing for those services if the claims advanced on behalf of the class had failed.

II. THE STANDARDS GOVERNING APPLICATIONS FOR ATTORNEYS FEES IN COMMON FUND CASES, SUCH AS THIS CLASS ACTION

A. Petitioners Are Entitled To Be Paid A Share Of The Common Fund Created By Their Efforts.

Under well-established law, petitioners are entitled to be paid a share of the Common Fund, as compensation for their successful efforts on behalf of the Plaintiff Class.

The Kansas Supreme Court has said:

The common fund doctrine provides the basis for awarding attorney fees in class actions. The rationale for awarding attorney fees out of a common fund is that the attorney's services benefit the fund by creating, increasing, or preserving the fund.

Moore v. St. Paul Fire Mercury Ins. Co., 269 Kan. 272, 277, 3 P.3d 81 (2000).

The Common Fund Doctrine was first enunciated by the United States Supreme Court more than a century ago, in *Trustees v. Greenough*, 105 U.S. 527, 25 L.Ed. 1157 (1881). The Supreme Court recognized that attorneys have a claim to fees payable out of a Common Fund which they created through their efforts. *Central R.R. Banking Co. v. Pettus*, 113 U.S. 116, 28 L.Ed. 915 (1885). The Common Fund Doctrine is based on "the equitable notion that those who have benefitted from the litigation should share its costs." *Report of The Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 250 (1985).

The Common Fund Doctrine is generally explained as being based on equitable principles of

restitution designed to prevent unjust enrichment and provide quantum meruit. 1 ALBA CONTE, ATTORNEY FEE AWARDS §§2.01, 2.05, at 27-28, 36 (2d ed. 1993); *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 313-14, 737 P.2d 18 (1987). In other words, 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).

B. The Requested Percentage Is Reasonable under Kansas Law.

The Kansas Supreme Court has provided specific guidance regarding the award of attorney fees in class actions in two cases: *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984); and *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 737 P.2d 18 (1987).

In *Shutts*, the Court discussed federal authorities as it set forth some general rules for the allowance of attorney fees in class actions in which a Common Fund has been created. The *Shutts* Court noted the special significance of a contingent fee arrangement, such as the one here, in determining reasonableness of attorney fees in a class action:

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.)).³

³“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)).

After considering the various relevant considerations for setting reasonable attorneys fees in a Common Fund class action, the Court singled out one: “[o]f major importance is the consideration of the benefit the lawsuit has produced.” 235 Kan. at 223.

Three years later, Kansas Supreme Court applied *Shutts* in *Gigot*. Finding that Judge Duckworth’s use of a percentage approach did not constitute an abuse of discretion and that the fees allowed by him were reasonable in amount, the Court approved the district court’s analysis, which began with a percentage of the fund and then considered other factors, as an appropriate exercise of discretion. In so holding, the *Gigot* Court quoted from *In Re Warner Communications Securities Litigation*, 618 F. Supp. 735, 794 (S.D.N.Y. 1985) that “courts have traditionally awarded fees in the 20% to 50% range in class actions.” 241 Kan. at 319-20.

Moreover, the Court in *Gigot* also relied on the following passage from 3 NEWBERG ON CLASS ACTIONS §14.03 (2d ed. 1985):

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.

241 Kan. at 318.

At the Fairness Hearing on December 15, petitioners will present evidence that focuses on the reasonableness of the requested fee, in light of the factors set forth in Rule 1.5 of the Kansas Rules of Professional Conduct, set forth below:

- (a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (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 he 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; and
- (8) whether the fee is fixed or contingent.

The percentage requested by petitioners falls into the low end of the range of fees typically allowed in Common Fund cases. In *Youngren v. Amoco Production Company*, Case No. 89 CV 22, this Court has twice (in 1998 and again in 2004) awarded attorney fees of one-third of the funds recovered in that case (after expenses and exclusive of future benefits to be received by the class). Moreover, the Twenty-Sixth Judicial District Court has historically approved and awarded fees equaling one-third of the net amount of the Common Fund created for the benefit of oil and gas royalty owners (likewise exclusive of any future benefits).⁴

⁴*Hennigh v. Western Natural Gas Co.*, No. 2523, District Court, Grant County, Kansas (Judge Morgan) (one-third fee); *Larrabee v. Mesa Petroleum Co.*, No. 4950, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Larrabee v. Panhandle Eastern Pipeline Co.*, No. 10150, District Court, Seward County, Kansas (Judge Stewart) (one-third fee); *Matzen v. Cities Service Oil Co. and Cities Service Co.*, No. 78-C-12, District Court, Grant County, Kansas (Judge Duckworth) (one-third fee); *Hampton v. Cities Service Oil Co. and City Service Co.*, No. 78-C-23, District Court, Grant County, Kansas (Judge Duckworth) (one-third fee); *Stanley, et al. v. Columbian Fuel Corp.*, No. 2602, District Court, Grant County, Kansas (Judge Duckworth) (one-third fee); *Matzen v. Columbian Fuel Corp.*, District Court Case No. 2395, Grant County, Kansas (Judge Duckworth) (one-third fee); *Baughman, et al. v. Mapco Production Co.*, No. 9382, District Court, Seward County, Kansas (Judge Duckworth) (one-third fee); *Baughman, et al. v. Hugoton Plains Gas & Oil Co.*, No. 9379, District Court, Seward County, Kansas (Judge Duckworth) (one-third fee); *Adams (Howard Miller, substituted) v. Magnolia Petroleum Co. (Mobil Oil Corp., substituted)*, No. 2458, District Court, Haskell County, Kansas (Judge Duckworth) (one-third fee); *Baughman, et al. v. Hugoton Plains Gas & Oil Co.*, No. 4842, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Light, et al. v. Mobil Oil Corp.*, No. 5156, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Roehr, et al. v. Mobil Oil Corp.*, No. 5157, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Batchelder, et al. v. Mobil Oil Corp.*, No. 78-C-9, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Combes v. Northern Natural Gas Producing Co.*, No. 78-C-7, District Court, Stevens County, Kansas (Judge Duckworth) (one-third fee); *Litell v. Ashland Oil Co., Inc. and Ashland Exploration, Inc.*, No. 78-C-13, District Court, Stevens County, Kansas (Judge Duckworth) (one-

Likewise, in other Kansas oil and gas cases in which petitioners have been involved as counsel for a plaintiff class, similar percentage fees have been awarded.⁵ In cases only seeking recovery of past damages, similar percentage fees have also been awarded by courts elsewhere.⁶

third fee); *Light v. Panhandle Eastern Pipeline Co.*, No. 77-C-81, District Court, Stevens County, Kansas (Judge Aldrich) (one-third fee); *Mason v. Anadarko Production Co.*, No. 78-C-6, District Court, Stevens County, Kansas (Judge Aldrich) (one-third fee); *Shore v. Atlantic Richfield Co.*, No. 93-C-55, District Court, Stanton County, Kansas (Judge Duckworth) (one-third fee).

⁵*Becker v. Plains Petroleum Co.*, No. 86-C-9, District Court, Kearny County, Kansas (Judge Duckworth) (one-third fee); *Gigot v. KN Energy, Inc.*, No. 13407A, District Court, Finney County (Judge Duckworth) (one-third fee); *Gigot v. Cities Service Gas Co.*, No. 13407, District Court, Finney County, Kansas (Judge Duckworth) (one-fourth fee); *Thomas v. Western Natural Gas Co.*, Case No. 2092, Court of Chancery, New Castle County, Delaware (Judge Duffy) (one-third fee); *National Helium Corp. v. Panhandle Eastern Pipeline Co.*, No. KC-1980, United States District Court for the District of Kansas (Judge Brown)(one-third fee); *Northern Natural Gas Co. v. Grounds*, No, KC-1969, United States District Court for the District of Kansas (Judge Brown)(one-third fee); *Gore v. Amerada Hess*, No. 4612, United States District Court for the District of Kansas (Judge Brown) (one-fourth fee); *Cities Service Gas Co. v. Mobil Oil Corp.*, United States District Court for the District of Kansas (Judge Brown)(one-third fee).

⁶ *E.g.*, *Lance v. Harrington*, 965 F. Supp. 630 (E.D.Pa. 1997) (30% fee approved); *In re Pacific Enterprises Securities Litigation.*, 47 F.3d 373 (9th Cir. 1995)(33 % fee approved); *In re Crazy Eddie Securities Litig.*, 824 F. Supp. 320 S.D.N.Y. 1993) (34 % fee approved); *In Re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912 (D.P.R. 1991) (33% fee approved); *Greene v. Emerson's, Ltd.*, [1987] Fed. Sec. L. Rep. (CCH) ¶ 93, 263 (S.D.N.Y. 1987) (award of 46.2% approved); *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987) (40% fee approved); *Roberts v. Heim*, Fed. Sec. L. Rep. (CCH) ¶ 96,221 (N. D. Cal. 1991) (30% fee awarded); *Kleinman v. Harris*, Case No. 3-89-CV-1869-X (N. D. Tex. June 21, 1993) (approximately 33% awarded); *In Re Crazy Eddie's Securities Litigation*, 824 F. Supp. 320 (E.D.N.Y. 1993) (fee of 38.6% approved); *In re Homestake Production Co. Securities Litigation*, MDL No. 153 (N. D. Okla. 1990) (30.3% of \$185,000,000); *Heckmann v. Ahamson*, No. CA 00851 (Cal. Super. Ct. Los Angeles Co. Sept. 15, 1989) (39.2% of \$60,800,000); *In Re First Republic Bank Securities Litigation*, Nos. 88-0641 88-0832 (N. D. Tex 1992) (31.2% of \$58,200,000); *Red Eagle Resources Corp. v. Banker Hughes, Inc.*, No. 91-627 (S. D. Tex. May 31, 1994) (35.9% of \$53,010,954); *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.*, Nos. 89-822 89-1186 (W. D. Okla. 1993) (34.9% of \$35,338,454); *Gulf Oil/Cities Service Tender Offer Litigation*, 142 F.R.D. 588 (S.D.N.Y. 1992) (30.0% of 34,000,000); *Public Service Co. of New Mexico Class Derivative Actions*, Fed. Sec. L. Rep. (CCH) ¶96,988 at 94,294 (S. D. Cal. 1992) (35.3% of \$33,000,000); *In Re Consolidated Capital Securities Litigation*, No. 85-7332 (N.D. Cal. Sept. 11, 1990) (30.0% of \$29,500,000); *In Re United Telecommunications, Inc. Securities Litigation*, 1994 U.S. Dist. LEXIS 9151 (D. Kan. 1994) (33.3% of \$28,000,000); *In Re Melridge Securities Litigation*, No. 87-1426 (D. Or. 1993) (34% of \$25,000,000); *In Re Sun Microsystems, Inc. Securities Litigation*, No. 89-20351 (N.D. Cal. June, 1993), as noted in *L.A. Daily J.*, June 7, 1993, at 3 (36.0% of \$25,000,000); *Hwang v. Smith Corona Corp.*, No. 89-450 (D. Conn. 1992) (35.8% of \$24,000,000); *In Re FPI/Agritech Securities Litigation*, MDL No. 763 (D. Hawaii Dec. 11, 1990, June 13, 1991, Dec. 8, 1994) (30.2% of \$23,933,334).

Finally, one-third of the net recovery is a standard fee in Kansas contingent fee cases, even in relatively simple cases that have not required the large investments of time, energy, money, and seemingly endless analysis, not to mention endurance and persistence, required in this case. *See, e.g., THE ECONOMICS OF LAW PRACTICE IN KANSAS IN 2005*, at p. 29 (Kansas Bar Association, October 2006).

CONCLUSION

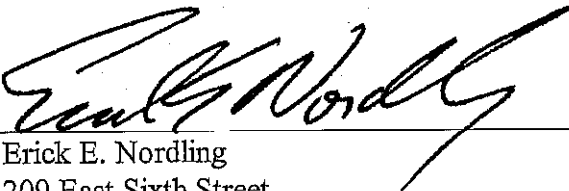
In *Shutts*, when describing the attributes of a reasonable attorney fee in a class action, the Kansas Supreme Court stated that “[o]f major importance is the consideration of the benefit the lawsuit has produced.” 235 Kan. at 223. The benefit generated by this litigation is the culmination of thirteen years of dogged perseverance by petitioners. But for that effort, instead of being the beneficiaries of a settlement valued at \$64.7 million, the Plaintiff Class would almost certainly have received nothing.

Petitioners’ request for a fee which constitutes less than eighteen percent (18%) of the total benefit to be received by the Plaintiff Class is fair and reasonable and should be approved by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 20th day of November, 2006, a copy of the foregoing **Memorandum in Support of Petition for Allowance of Reasonable Attorney Fees and Litigation Expenses** was placed in the United States mail in Wichita, Kansas, first-class, postage prepaid, addressed to:

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