DISTRICT COURT CITY AND COUNTY OF DENVER 1437 Bannock Street Denver, CO 80202 **Plaintiffs:** RAYMOND AND SALLY MILLER, ET AL., on behalf of themselves and all others similarly situated. **Defendant:** ENCANA OIL & GAS (USA) INC.	COURT USE ONLY Case Number: 05 CV 2753 Courtroom: 19

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, EXPENSES AND INCENTIVE AWARD PAYMENTS TO CLASS REPRESENTATIVES

Before the Court is Class Counsel's motion for attorneys' fees and expenses and for incentive award payments to Class Representatives, filed on June 13, 2008. The Court has reviewed Class Counsel's motion; the memorandum, exhibits, and affidavits in support of Class Counsel's motion; Class Counsel's submission of supporting documentation of litigation expenses incurred; Class Counsel's affidavits regarding the hourly rates of the attorneys and legal assistants who worked on this matter; and the objections to Class Counsel's attorneys' fee request submitted by four Class members. The Court has also considered the evidence and statements of counsel presented at the August 1, 2008 hearing to consider final approval of the Class Settlement, and hereby finds the following:

1. In June 2004, Class Counsel were retained to investigate and pursue this class action litigation against EnCana Oil & Gas (USA), Inc. ("EnCana"). After completing their pre-litigation investigation, Class Counsel filed Plaintiffs' class action complaint against EnCana on April 13, 2005. The Plaintiff Class consists of persons who have or have had the contractual

right to receive royalty payments from EnCana on natural gas produced and sold by EnCana in the state of Colorado, and whose Royalty Agreements do not expressly authorize EnCana to deduct the costs incurred to market natural gas after it is severed from the wellhead in the calculation of royalties. The relief sought by the eight named Plaintiffs and the proposed Class included claims for damages based on EnCana's alleged breach of the Royalty Agreements at issue, and a request for a declaratory judgment determining the proper method for EnCana's calculation and payment of royalties to the members of the Class on future natural gas production.

2. For more than six months after the original complaint was filed, Class Counsel engaged in extensive discovery relating to both class certification issues and the claims on the merits. This discovery included an extensive review and categorization of thousands of Royalty Agreements, in order to properly identify the Agreements which should be included as part of the defined Class, and to identify those Agreements which should be excluded. Class Counsel also reviewed thousands of other documents produced by EnCana relating to specific issues in this litigation, including documents related to EnCana's production and marketing of the natural gas and natural gas liquids at issue, and electronic data detailing EnCana's methods for calculating royalties paid to the members of the Class. Class Counsel also retained, and extensively worked with, three designated experts, including a natural gas marketing expert, a certified public accountant, and a third expert who provided an extensive report categorizing various types of royalty provisions found in the Royalty Agreements at issue.

3. Class Counsel took extensive depositions of fourteen witnesses, primarily employed by EnCana, on various issues relating to natural gas marketing, royalty accounting, and EnCana's natural gas production operations in the state of Colorado. Class Counsel also met

extensively with each of the eight named Plaintiffs, obtained and analyzed all relevant documents in their possession, and met with, and produced, each of these eight named Plaintiffs for their depositions which were taken by EnCana's attorneys.

4. On December 16, 2005, Class Counsel filed the Plaintiffs' motion for certification of a C.R.C.P. 23(b)(3) Class, along with an extensive memorandum in support of that motion, with numerous exhibits. EnCana filed its response in opposition to the class certification motion on January 27, 2006, and Plaintiffs filed their reply memorandum in further support of the class certification motion on February 21, 2006. On March 2-3, 2006, this Court held a two-day evidentiary hearing on Plaintiffs' motion for Class certification, in which twelve witnesses testified. At the conclusion of that hearing, the Court requested that Plaintiffs' counsel, and EnCana's counsel, submit proposed findings of fact and conclusions of law on the class certification issue. Plaintiffs' proposed findings of fact and conclusions of law were submitted to the Court on March 17, 2006. This Court entered its Order granting Plaintiffs' motion for certification of a C.R.C.P. 23(b)(3) class on May 30, 2006, in which the Court adopted nearly all of the Plaintiffs' proposed findings of fact and conclusions of law.

5. On June 13, 2006, EnCana filed a petition in the Colorado Court of Appeals for permission to appeal this Court's May 30, 2006 class certification Order. On June 29, 2006, Plaintiffs filed their response in opposition to EnCana's petition. On July 7, 2006, the Colorado Court of Appeals denied EnCana's petition. EnCana's subsequent petition for mandamus filed in the Supreme Court of Colorado, requesting an order vacating this Court's May 30, 2006 class certification Order, was denied by the Supreme Court of Colorado on August 2, 2006.

6. In the summer of 2006, the parties' attorneys submitted a stipulated procedure for the identification of the Class members who should receive notice of the Class certification,

which this Court approved on July 18, 2006. Over the course of the next eighteen months, the parties' attorneys worked on the compilation of a comprehensive list of the persons who are members of the defined Class, and who should therefore receive notice of the Court's certification of this case as a class action. In order to obtain a comprehensive list of the Class members, Class Counsel conducted a detailed examination of thousands of Royalty Agreements, as well as other documents, to ensure that a complete and accurate list of the Class members would be prepared. By November 30, 2007, a final list had been prepared containing the names and addresses of all Class members who could be identified through reasonable efforts. In December 2007, Class Counsel supervised the mailing of the Court approved Notice which informed the Class members of this Court's Order certifying this case as a class action, which was mailed to approximately 6,000 members of the certified Class.

7. After this Court entered its class certification Order, EnCana produced, and Class Counsel reviewed, extensive electronic data detailing EnCana's monthly royalty calculations and payments for all of its statewide production from May 1999 through June 2006, covering approximately twenty-six different production areas in Colorado, 4,500 wells, and 8,000 royalty owner accounts. Class Counsel and their accounting expert, Mr. Don Phend, extensively analyzed that data, and as a result of a very extensive review of that data, certain royalty underpayment estimates for the Class were prepared based on the Plaintiffs' contention that the first commercial market for the natural gas and natural gas liquids sold by EnCana was at or beyond the tailgate of a processing plant. The electronic royalty calculation and payment data produced by EnCana was periodically updated, so that Plaintiffs' expert, Mr. Don Phend, was able to obtain complete royalty payment data for the members of the Class through August 2007.

8. Beginning in June 2007, the parties exchanged correspondence regarding proposals for a Class Settlement, which addressed both compensation to the Class on the claim for past royalty underpayments, and a royalty calculation methodology for future royalty payments to the Class. After several exchanges of correspondence in the summer of 2007, the parties remained far apart regarding their respective positions concerning a Class Settlement. The parties thereafter agreed to a mediation before former Judge Richard Dana of the Judicial Arbiter Group, which was held on November 19, 2007. At the mediation, the parties did not reach a settlement on the past royalty underpayment claim or the appropriate method of calculating future royalties, and in fact remained far apart regarding their respective positions. Through the mediation process, however, the parties did exchange significant information regarding the strengths and weaknesses of their respective positions and damage estimates, which did assist the parties in later settlement negotiations in 2008.

9. Pursuant to the Notice of Class Certification which was mailed to members of the Class, the Class members had until January 30, 2008 to elect to opt out of the certified Class. Approximately one hundred fifty persons, out of approximately six thousand Class members, did elect to opt out of the certified Class by the January 30, 2008 deadline.

10. In February 2008, after the opt out period had expired, the parties' attorneys again addressed the subject of a possible settlement of the Class members' claims. During the course of numerous discussions and meetings in February 2008 and March 2008, the parties were able to narrow their differences, and ultimately reached an agreement regarding the terms of a Class settlement, subject to this Court's approval.

11. The Class settlement includes a forty million dollar compensatory payment by EnCana to resolve the royalty underpayment claims of the Class through December 31, 2008.

On May 1, 2008, EnCana paid the forty million dollar settlement amount into an interest bearing escrow account.

12. In addition to the forty million dollar payment, EnCana and the Class also reached agreement regarding EnCana's method for calculating royalty payments to the Class on the natural gas produced and sold by EnCana on and after January 1, 2009. The specific terms of the agreement regarding EnCana's calculation of future royalties vary somewhat from field to field, to take into account the various types of marketing arrangements utilized for each field. The terms of the future payment method are specifically described in paragraph 10 of the parties' Settlement Agreement.

13. The agreed upon methods for EnCana's calculation and payment of future royalties are substantially more favorable to the members of the Class than the methods which EnCana has been utilizing to pay royalties during the last several years. Don Phend, the accounting expert for the Plaintiff Class, made a calculation of the economic benefit of the future royalty calculation methods to the Class members, by comparing the existing royalty payment methodology used by EnCana to the future royalty payment methods which EnCana will use after January 1, 2009. Mr. Phend calculated an undiscounted benefit to the Class members of approximately sixty-five million dollars resulting from the future royalty payment method agreement. Mr. Phend determined that the present value of the future royalty payment method to the Class members is approximately forty-four million dollars, which Mr. Phend testified is a conservative estimate of the benefit. The Court finds that Mr. Phend's calculation of the present value of the benefit of the future royalty payment method to the Class members has been reasonably determined to be forty-four million dollars. Thus, the benefit of the future royalty payment method to the Class members, in combination with the forty million dollar settlement

fund, has resulted in a Class settlement which has a total economic benefit to the Class members of approximately eighty-four million dollars, in present value.

14. On April 3, 2008, the parties filed their Joint Motion for preliminary approval of the Class Settlement. Class Counsel filed an extensive memorandum in support of the Joint Motion for preliminary approval of the Class Settlement. After a hearing on the Joint Motion which was held on April 10, 2008, this Court entered its Order granting preliminary approval of the Class Settlement. Pursuant to the Court's April 11, 2008 Order, a Notice of the Class Settlement was mailed to approximately 6,500 members of the Class on May 2, 2008. Section 7 of that Notice informed the Class members of Class Counsel's intention to request attorneys' fees equal to one-third of the net Settlement Fund, and to seek reimbursement of litigation expenses. Section 8 of that Notice informed the Class members of Class Counsel's intention to request incentive awards for the Class Representatives totaling $67,500.

15. On June 13, 2008, Class Counsel filed their motion for attorneys' fees and expenses, and for incentive award payments to the Class Representatives, along with a memorandum in support of that motion, with supporting exhibits and affidavits. Pursuant to the Court's request, on August 12, 2008 Class Counsel supplemented their motion for attorneys' fees and expenses and for incentive award payments to the Class Representatives by submitting the supporting documentation for the litigation expenses for which they seek reimbursement, and also supplemented their motion for attorneys' fees by submitting affidavits reflecting the applicable hourly rates for each of the attorneys, legal assistants, and law clerks who have worked on this case on behalf of the Plaintiff Class.

16. Class Counsel are requesting an award for reimbursement of litigation expenses which they incurred through June 10, 2008, and through the completion of this litigation, in the

total amount of $286,524. The litigation expenses for which Class Counsel seek reimbursement through June 10, 2008 are in the total amount of $245,724.

17. The Court finds that Class Counsel have provided detailed and adequate supporting documentation for their request for litigation expenses incurred through June 10, 2008. The categories of expenses for which Class Counsel seek reimbursement include expert witness expenses, the expenses of mailing Notices to the Class members in December 2007 and in May 2008, deposition expenses, travel expenses, photocopying expenses, telephone expenses, mailing expenses, computer legal research expenses, court fees, and third-party contractor expenses. The affidavits of Class Counsel, and the supporting documentation for the litigation expenses, demonstrate that the litigation expenses for which reimbursement is sought through June 10, 2008 are reasonable in amount, and were necessarily incurred by Class Counsel in the prosecution of this class action litigation. In addition, all of the litigation expenses for which reimbursement is sought are the type of expenses typically billed by attorneys to paying clients in the marketplace.

18. In addition to the litigation expenses which Class Counsel have incurred through June 10, 2008, Class Counsel have reasonably estimated that they will incur additional litigation expenses after June 10, 2008, and through the conclusion of this litigation, in the amount of $40,800. In support of Class Counsel's request for reimbursement of anticipated expenses after June 10, 2008, Class Counsel have submitted a written estimate of the cost of preparing and mailing settlement checks to the Class members, in the amount of $8,500, and of preparing and mailing IRS 1099 forms to the Class members, in the amount of $6,500. Class Counsel's expert, Mr. Don Phend, has also submitted an affidavit in which he estimates that his additional charges for work done after June 10, 2008 will be in the approximate amount of $10,000.

19. The Court therefore finds that Class Counsel should be awarded reimbursement of litigation expenses, including litigation expenses incurred through June 10, 2008, and estimated expenses through the conclusion of this litigation, in the amount of $286,524.

20. Class Counsel are requesting that incentive awards totaling $67,500 be approved for the eight Class Representatives. Each of the eight Class Representatives has been actively involved in working with Class Counsel throughout the three year litigation process, in providing documents and information to Class Counsel, and in consulting with Class Counsel regarding various aspects of this litigation. In addition, each of the eight named Plaintiffs (or their representatives) appeared for their respective depositions which were taken by EnCana's attorneys in November and December of 2005. Thus, each of the eight Class Representatives has devoted significant time and effort in contribution to the successful resolution of this litigation.

21. The purpose of incentive awards for class representatives is to encourage people with significant claims to pursue actions on behalf of others similarly situated. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003). Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and in rewarding individual efforts taken on behalf of the Class. *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F.Supp. 525, 534 (E.D. Pa. 1990).

22. The factors which this Court should consider in determining an incentive award include: (1) the actions the named class representatives have taken to protect the interests of the class; (2) the degree to which the class has benefited from those actions; and (3) the amount of

time and effort the named class representatives expended in pursuing the litigation. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995). Having considered these factors, the Court finds that the requested incentive awards to the Class Representatives in the amount of $67,500 are justified. The Class Representatives provided substantial assistance to Class Counsel, and each of them has been actively involved in working with Class Counsel since the inception of this litigation, which contributed to the successful resolution of this litigation.

23. The Court finds that somewhat higher incentive awards for Barclay Farms, LLC and for White River Royalties, LLC are warranted. A $10,000 award to Barclay Farms, LLC is warranted because its representative, Ms. Kay Stevenson, appeared and testified at the class certification hearing on March 3, 2006, in addition to the other contributions which Ms. Stevenson made on behalf of Barclay Farms, LLC in this case. A $12,500 award is warranted for White River Royalties, LLC because its representative, Ms. Susan Jerman, appeared and testified at the class certification hearing, appeared on behalf of the Class at the November 19, 2007 mediation session, and also appeared and testified at the August 1, 2008 hearing to consider final approval of the Class Settlement.

24. The incentive awards to the Class Representatives totaling $67,500 represent less than one-fifth of one percent of the forty million dollar Settlement Fund. The requested awards are therefore reasonable, particularly when compared to incentive awards which have been awarded in other class action cases. *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving incentive awards totaling $300,000 to class representatives out of a common settlement fund of 56.6 million dollars); *In re Remeron End-Payer Antitrust Litig.*, No. Civ. O2-2007 FSH, 2005 W.L. 2230314, at *32 (D.N.J. 2005)

(incentive payments totaling $75,000 for six named plaintiffs in a class action which settled for 36 million dollars); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (incentive awards to five class representatives, ranging from $35,000 to $55,000 each, paid from a common fund of 18 million dollars). Moreover, in a similar royalty underpayment class action, involving a class settlement of 53 million dollars, the Weld County District Court recently approved incentive awards to four class representatives in the total amount of $150,000. *Holman v. Noble Energy Prod., Inc.*, Case No. 03CV9 (Weld County District Court, June 11, 1997 Order). Thus, the requested incentive awards to the eight Class Representatives are hereby approved, to be allocated as follows: (1) Raymond Miller – $7,500; (2) Sally Miller – $7,500; (3) Barclay Farms, LLC – $10,000; (4) Joan E. Brehon – $7,500; (5) Janette Foote – $7,500; (6) Niles Miller – $7,500; (7) US Bank, N.A., as Trustee for the T.E. McClintock Trust – $7,500; and (8) White River Royalties, LLC – $12,500.

25. Class Counsel are requesting an award of attorneys' fees equal to one-third of the net Class Settlement Fund, after subtraction of litigation expenses and incentive awards awarded by the Court. In determining the amount of the net Settlement Fund remaining after the approved awards of the litigation expenses and incentive awards, the Court finds that the starting point should be the forty million dollar Settlement Fund which EnCana paid into an escrow account on May 1, 2008. Thus, after subtracting the $286,524 for litigation expenses and the $67,500 for incentive awards which the Court has approved, the net Settlement Fund is in the amount of $39,645,976. Class Counsel's request for attorneys' fees from the net Settlement Fund is therefore in the amount of $13,215,325. Thus, Class Counsel's fee request is equal to one-third of the net Class Settlement Fund, and is equal to approximately sixteen percent of the eighty-four million dollar total economic benefit of the Class Settlement.

26. Under Colorado law, the common fund doctrine is recognized as an exception to the principle that attorneys' fees generally cannot be recovered absent an express statute, court rule or private contract providing for them. *Hawes v. Colo. Div. Of Ins.*, 65 P.3d 1008, 1015 (Colo. 2003); *Kuhn v. State*, 924 P.2d 1053, 1060 (Colo. 1996). In class action lawsuits where a fund is created for the benefit of the class, either through settlement or a judgment on the merits, the common fund doctrine is adhered to as a method for proportionately spreading attorneys' fees among the class members. *Brody v. Hellman*, 167 P.3d 192, 198 (Colo. App. 2007); *Kuhn*, 924 P.2d at 1060, citing 7B Charles A. Wright, Arthur R. Miller, and Mary K. Kane, *Federal Practice and Procedure*, § 1803 (1986). In the recent *Brody* decision, the Colorado Court of Appeals recognized that the prevailing trend in the award of attorneys' fees to class counsel in a common fund case is to award fees based on a percentage of the common fund obtained for the benefit of the class. 167 P.3d at 201. As the Court of Appeals noted, the rationale for awarding a percentage of the fund to attorneys in common fund cases is the same as the rationale for permitting contingency fee agreements in general. *Id.* The size of the contingent fee is designed to be greater than the reasonable value of the services, or the hours worked multiplied by an hourly rate, to recognize the fact that attorneys will realize no return for their investment of time and expenses in cases they lose. *Id.*

27. In *Brody*, the trial court awarded class counsel fifteen million dollars in attorneys' fees, an amount equal to thirty percent of the fifty million dollar settlement fund. *Id.* at 197. On appeal, the objectors argued that the trial court had abused its discretion in awarding class counsel fifteen million dollars. *Id.* The Court of Appeals rejected the objectors' contention, and held that the percentage of the common fund awarded by the trial court was reasonable. *Id.* at 203. The Court of Appeals cited to a series of decisions in which the courts have awarded

attorneys' fees based on a percentage of the settlement fund, which generally range between twenty-five percent and thirty-six percent of the common fund. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590-91 (E.D. Pa. 2005); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) *In re Combustion, Inc.*, 968 F. Supp. 1116, 1132 (W.D. La. 1997); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993).

28. In support of their attorneys' fee request, Class Counsel have demonstrated that the attorneys' fees which they request are in accordance with the attorneys' fee awards to class counsel in other Colorado royalty underpayment class action lawsuits. Class Counsel have attached copies of the attorneys' fee awards to class counsel in four other class action cases in state courts in Colorado, in which similar royalty underpayment claims have been prosecuted against other natural gas producers, including the attorneys' fee decisions in *Parry, et al. v. Amoco Production Co.*, Case No. 94CV105 (La Plata County District Court, December 21, 2005 Judgment); *Boulter, et al. v. Kerr-McGee Rocky Mountain Corporation*; Case No. 04CV7739 (Denver District Court, October 11, 2005 Order); *Mountains West Exploration, Inc. v. Evergreen Resources, Inc.*, Case No. 02CV8854 (Denver District Court, April 22, 2004 Order); and *Holman, et al. v. Noble Energy Production, Inc.*, Case No. 03CV9 (Weld County District Court, June 11, 1997 Order). In each of those four class action cases, the trial court awarded class counsel attorneys' fees which were equal to at least one-third of the net class settlement fund after subtraction of litigation expenses. In each of those four decisions, the court took into consideration the fact that the class settlement had conferred an additional benefit to the members of the class resulting from an agreed upon improvement in the future royalty payment methodology by the defendant gas producer. Thus, as the fee awards to class counsel in *Parry*, *Boulter*, *Holman*, and *Evergreen* demonstrate, Class Counsel's request for attorneys' fees in this

case is in accordance with attorneys' fees awards to class counsel in four similar class action cases in Colorado state courts.

29. In addition, in other class action cases in this court and the United States District Court for the District of Colorado, the fees awarded to class counsel have consistently been determined based on a percentage of the class settlement fund, and the percentage awarded is usually one-third of the settlement fund. *Toothman v. Escrow Serv. Liquidating Corp.*, Case No. 98 CV 931 (Denver District Court, June 29, 2000 Order); *Sonnenfeld v. City and County of Denver, Colorado*, Case No. 95-Z-468 (D. Colo., December 8, 1997 Order); *In re Intelcom Group, Inc. Sec. Litig.*, Case No. 95-D-1166 (D. Colo., March 21, 1997 Order); *Schwartz v. Celestial Seasonings, Inc.*, Case No. 95-K-1045 (D. Colo., April 25, 2000 Order).

30. In *Brody*, the Court of Appeals held that trial courts should also consider the factors articulated by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), in determining the reasonableness of the percentage of the common fund requested by class counsel. *Brody*, 167 P.3d at 200. The *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (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; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-719. As discussed below, an analysis of the most relevant *Johnson* factors fully supports an award of the requested attorneys' fees to Class Counsel.

31. The first *Johnson* factor is the time and labor involved. Class Counsel and their employees have worked more than three years to obtain a favorable settlement for the members of the Class. The affidavits of Class Counsel reflect that Class Counsel and their employees have worked 8,654.35 attorney hours, and 1,417.3 legal assistant and law clerk hours, on this Class action litigation, through June 10, 2008. In addition, Class Counsel reasonably estimate that after June 10, 2008, they will expend 1,200 additional attorney hours, and 500 additional legal assistant hours, in the completion of this litigation.

32. Class Counsel have submitted hourly rates for each of the attorneys who have worked on this litigation, as well as hourly rates for the legal assistants and law clerks who have worked on this litigation. Class Counsel have also submitted information regarding the hourly rates of the class counsel who submitted the fee application to the trial court in the *Brody* litigation, to demonstrate that the hourly rates which they are charging for the attorneys and legal assistants who worked on this litigation are in accordance with the hourly rates charged in similar class action cases which have been litigated in this Court.

33. The Court finds that the hourly rates utilized by Class Counsel are reasonable, and comparable to the hourly rates of other attorneys who have litigated complex class action cases in this Court. Moreover, the Court notes that the hourly rates for George Barton and Charles Carpenter are reasonable, based on their extensive experience in prosecuting royalty underpayment cases, both in Colorado and in other jurisdictions.

34. The Court also finds that the total number of hours worked by the attorneys, legal assistants, and law clerks who worked on this class action are reasonable, in light of the extensive work Class Counsel and their employees have done since they began work on this case back in June 2004.

35. When the applicable hourly rates are multiplied by the hours worked by the attorneys, legal assistants and law clerks in this litigation, and by their estimated additional hours to complete this litigation, the total lodestar for Class Counsel and their employees is in the amount of $6,744,575. Thus, the requested fee award represents a multiplier of approximately two times the lodestar amount. Such a multiplier is certainly reasonable in this case, and comparable to multipliers that have been approved in other class action cases, including the *Brody* class action. *Brody*, 167 P.3d at 202-204; *see also In re Prudential-Bache Energy Income P'ships Sec. Litig*., 1994 WL 202394 *13 n.3 (E.D. La.) ("the jurisprudence reflects that the average multiplier is 3"); *Rabin v. Concord Assets Group, Inc.*, 1991 WL 275757 *1-*2 (S.D.N.Y) (approving a multiplier of 4.4 and noting that "multipliers of between 3 and 4.5 have been common"); *Cosgrove v. Sullivan*, 759 F.Supp. 166, 168 (S.D.N.Y. 1991) (finding that "a contingency factor multiplier has always been allowed" in common fund cases).

36. Another *Johnson* factor for this Court to consider is the novelty and difficulty of the questions presented in this litigation. Class Counsel were faced with difficult and complex legal and factual issues throughout the course of this three year litigation. EnCana vigorously opposed the certification of a class from the outset, and Class Counsel were required to engage in extensive document discovery, as well as numerous depositions, in order to obtain the evidence necessary to demonstrate that class certification was warranted in this case. A class was certified only after extensive briefing, and a two-day evidentiary hearing, in which twelve witnesses testified. Class Counsel were also required to file an extensive opposition to EnCana's petition for permission to appeal the class certification order. In addition, with respect to the claims on the merits, there were numerous complex issues of fact and law regarding the location of the first commercial market for the natural gas produced and sold by EnCana in Colorado, pursuant to the

Colorado Supreme Court's holding in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001). The time and expertise required to address such complex issues were compounded by the need to comprehensively address these issues for multiple EnCana production areas in Colorado, and covering a substantial time period for varying types of natural gas marketing arrangements. Class Counsel also faced very difficult issues regarding the appropriate calculation of the Class members' alleged royalty underpayments, as well as complex issues regarding the proper resolution of EnCana's calculation of future royalty payments to the Class members in the various natural gas fields in which EnCana produces gas in Colorado. Class Counsel thoroughly addressed each of these issues, which ultimately contributed to a fair and reasonable resolution of this litigation.

37. Class Counsel's ability to handle this Class litigation properly, as well as Class Counsel's experience, reputation and abilities, are additional *Johnson* factors that may be considered in the determination of an attorneys' fee award. Both of the Class Counsel have extensive experience in litigating royalty underpayment cases in Colorado, as well as other jurisdictions. One of the Class Counsel, George Barton, was lead counsel for the royalty owners in the *Rogers v. Westerman Farm* litigation, both in the trial court and on appeal, which ultimately resulted in the seminal decision of the Colorado Supreme Court confirming the legal standards which govern this case. *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001). In addition, Mr. Barton has handled twenty-five other lawsuits against various energy producers, including other class action cases in Colorado, in which he has successfully represented hundreds of royalty owners in royalty underpayment litigation. Similarly, Charles Carpenter has devoted the majority of his law practice to royalty underpayment litigation, and has successfully litigated numerous individual and class action royalty underpayment cases against more than twenty

different oil and gas companies, both in Colorado and in Wyoming. Thus, Class Counsel's knowledge and experience, which has significantly contributed to a fair and adequate settlement of this litigation, is another factor which supports Class Counsel's request for attorneys' fees in this case.

38. Two other *Johnson* factors are the customary fee for this type of litigation, and any prearranged fee. Before this lawsuit was filed in April, 2005, Class Counsel entered into written contingent fee agreements with each of the eight Class Representatives, under which the clients agreed that Class Counsel's contingent attorneys' fee would equal one-third of the net recovery obtained on behalf of the clients, whether by judgment or by settlement. In addition, the terms of Class Counsel's fee agreements with the Class Representatives are consistent with the contingent fee agreements which Class Counsel have previously entered into with hundreds of other royalty owners regarding litigation against other Colorado natural gas producers for royalty underpayments. Class Counsel have entered into separate contingent fee agreements with more than four hundred Colorado royalty owners during the course of the last several years, each providing for attorneys' fees equal to one-third of the net recovery obtained for the clients. Thus, it is apparent that the customary fee for this type of royalty underpayment litigation is a contingent fee equal to one-third of the net recovery obtained for the client, and that the only prearranged fee agreements in this case also provided for a contingent fee of one third of the net recovery obtained from EnCana.

39. In determining what constitutes a reasonable percentage of a class settlement fund to be awarded to class counsel, courts have frequently considered the terms of a contingent fee agreement which would normally be agreed to between the attorneys and the clients in a particular case. *In re Ikon Solutions Inc. Securities Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000).

As these courts have recognized, the objective in awarding reasonable attorneys' fees to class counsel is to simulate the market, and class counsel should be entitled to a legal fee equal to what they would have received had they handled a similar suit on a contingent fee basis. *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992); *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (in awarding class counsel attorneys' fees, the court should consider actual fee contracts that are privately negotiated for similar litigation); *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (when the prevailing method of compensating attorneys for similar services is a contingent fee, then the contingent fee is the market rate). Moreover, in *Brody*, although the Court of Appeals held that there is no requirement that the trial court examine the contingent fee agreements between class counsel and the named plaintiffs in determining the amount of attorneys' fees, the Court did recognize that such fee agreements are a relevant factor to consider. 167 P.3d at 200, citing *Spensieri v. Farmers Alliance Mutual Ins. Co.*, 804 P.2d 268, 271 (Colo. App. 1990). Thus, the Court finds that the fees requested by Class Counsel are in accordance with the customary fees for this type of litigation, and are also consistent with the contingent fee agreements entered into between Class Counsel and the Class Representatives at the outset of this litigation.

40. Another *Johnson* factor to consider is the attorneys' fee awards in similar cases. As previously discussed, the attorneys' fee awards to class counsel in very similar class action royalty underpayment cases in Colorado have consistently been based on one-third of the net class settlement fund. Thus, the awards in similar cases fully support Class Counsel's request for attorneys' fees in this case.

41. Another *Johnson* factor is the amount involved, and the results obtained. Numerous courts have recognized that in evaluating the various *Johnson* factors, the greatest

weight should be given to the monetary results achieved for the benefit of the class. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (in a common fund analysis, "monetary results achieved predominate over other criteria"); *Allapattah Serv. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1202 (S.D. Fla. 2006) (courts should evaluate the *Johnson* factors "with particular emphasis on monetary results achieved"). As previously stated, Class Counsel have obtained a favorable settlement for the Class, both on the past royalty underpayment claim and the claim relating to the appropriate method for calculating future royalties, resulting in a total economic benefit for the class of approximately eighty-four million dollars. Thus, an evaluation of this factor supports the requested award of attorneys' fees to Class Counsel.

42. Based on the foregoing, the Court finds that an analysis of the most relevant *Johnson* factors confirms that an award of attorneys' fees to Class Counsel equal to one-third of the net Class Settlement Fund is warranted.

43. Four Class members – out of a Class consisting of 6,500 persons – have objected to the amount of attorneys' fees requested by Class Counsel. One of the objectors – Chesapeake Exploration, L.L.C. – has a very small share of the Class Settlement Fund, which is less than four dollars. Moreover, the substance of Chesapeake's objection is that the award of fees to Class Counsel should be for an amount which does not exceed three times the lodestar of Class Counsel. As noted above, the lodestar multiplier is less than three. A second objector – Barbara Choksy – requests that attorneys' fees be limited to fifteen percent of the Class Settlement Fund because the Class Settlement was allegedly reached "quickly with the defendant." As discussed above, this case was not settled quickly. The other two objectors – Dever Family Minerals, LLC, and Richard Thompson Dever – are related royalty owners who appeared through counsel at the

August 1, 2008 hearing to contest final approval of the proposed Class Settlement. At that hearing, the Dever Objectors did not submit any evidence or argument regarding the appropriateness of the requested attorneys' fees, nor have they submitted any case authority in opposition to Class Counsel's attorneys' fee request.

44. A small number of Class member objections is an additional factor which supports this Court's approval of the requested attorneys' fees. *In re Ins. Brokerage Antitrust Litig.*, 2007 W.L. 1652303 *4 (D.N.J.) (the absence of substantial objections by class members to the fees requested by class counsel strongly supports approval of the requested fee award); *Millsap v. McDonnell Douglas Corp.*, 2003 W.L. 21277124 *14 (N.D. Okla.) (where only three class members, out of 1,074, objected to class counsel's requested attorneys' fees, the small number of objections supported the appropriateness of the attorneys' fee award). The fact that less than one-tenth of one percent of the 6,500 Class members have asserted any objection to Class Counsel's request for an award of attorneys' fees – which was specifically disclosed in the Class Settlement Notice – is a strong indication that the Class members are satisfied with the requested award of attorneys' fees to Class Counsel. In addition, a representative of Aristocrat Angus Ranch – the Class member which has the largest allocated share of the net Class Settlement Fund – testified at the Final Approval Hearing that Aristocrat Angus Ranch supports Class Counsel's request for an award of attorneys' fees equal to one-third of the net Class Settlement Fund.

45. Based upon the foregoing analysis, the Court finds that Class Counsel's motion for attorneys' fees, expenses and incentive award payments to the Class Representatives should be granted.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Class Counsel are awarded the sum of $286,524 in reimbursement for litigation expenses which they have incurred through June 10, 2008, and which they reasonably expect to incur through the conclusion of this litigation. If the additional expenses which Class Counsel incur after June 10, 2008 turn out to be less than the $40,800 which Class Counsel have estimated, then Class Counsel are ordered to distribute the difference between the estimated expenses and the actual expenses to the members of the Class in accordance with each Class member's proportionate share of the net Class Settlement Fund;

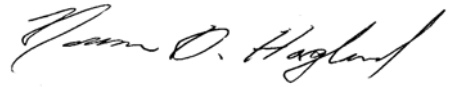
2. Incentive awards to the Class Representatives are hereby approved in the total amount of $67,500, to be allocated as follows: (1) Raymond Miller – $7,500; (2) Sally Miller – $7,500; (3) Barclay Farms, LLC – $10,000; (4) Joan E. Brehon – $7,500; (5) Janette Foote – $7,500; (6) Niles Miller – $7,500; (7) US Bank, N.A., as Trustee for the T.E. McClintock Trust – $7,500; and (8) White River Royalties, LLC – $12,500.

3. Class Counsel are awarded attorneys' fees in the amount of $13,215,325.

SO ORDERED.

DATED this 26th day of August, 2008.

BY THE COURT:



Judge Norman D. Haglund
Denver District Judge