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STATE OF WYOMING)
)ss.
COUNTY OF CAMPBELL)

IN THE DISTRICT COURT

SIXTH JUDICIAL DISTRICT

Civil Action No. 32753

Oedekoven Water & Hot Oil, Inc., a Wyoming corporation; Fred L. and Mary Ann Oedekoven Family Trust under agreement dated September 12, 1995, as amended; and Don and Betty Brown Family Trust under agreement dated September 12, 1995, as amended

Plaintiffs,

vs.

BERRY PETROLEUM COMPANY, a Delaware corporation

Defendant.

FILED NO.
CIVIL ☐ PROBATE ☐ CRIMINAL ☐
ADOPT ☐ DEL ☐
NOV 28 2011
DEPUTY CLERK OF DISTRICT COURT

PLAINTIFFS' POINTS AND AUTHORITIES FOR AWARD OF ATTORNEY FEES AND COSTS IN COMMON FUND CLASS ACTION CASES

Plaintiffs, by and through their undersigned counsel, hereby submit the following Points and Authorities for the Court's consideration in evaluating Class Counsel's application for attorney's fees and costs:

I. INTRODUCTION AND BACKGROUND

The background of this litigation is discussed in both the affidavit of Steven F. Freudenthal attached to the Application for Fees, and the Motion for Conditional Consideration of Settlement Agreement and Provisional Certification of the Berry Settlement Class. The purpose of these Points and Authorities is to provide the Court with an analysis of attorneys' fees awards in class action cases and a discussion of some of the factors that are particularly germane to the *Wyoming Royalty Payment Act* class cases presently pending before the Court. As part of achieving settlement, Plaintiffs' counsel have agreed that the attorneys' fees, costs and settlement administration expenses shall be limited to fifteen percent (15%) of the gross settlement or aggregate settlement amount, rather than the thirty percent (30%) provided in the retainer agreements with the named Plaintiffs. The amount paid for attorney's fees, costs, expenses and expenses of administration of this settlement is proposed to be calculated as three/seventeenths of the additional royalties due and added to the additional royalties due, resulting in a gross settlement amount.

This memorandum draws heavily upon the analysis and memorandum submitted by class counsel in Madsen v. Cabot Oil and Gas Corporation, Lincoln County District Court (Civ. Action No. 10,550).

II. DISCUSSION

In the class action context, the issue of awarding attorneys fees is different than in individual litigation. It is important

to note that there is a significant degree of variation among states as well as federal jurisdictions regarding the determination of attorneys' fees in common fund class action cases. In Wyoming, given the relative rarity of class action litigation, the Wyoming Supreme Court has not had occasion to analyze the various methods employed to determine reasonable attorney's fees. Nonetheless, it is important to note that the basic difference between conventional civil litigation and class action cases is that the Court is usually involved in the ultimate decision as to the amount of attorney's fees and costs, especially in a case where there is a common fund from which all class members are paid. In conventional civil litigation in Wyoming, Wyo. Stat. § 1-14-126(b) sets forth factors for the Court to consider when the award of attorneys fees is provided in the discretion of the Court. The following factors are stated:

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

ii. The likelihood that the acceptance of the particular employment precluded other employment by the lawyer;

iii. The fee customarily charged in the locality for similar legal services;

iv. The amount involved and the results obtained;

v. The time limitations imposed by the client or by the circumstances;

vi. The nature and length of the professional relationship with the client;

vii. The experience, reputation and ability of the lawyer or lawyers performing the services; and

viii. Whether the fee is fixed or contingent.

These factors take into account only some of the characteristics of the common fund class action case. For guidance as to the determination of issues unique to the distribution of attorneys' fees in common fund cases, one must consult other jurisdictions.

A. The Three Methods of Calculating Common Fund Attorneys Fees

In a case involving injuries sustained by a number of individuals, United States District Court Judge Clarence Brimmer analyzed some of the issues that are involved in determining attorney's fees in common fund cases.

> "The settlement in this case created a 'common fund' from which the plaintiff class obtained a benefit. In a rare exception to the American rule that parties bear their own costs in litigation, 'a litigant or 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.'"

In re Copley Pharmaceutical, Inc., 1 F.Supp.2d 1407, 1409 (D.Wyo. 1998), *citing Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (other citations omitted) and *Ingram v. The Coca-Coal Company*, 200 F.R.D. *685*, 694 (N. LX Ga. 2001) (observing that it is well-established that parties to a lawsuit may negotiate a settlement wherein the defendant makes total cash payments encompassing both monetary relief and any liability for attorneys fees. * * * Any such agreement as to fees,

like any provision of a class action settlement, remains subject to district court approval) (citations omitted).

Judge Brimmer pointed out in the *Copley Pharmaceutical* matter, that the class action exception to the American rule prevents the unjust enrichment of persons who obtained the benefit of a class without risk or contribution to costs. *Id.* The Court is placed in a fiduciary role in those circumstances where the attorneys are being paid from funds attributable to class member claims or damages. Id.

In awarding attorneys fees and costs in class actions, Courts across the United States have essentially recognized three different theories. These theories are commonly referred to as the "lodestar method" and the "percentage of the fund method" and the "hybrid method." Though many formulas exist, legal scholars and the majority of Courts have decided a "percentage of the fund method" is preferred. With the hybrid method, the court begins with a base percentage of the common fund and then adjusts upward or downward based in the analysis of factors set forth in *Johnson v. Georgia Highway Express, Inc.* 488 714, 7 14-19 (5th Cir. 1974).

B. The History of Attorneys Fees in Common Fund Cases

A very thorough analysis concerning the historical development of the Lodestar and percentage of the fund methods of attorneys fee calculation is provided in *Camden I Condominium Association v. Dunkle,* 946 F.2d 768 (11th Cir. 1991). In concluding that the percentage of the fund method was superior to the Lodestar

approach, Judge Brimmer consulted *Camden.* *See In re Copley Pharmaceutical,* 1 F.Supp.2d at 1411 and 1413. In the 1970s a debate was triggered primarily by the Second and Third Federal Circuit Courts over calculating a common fund fee award. *Camden I,* 946 F.2d at 771.

Many years earlier, in 1885, the United States Supreme Court recognized that in a common fund created through the efforts of the attorneys who litigated the claim, it was appropriate for the fee award to be based upon a percentage of the fund recovered for the class. *Central R.R. & Banking v. Pettus,* 113 U.S. 116, 127-28 5 S.Ct. 387, 393 (1885). In the *Pettus* case, class counsel had a fee agreement with the named plaintiffs that limited the attorneys' fees, the court used that fee agreement as a guideline to determine the reasonable percentage based fee. *Camden I,* 946 F.2d at 771 *citing Pettus,* 113 U.S. at 128. From 1885 until 1973, fee awards granted pursuant to the common fund were computed as a percentage of the common fund. *Camden I,* 946 F.2d at 771.

C. The Announcement of the Lindy Lodestar Method

By the mid 1970s, the Third Circuit announced what has commonly been known as the lodestar method. *See Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 487 F.2d (3d Cir. 1973). To arrive at the lodestar figure under the Third Circuits' approach, the district court must first determine the number of hours reasonably spent by the plaintiffs' counsel on the matter, then multiply those hours by an hourly rate the court

deems reasonable for similarly complex non-contingent work. *Camden I*, 946 F.2d at 772. That figure may then be adjusted upward or downward for certain factors known as multipliers, such as contingency and the quality of the work performed, to arrive at the final fee. *Camden I*, 946 F.2d at 772.

D. The Johnson Factors

At about the same time as the *Lindy* court's creation of the lodestar approach, the Fifth Circuit announced a twelve-factor method to determine court awarded attorneys fees. These factors are:

1. The time and labor required;
2. The novelty and difficulty of the questions involved;
3. The skill requisite to perform the legal services properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client;

12. Awards in similar cases.

See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Most commentators consider the *Johnson* factors to be little different from the *Lindy* lodestar approach since many of the *Johnson* factors are subsumed within the initial calculation of hours reasonably expended at the customary rate. *Camden I*, 946 F.2d at 771 *citing* Report of Third Circuit Task Force, 108 F.R.D. 237, 244 (October 8, 1985).

It is important to note that although the United States Supreme Court has had the occasion to adopt or endorse the lodestar method, it has not done so. *Camden I*, 946 F.2d at 771. In *Blum v. Stevenson*, 465 U.S. 886 (1984) the Court noted that attorneys' fees in common fund cases, unlike statutory fee-shifting cases, are "based on a percentage of the fund bestowed on the class. *Id.* at 900 n.16. The Court's recognition that the percentage method is necessary in common fund cases is consistent with the Court's use of such a method in every case in which it has addressed the computation of a common fund fee award. *Camden I*, 946 F.2d at 771 *citing Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Pettus*, 113 U.S. at 128, 5 S.Ct. at 393; and *Trustees v. Greenough*, 105 U.S. (15 Otto) 527, 532, 26 L.Ed. 1157 (1881). Thus, the Court, which has favorably cited the Task Force Report, *Evans v. Jeff D.*, 475 U.S. 717, 736-37 n.28 (1986), has never endorsed the use of any other method in common fund cases.

E. *Modern Developments: Courts Return to the Percentage of the Fund Method*

The *Lindy* lodestar method and *Johnson* factors have begun to fall out of favor and Courts are increasingly endorsing the percentage of the fund method. *Camden I,* 946 F.2d at 774. The *Camden* court noted that the Seventh, First, Ninth, Tenth, and D.C. Circuits have endorsed the percentage of the fund method for determining attorneys fees. *Camden I,* 946 F.2d at 774. Importantly, however, both the Eleventh Circuit in *Camden* and the Tenth Circuit in *Brown v. Phillips Petroluem Co.*, 838 F.2d 451, 454 (10th Cir. 1988) have determined that although the percentage of the fee approach is appropriate, the *Johnson* factors should be employed in reviewing, evaluating, and setting percentage fee awards in common fund cases. *Camden I,* 946 F.2d at 775.

In a New York District Court case, *Maley v. Del Global Technologies Corp.*, 186 F.Supp.2d 358 (S. D. New York), the court noted that the trend toward favoring the percentage of the fund method over the lodestar method continues. *Maley,* 186 F.Supp.2d at 370 (noting that "there is a strong consensus—both in this Circuit and across the country—in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery.") It is worth noting that in *Maley,* the Court approved attorneys' fees of 33 1/3 percent of the fund wherein the fund was approximately $11 million and represented approximately "41% of the maximum damages." *Maley,* 186 F.Supp.2d at 360. While the court relied on the percentage of

the fund method to calculate the attorneys fees, it also cross-checked the 33 1/3% fee by applying the lodestar and multiplier method. *Maley*, 186 F.Supp.2d at 369-71. Applying this cross-check or hybrid approach, the Court determined that the percentage of the fund fee amount which yielded "a modest multiplier of 4.65 is fair and reasonable." *Maley*, 186 F.Supp.2d at 371.

The rationale for the trend toward the percentage of the fund method is explained to some extent in the Third Circuit Task Force's report. In studying the problems associated with court-awarded attorney's fees cases, the following goals were established:

> [T]o provide fair and reasonable compensation for attorneys in those matter in which fee awards are provided by federal statute or by the fund-in-court doctrine; to discourage abuses and delays in the fee-setting process; to encourage early settlement or determination of cases; to provide predictability; to carry out the purposes underlying court-awarded compensation; to simplify the process by reducing the burdens it currently imposes on the courts and on litigants; and to arrive at fee awards that are fair and equitable to the parties and that take into account the economic realities of the practice of law. *Camden I*, 946 F.2d at 773 *citing* Task Force Report, 108 F.R.D. at 238.

The lodestar approach was determined to be incapable of achieving these goals. The *Camden* court noted:

> The Task Force found that the *Lindy* lodestar approach, or for that matter, any method premised upon the number of hours expended, failed to achieve any of these stated goals in a common fund cases in which the measure of the recovery is the best determinant of the reasonableness and quality of the time expended. *Camden I*, 946 F.2d at 773.

F. The Percentage of Fund Approach Used By Judge Brimmer

Though the Wyoming Supreme Court has yet to articulate which rule applies in Wyoming, the United States District Court for the District of Wyoming adopted the "percentage of the fund method" in *Copley Pharmaceutical*. There, Judge Brimmer reasoned that the "percentage of the fund method" was preferred for four basic reasons.

First, the "percentage of the fund method" is less burdensome on the Court. Indeed, it does not require the Court to scrutinize attorney bills and expenditures as would be necessary under the lodestar test. *Copley Pharmaceutical*, 1 F.Supp.2d at 1411. Second, the "percentage of the fund method" rewards efficiency rather than inefficiency. *Id.* In other words, if an attorney is compensated on the number of hours worked, he/she might "delay" (potentially to the detriment of the class and/or client) an early settlement in an effort to increase the billable hours and the amount ultimately awarded for attorneys fees. Third, the "percentage of the fund method" more closely aligns the attorneys with the members of the class in that both are interested in a higher settlement amount. *Id.* Finally, there is little reason to treat class actions differently than non-class actions. The market will determine what an attorney is willing or not willing to do recognizing the inherent risks and benefits of moving forward on a contingency basis versus an hourly basis. *Id.* at 1411-12.

G. Determining the Appropriate Percentage

Once a court determines that the percentage of the fund is the appropriate method to apply, the next critical question is what percentage is appropriate. The percentage may vary from less than 20% in mega-fund cases to greater than 50%. *See e.g. Camden I*, 946 F.2d at 775; *see also Faircloth v. Certified Finance, Inc.*, 2001 WL 527489, page 8, (E.D. La. 2001) (noting that the majority of attorneys fees awarded pursuant to the percentage method range between 25% and 33.34% of the common fund). Citing the Newberg treatise, the *Camden* court observed "[t]o avoid depleting the funds available for distribution to the class, an upper limit of 50% of the fund may be stated as a general rule, although even larger parentages have been awarded." *Camden I*, 946 F.2d at 774-75.

In reviewing a number of cases with varying percentages of the fund allocated to attorney's fees, the amount of the fund or recovery in the case appears to be one of the most important factors that significantly decreases the recovery of attorney's fees. In mega-fund cases with recoveries over 100 million dollars, the percentage of the fund allocated to attorney's fees is often reduced below the average range of recoveries.

In a very lengthy opinion that addresses attorney fees in a common fund estimated to exceed 1 billion dollars and by some accounts more than $2.1 billion, a United States District Court in Texas analyzed the typical common fund case versus a mega-fund case. *Shaw v. Toshiba America Information Systems, et al.*, 91

F.Supp.2d 942, 972 (E.D. Tex. 2000). The court described the percentage of the fund analysis:

> Under a percentage of the common fund analysis (the "percentage method"), based on the opinions of other courts and the available studies of class action attorneys' fee awards (such as the NERA study)[1], this Court concludes that attorneys' fees in the range from twenty-five (25%) to thirty-three and thirty-four one hundredths percent (33.34%) have been routinely awarded in class actions. Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery. The evidence concerning fee awards in mega-fund cases is more limited since there are fewer such cases to study. *Shaw*, 91 F.Supp.2d 972.

The *Shaw* court continued to note that in several mega-fund cases from Louisiana, Texas and New York each involving over $100 million, attorneys fee awards based on a percentage of the fund were 18%, 36%, 25%, 30% and 14%. *Shaw*, 91 F.Supp.2d at 972, *see also In re Sunbeam Securities Litigation*, 176 F.Supp.2d 1323, 1334 (S. D. Fla. 2001)(finding 25% award of attorneys fees of a $110 million settlement appropriate).

III. CONCLUSION

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[1]According to the *Shaw* court, the most complete analysis of fee awards in class actions conducted to date was conducted by the National Economic Research Associates, an economics consulting firm. That data is reported at Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, Recent Trends III: What Explains Settlements in Shareholder Class Actions? (NERA, June, 1995) This data indicates that regardless of size, attorney's fees average approximately 32% of the settlement. (NERA Study at 7). *Shaw*, 91 F.Supp.2d at 988.

For these reasons, this Court should also adopt a "percentage of the fund method" as it is the most efficient, effective and preferred method. Should the Court adopt a "percentage of the fund method," a determination must then be made as to the appropriate percentage to be awarded. *Id.* To aid this decision, Courts have often looked to those lodestar factors that may apply.[2]

Plaintiffs request the Court follow the preferred and majority rule of a "percentage of the fund." Given the hours worked, the complexity of this matter, the requisite skills needed to prosecute such a matter, and the favorable results obtained on behalf of royalty owners, the fee and costs set forth in the settlement agreement in the amount of 15% of the total settlement amount is reasonable in this case.

Class Counsel respectfully requests this Court grant Class Counsel's fee and cost application and adopt a "percentage of the fund" method for such an award and order the distribution of attorneys fees and costs in accordance with the amount set forth in the settlement agreement.

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[2]The lodestar factors that could be reviewed include: (I) the time and labor involved; (2) the novelty and difficulty of the legal and factual questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other work by the attorneys; (5) the customary fee; (6) any prearranged fee; (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; and (12) awards in similar cases. *See Copley Pharmaceutical,* 1 F.Supp.2d at 1413.

DATED this 23rd day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2011 I served the foregoing by hand-delivering a true and correct copy thereof to the following:

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