

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

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|---|---|
| PERRY CLINE, on behalf of |) |
| himself and all others |) |
| similarly situated |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| SUNOCO, INC. (R&M) |) |
| and SUNOCO PARTNERS |) |
| MARKETING & TERMINALS, L.P., |) |
| |) |
| Defendants. |) |

Case No. 17-cv-313-JAG

**MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE’S
MOTION FOR APPROVAL OF CASE CONTRIBUTION AWARD**

I. INTRODUCTION

The Court is well aware of the factual, procedural, and appellate background of this case. Therefore, in the interest of brevity, Class Representative will not recite the background of this litigation again. Instead, Class Representative respectfully refers the Court to Class Counsel’s Motion for Approval of Attorneys’ Fees and exhibits thereto, the relevant pleadings on file, and any other matters of which the Court may take judicial notice (including the trial record), all of which are incorporated by reference as if set forth fully herein. *See, e.g., New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n. 21 (10th Cir. 2009) (court may take judicial notice of its own files and records); *United States v. Ahidley*, 486 F.3d 1184, 1192 n. 5 (10th Cir. 2007); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979).

In sum, Class Counsel obtained a Final Judgment for the benefit of the Certified Class, which consists of: (1) \$80,691,486.00 in actual damages, (2) \$75,000,000.00 in punitive damages, plus (3) post-judgment interest. The \$80,691,486.00 actual damages award represents **100%** of the

Class's highest possible actual damages during the Relevant Time Period. In addition to these amounts, Class Representative negotiated a stipulation with Defendants whereby Defendants paid \$5,000,000.00 in statutory fees and expenses. Defendants already have deposited all of these amounts with the Judgment Administrator, and all amounts are accruing interest. The \$5 million in statutory fees and expenses is being held in a separate, interest-bearing account with the Judgment Administrator.

Pursuant to the Court's Order (Dkt. No. 610), Class Counsel caused the "Notice of Motion for Attorney's Fees From Judgment Fund Pursuant to Rule 23(h)" to be issued on January 13, 2023. Ex. 21 at ¶5.¹ Class Counsel also caused the publication notice to be published on January 19, 2023 in six newspapers. *Id.* at ¶8. The Notices stated that Class Representative would seek a Case Contribution Award not to exceed \$500,000.00 from the Judgment Common Fund, as compensation for his valuable time, effort, and assistance throughout this Litigation, which culminated in the outstanding result. *Id.* at Ex. A.

The Case Contribution Award requested here is appropriate and reasonable under Oklahoma law, which permits the Court to evaluate the request under factors similar to the 12 OKLA. STAT. §2023(G)(4)(e) factors for determining reasonable attorney fees. When considering the time and labor Perry Cline contributed, the harassment he has endured, the extraordinary result he helped achieve on behalf of the Class, the risk he incurred, the fortitude he showed when he turned down payment in full for his own benefit on at least two occasions so he could continue fighting for the entire Class even at the risk that he would receive nothing, the fact that he refused to settle for less than he believed the Class deserved, and awards in similar cases, the requested

¹ References to "Ex. ___" are to the exhibits attached to Class Counsel's Motion for Approval of Attorneys' Fees filed contemporaneously herewith.

award is reasonable. In recognition of the service and results obtained, class members also endorse and support Mr. Cline’s requested award. *See, e.g.*, Exs. 8 – 18.

Therefore, for the reasons set forth herein, Mr. Cline respectfully requests the Court grant his Motion for Approval of Case Contribution Award (the “Motion”).

II. ARGUMENT

A. Oklahoma Law Governs the Case Contribution Award

The Court has diversity jurisdiction over this case pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Because Oklahoma law forms the basis of the Class claims, Oklahoma law governs the award of an incentive fee or case contribution award. *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017). Consistent with the practice common to state and federal courts across the country, Oklahoma courts “regularly grant incentive awards to compensate named class representatives for the work they performed – their time and effort invested in the case.” *Strack v. Continental Resources, Inc.*, 507 P.3d 609, 620 (Okla. 2021). Decisions from Oklahoma courts demonstrate the state’s long-standing commitment to compensating class representatives for the valuable work they perform on behalf of class members. *See, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, LLC*, CJ-2010-38, 2015 WL 2015 WL 5794008 (Okla. Dist. Ct. Beaver County, July 2, 2015); *Drummond v. Range*, CJ-2010-510 (Okla. Dist. Ct. Grady County, September 9, 2013); *Sacket v. Great Plains Pipeline Co.*, CJ-2002-70 (Okla. Dist. Ct. Woods County, March 5, 2009); *Continental Resources, Inc. v. Conoco Inc.*, CJ-95-739; CJ-2000-356 (Okla. Dist. Ct. Garfield County, August 22, 2005); *Robertson/Taylor v. Sanguine, Ltd.*, CJ-2002-150 (Okla. Dist. Ct. Caddo County, July 11, 2003).²

² The referenced Oklahoma decisions are attached as Ex. 22 to Class Counsel’s Motion for Approval of Attorneys’ Fees.

In 2021, the Oklahoma Supreme Court provided guidance for calculating case contribution awards in class actions under Oklahoma law. *See Strack*, 507 P.3d at 620. In *Strack*, the Oklahoma Supreme Court recognized certain affinities between attorney fee awards and case contribution awards: case contribution awards are justified as payment for valuable services rendered on behalf of the class; must be supported by sufficient evidence in the record; and a variety of factors should be considered to determine an appropriate award in a particular case. *See id.*

Specifically, when determining the appropriate amount of a case contribution award, “[c]ourts should grant incentive awards to class representatives based on the actual time expended on services rendered *and other factors similar to those outlined in Oklahoma’s class action attorney fee statute pertinent to an incentive award.*” *Id.* (emphasis added) (citing 12 O.S. § 2023(G)(4)(e); 5 William Rubenstein, *Newberg on Class Actions* § 17.12 (explaining incentive awards are based on evidence of the particular services performed, the risks encountered, and any other factors pertinent to the award)). Thus, under Oklahoma law, courts have authority to award amounts beyond a simple calculation of the time and labor expended by the class representative. *See id.* The “result obtained” is generally the most important factor in assessing reasonableness. *See Tibbetts v. Sight ‘n Sound Appliance Ctrs., Inc.*, 77 P.3d 1042, 1046, 1049-50 (Okla. 2003); *see also Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988). The value a court places on the additional factors will differ in each case. *See Strack*, 507 P.3d at 614.

B. The Case Contribution Award Is Reasonable and Should Be Granted

Here, Mr. Cline seeks an award of \$500,000.00. This request is supported by evidence including Mr. Cline’s trial testimony and Declaration, Declarations by Class Counsel, the Declaration of Prof. Miller, Declarations of multiple Class Members, and other evidence in the record. *See Newberg* at § 17:12 (evidence might be provided through “affidavits submitted by class

counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”). This evidence demonstrates the award Mr. Cline seeks is appropriate under the factors.

1. Mr. Cline’s work on behalf of the Class.

The first factor considered is often the “time and labor required.” *See* 12 OKLA. STAT. §2023(G)(4)(e)(1). Mr. Cline’s work on this case began before it was filed. Ex. 2 at ¶17. Since determining to pursue a class action against Sunoco in early 2017, Mr. Cline constantly communicated with Class Counsel; identified materials and information related to the claims and defenses in this case; and reviewed pleadings, briefs, and written discovery. *Id.* at ¶¶18, 20, 31. He has reviewed documents from proceedings in both the district court and the multiple appeals filed by Sunoco. He has been deposed twice, and before those depositions, he met with Class Counsel for multiple days to prepare for his deposition testimony. *Id.* at ¶18. As part of his work on behalf of the Class, Mr. Cline helped find evidence and witnesses, including introducing Class Counsel to Paul Walker, who testified at the trial. *Id.*; *see also* Ex. 8 at ¶17. In November 2019, Mr. Cline traveled to Austin to participate in a mediation, and in December 2019, he traveled to Muskogee for the trial of this case. Ex. 2 at ¶18. Mr. Cline stayed in Muskogee with the trial team for the entire trial, and he was in the courtroom all day, every day on behalf of the Class. *Id.* In May of 2022, Mr. Cline also participated in an all-day, post-trial mediation in Oklahoma City with the Magistrate Judge, as ordered by the Court. *Id.* All of these efforts were necessary and beneficial to the Litigation and the Judgment, and they continue to be useful in fighting Defendants’ appeals.

To date, Mr. Cline estimates he has dedicated more than 800 hours to working on this Litigation for the Class and anticipates spending at least 30-50 hours working on this case in the future. *Id.* at ¶¶13, 17, 18, 31.

For purposes of estimating a reasonable hourly rate to calculate the value of his time, Mr. Cline has a variety of income sources the Court should consider. *Id.* at ¶31. Mr. Cline is a farmer, and the nature of that work makes it difficult to calculate the value of his time in terms of an hourly rate. However, Mr. Cline also operates a bulldozer for \$150/hour, and he typically earns \$125/hour for work he does as part of his truck-driving business. *Id.* When Mr. Cline hosts rodeos in Hennessey, Oklahoma, his payment for work over a two-day period represents approximately \$500/hour. *Id.* And, when operating his stagecoach business, Mr. Cline has earned over \$500/hour for hosting and operating stagecoach rides and performances. *Id.*

When determining an appropriate hourly rate to calculate a case contribution award, it is reasonable to consider the hourly rate the class representative would be paid in other settings, based upon his or her skills and expertise. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 F. App'x 232, 235 (10th Cir. 2009) (unpublished) (“... a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.”); *see also, Chieftain Royalty Co. v. Enervest Energy Institutional Fund XII-A, L.P.*, No. CIV-11-177-D, 2022 WL 1301835, at *5 (W.D. Okla. March 31, 2022) (class representative’s compensation in other business or industry activities could have provided an “objective measure” of class representative’s time for purposes of determining his reasonable hourly rate for case contribution award). The time a class representative spends working on behalf of the class can be thought of as a financial loss suffered by the class representative because it is time the class representative could have spent earning personal income. If the court were to average the hourly rates for Mr. Cline’s multiple jobs, it comes out to approximately \$318/hour. Ex. 2 at ¶31. Multiplying Mr. Cline’s hours (850) by this rate equals \$270,300.00 in time and services alone.

Finally, based on his review of the evidence, Professor Miller agrees that “[Mr. Cline] devoted a significant amount of time and attention to this matter – much more than is typical for class representatives.” Ex. 7 at ¶128.

This factor supports Mr. Cline’s requested award. *See id.* at ¶¶128-37.

2. *The evidence supports an enhancement of Mr. Cline’s award based on additional factors.*

Under certain circumstances, a simple time-expended calculation will not appropriately compensate a class representative for the value of his or her services. *See Strack*, 507 P.3d at 620; compare *Oliver’s Sports Center, Inc. v. Nat’l Standard Ins. Co.*, 615 P.2d 291, 294 (Okla. 1980) (“Fees cannot fairly be awarded on the basis of time alone.”). This is one of those circumstances. As demonstrated below, the record supports an increase of Mr. Cline’s award to \$500,000.00.

First, in addition to the work outlined above, Mr. Cline has put himself second to the Class, even when he had several opportunities to eliminate his risk of no recovery. For example, Sunoco sent Mr. Cline a check on multiple occasions for what it claimed was the unpaid interest owed to Mr. Cline. With the full understanding that he may never get anything out of this lawsuit and could ultimately lose at trial or on appeal, Mr. Cline turned down this money (twice) because he believed pursuing the full recovery for himself and the Class and holding Sunoco accountable was the right thing to do. Ex. 2 at ¶34. He also turned down every attempt by Defendants to settle this case for less than he believed was a fair amount. Throughout the Litigation, Mr. Cline could have taken an easier path to resolution that would have resulted in a substantially lower recovery or required him to abandon parts of the Class or their damages. *Id.* at ¶¶19, 32. Mr. Cline refused to do so and took on the risk of no recovery to achieve the best possible result for the entire Class. The risk of no recovery was very real to Mr. Cline and, because of the pending appeal, Mr. Cline’s risk of no recovery continues to this day.

Thus, Mr. Cline exemplifies the ideal that a class representative must put himself second and the best interest of the Class first. Ex. 2 at ¶¶10, 12, 19; Ex. 8 at ¶18; Ex. 1 at ¶¶41, 93. The Class is fortunate to have Mr. Cline as their representative. And so are Class Counsel. Ex. 1 at ¶93.

Second, Mr. Cline also has carried out his duties outside of the courtroom. Class Members have come to know Mr. Cline and, as a result, they often ask him about the case when they see him at church, in town having lunch at the local diner, or out running errands. Some Class members even call him directly. For example, an elderly member of the Class calls Mr. Cline on a regular basis to check on the Litigation, with particular concerns that he may not live long enough to receive his distribution from the Final Judgment. Ex. 2 at ¶20. Over the past several years, Mr. Cline has averaged at least an hour per week responding to these types of questions. After significant events in the Litigation, like entry of the Final Judgment and whenever Notices are mailed to the Class, the number and frequency of questions increase, and Mr. Cline always does his best to provide answers. *Id.* And, it was Mr. Cline that talked to Mr. Walker and enabled him to testify in this case. *Id.* at ¶18.

Third, Mr. Cline's work helped achieve an extraordinary result for the Class. Most class actions are not tried to verdict and, as such, they result in settlement payments to class members representing less than 100% of their actual damages. But, here, Mr. Cline never quit, and he always worked with his lawyers to do what he believed was best for the Class. Ex. 1 at ¶¶41. Through his years of commitment to work on behalf of the Class, he held Sunoco accountable for 100% of the maximum amount it could have been liable for under the PRSA. And his pursuit of the Class claims resulted in a Judgment that nearly doubled that amount, after considering the punitive damages and interest. This means the total value of the case to the Class is approximately *two times* their actual damages. Even after attorneys' fees, expenses, and a case contribution award at

the requested amounts, the Class will still receive more than 100% of their actual damages. By any measure, this is a fantastic result for the Class and all owners in Oklahoma who may benefit indirectly from this Judgment.

Fourth, the requested amount is within the range of awards ordered by Oklahoma state and federal courts in other royalty class actions. *See, e.g., Chieftain Royalty Co. v. QEP Energy Co.*, Case No. 11-CV-212-R, Dkt. No. 182 at ¶25 (W.D. Okla. May 31, 2013) (\$775,000 case contribution award in \$155,000,000 common-fund case); *Cecil v. BP Am. Prod. Co.*, Case No. 16-CV-410-KEW, Dkt. No. 260 at ¶38 (E.D. Okla. Nov. 19, 2018) (\$450,000 case contribution award in \$147,000,000 common-fund case); *Hay Creek Royalties, LLC v. Roan Resources LLC*, Case No. 19-CV-177-CVE, Dkt. No. 74 at ¶2(a) (N.D. Okla. April 28, 2021) (\$300,000 case contribution award in \$20,200,000 common-fund case); Ex. 1-B (chart summarizing Oklahoma oil-and-gas class action fee and incentive awards from 1998-2018, including multiple awards in excess of \$700k). Moreover, the vast majority of these awards were the results of settlements—not a final judgment procured after a full trial on the merits. And in none of them did the class recover more than 100% of its damages—as the Class did here. Because the Final Judgment Mr. Cline obtained is twice the amount of actual damages suffered by the Class, and because Mr. Cline obtained that Final Judgment following full trial and defended it through multiple appeals, he deserves a case contribution award above the amount typically awarded in similar settlements. The award he requests here is reasonable.

The above-described evidence and factors support Mr. Cline's requested award. *See* Ex. 7 at ¶¶127-37.

C. The Case Contribution Award Is Supported by Members of the Class

In recognition of Mr. Cline’s dedicated work on behalf of the Class, multiple Class Members executed declarations supporting his request for a case contribution award. *See* Exs. 8 – 18. Those individuals all recognize and agree Mr. Cline “performed an extraordinary service” for the Class and should receive the requested award. Mr. Walker, a Class Member who testified at trial, further states: “I have known Perry Cline for over 40 years, and we have talked often about this matter over the past several years. I’ve seen first-hand how hard he has worked to pursue this matter on behalf of the Class. He has always made himself available to answer my questions about this matter and the questions of other Class members.” Ex. 8 at ¶18.

Rob Abernathy, a Class Member who has previously served as a Class Representative, “understand[s] what it requires” to take on “a well-funded oil company that hires top defense counsel from major law firms.” Ex. 13 at ¶4. “If individuals did not take on the responsibility of representing classes of Owners, the benefits of a class recovery like this Judgment would not be possible[.]” *Id.* at ¶10.

Dan Little, a Class Member and highly respected Oklahoma attorney, agrees and acknowledges Mr. Cline’s efforts in “reject[ing] Defendants’ attempts to pay him his damages and end the case on behalf of the Class.” *See* Ex. 9 at ¶8; Ex. 1 at ¶44. Mr. Little has been practicing law in Oklahoma for over 40 years, has represented royalty owners for much of that time and has served as a class representative. Ex. 1 at ¶44. He understands what this kind of litigation requires and fully supports Mr. Cline’s requested award. Ex. 9 at ¶8.

The support Mr. Cline has received from the Class supports the requested award.

IV. CONCLUSION

Perry Cline was never promised any recovery and he was not given any guarantees prior to filing this Litigation, nor at any time during the Litigation. Ex. 2 at ¶35. In fact, Mr. Cline

understands and agrees that such an award, or rejection thereof, has no bearing on distribution of the Judgment Common Fund and fully supports the proposal for distributing the Judgment Common Fund, even if he is awarded no case contribution award at all. *See id.* Oklahoma law, however, fully supports the requested award. Mr. Cline “call[ed] Sunoco to task on” their business practice in this case. *See* Dkt. No. 298 at 1. He went above and beyond at all times for the Class and achieved a rare result. For the foregoing reasons, Class Representative respectfully requests the Court enter an order granting approval of a Case Contribution Award of \$500,000.00 to reflect the important role he played in representing the interests of the Class and in achieving the substantial result reflected in the Final Judgment.

DATED: January 31, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023 I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Bradley E. Beckworth

Bradley E. Beckworth