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

DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 6:16-cv-00445-SPS**
	)	
CIMAREX ENERGY COMPANY and CIMAREX ENERGY CO. OF COLORADO,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO CERTIFY THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES, PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT, APPROVE FORM AND MANNER OF NOTICE AND SET DATE FOR FINAL APPROVAL HEARING

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I. INTRODUCTION

Plaintiff and Plaintiff's Counsel have achieved an outstanding recovery for the Settlement Class as a result of their vigorous prosecution of this Litigation.[1] Pursuant to the terms set forth in the Settlement Agreement, the Settlement provides for a cash payment of $10,000,000.00 (the "Gross Settlement Fund") to compensate the Settlement Class for past damages. Plaintiff submits this Memorandum in support of his Motion to Certify the Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (the "Preliminary Approval Motion") and respectfully requests the Court enter the Proposed Order Certifying the Class for Settlement Purposes, Preliminarily Approving the Settlement and Form and Manner of Notice, and Setting Date for Final Fairness Hearing (the "Preliminary Approval Order").

The Preliminary Approval Order will, *inter alia*: (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiff as Class Representative for the Settlement Class; (4) appoint Nix Patterson, LLP and Barnes & Lewis, LLP as Class Counsel for the Settlement Class, and Whitten Burrage and Lawrence R. Murphy, Jr. as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notice; (6) appoint a Settlement Administrator; (7) appoint an Escrow Agent; and (8) set a hearing date for final approval of the Settlement and application for an award of Attorneys' Fees, Litigation Expenses, and Case Contribution Award to Plaintiff.

II. SUMMARY OF THE LITIGATION

Plaintiff initiated this Action on October 14, 2016 by filing an Original Class Action Complaint ("the Complaint") against Defendants in this Court (Dkt. No. 2). In the Complaint, Plaintiff alleged Plaintiff and the other putative class members owned mineral interests in Oklahoma wells in which Defendants incurred an obligation to pay oil and gas proceeds therefrom (the "Oklahoma Wells"). *Id*. at ¶¶3, 8, 20. Plaintiff filed the case as a putative class action on behalf of himself and all others similarly situated seeking judgment against Defendants for allegedly underpaying royalties due Plaintiff and the Class on the full production of natural gas (and all constituents) from the Oklahoma Wells. *Id*. at ¶¶1, 4-6, 23-56.

[1] All capitalized terms not otherwise defined herein shall have the meaning given to them in the October 10, 2019 Stipulation and Agreement of Settlement ("Settlement Agreement"), a copy of which is attached hereto as Exhibit 1.

Specifically, Plaintiff alleged Defendants used, caused to be used, and/or allowed third parties to use natural gas produced from the Oklahoma Wells off the lease premises as fuel to power compressors and other machinery and equipment in gathering systems and/or gas plant operations ("Fuel Gas") without paying royalty on the value of such gas as they allegedly were required to do under the express provisions of Plaintiff's and the putative class members' oil and gas leases ("Fuel Gas Clause"). Complaint at ¶¶2-4, 23-29. Plaintiff alleged Defendants hid this alleged practice from Plaintiff and the Class by disbursing checks each month that falsely represented that no deductions were being made from the gross value of the gas. *Id*. at ¶¶5, 30-31. By virtue of these allegations, Plaintiff contended Defendants not only breached the oil and gas leases with Plaintiff and the putative class members; they also committed fraud, tortious breach of contract and were unjustly enriched. *Id*. at ¶¶33-35, 44-54. Plaintiff also sought equitable relief in the form of an accounting and injunction. *Id*. at ¶¶55-61.

On November 18, 2016, Defendants filed a Partial Motion to Dismiss Plaintiff's Original Complaint for Failure to State a Claim (Dkt. No. 25), which sought to dismiss Plaintiff's claims for tortious breach of contract, unjust enrichment, fraud, accounting and injunction. Plaintiff's Counsel engaged in substantial legal research and spent significant time drafting their opposition to the Motion (Dkt. No. 28). Defendants replied to Plaintiff's Opposition on December 16, 2016 (Dkt. No. 29). On September 27, 2017, the Court granted Defendants' Motion as to Plaintiff's claims of tortious breach of contract (with prejudice) and fraud (without prejudice), but denied Defendants' Motion as to Plaintiff's claims of unjust enrichment, accounting, and injunction (Dkt. No. 42). On October 11, 2017, Plaintiff filed an Amended Class Action Complaint (Dkt. No. 43) reasserting the fraud claim.

On October 25, 2017, Defendants filed another Partial Motion to Dismiss (Dkt. No. 44), which sought to once again dismiss Plaintiff's fraud claim regarding the element of reliance. Plaintiff's Counsel's briefing in response (Dkt. No. 47) persuaded the Court to deny Defendants' Motion to Dismiss and allow Plaintiff to proceed to discovery on his fraud claim (Dkt. No. 94).

On January 11, 2018, Plaintiff moved for the appointment of Nix Patterson, LLP and Barnes & Lewis, LLP as interim class counsel, and Whitten Burrage and Lawrence R. Murphy, Jr. as interim liaison local counsel (Dkt. No. 51). On January 30, 2018, Defendants filed three separate Motions for Summary Judgment on certain leases—the Douglass Leases, the Sinclair Leases, and

the Beard Leases—wherein they argued Plaintiff was not entitled to receive royalty on Fuel Gas (Dkt. Nos. 53-55). Plaintiff filed his responses in opposition on March 6, 2018 (Dkt. Nos. 63-65).

Defendants filed replies in support of their summary judgment motions on March 20, 2018 (Dkt. No. 72-74). On June 5, 2018, Plaintiff filed a Notice of Supplemental Authority (Dkt. No. 75), which notified the Court that the Oklahoma Supreme Court denied Defendants' Petition for Writ of Certiorari in the *Pummill* proceedings. The Court stayed the case on June 26, 2018, pending formal mediation by the Parties with mediator Steve McNamara (Dkt. No. 78). The case was reopened following the conclusion of the Parties' first mediation on September 25, 2018 (Dkt. No. 81).

On October 25, 2018, Defendants filed another Motion for Partial Summary Judgment on Plaintiff's Non-Contract Claims (Dkt. No. 83), urging, among other arguments, that Plaintiff had an adequate remedy at law. Plaintiff responded on November 8, 2018 (Dkt. No. 85). Plaintiff's response argued Defendants' Motion violated the Court's Local Rules, which only allows the filing of one motion for summary judgment; Plaintiff was permitted to pursue alternate theories of recovery; and genuine issues of material fact precluded summary judgment on Plaintiff's fraud claim. Plaintiff filed another Notice of Supplemental Authority on February 28, 2019 (Dkt. No. 91), informing the Court of the recent decisions in *Rhea v. Apache Corp*., Case No. CIV-14-0433-JH, and *Chieftain Royalty Co., et al. v. Apache Corp*., Case No. CJ-2012-81 (Dist. Ct. Caddo Co.). Plaintiff's Notice argued the foregoing orders bore directly on the issues raised in Defendants' Motions for Summary Judgment concerning the leases and Plaintiff's non-contract claims.

On March 21, 2019, the Court (1) denied Defendants' Partial Motion to Dismiss Plaintiff's Amended Class Action Complaint (Dkt. No. 94); (2) granted Plaintiff's Motion to Appoint Interim Class Counsel (Dkt. No. 95); (3) granted Defendants' Motion for Summary Judgment on all claims regarding the Douglass Leases (Dkt. No. 96); (4) denied Defendants' Motion for Summary Judgment on all claims regarding the Sinclair Leases (Dkt. No. 97); and (5) denied Defendants' Motion for Summary Judgment on all claims regarding the Beard Leases (Dkt. No. 98). On April 4, 2019, Defendants filed an answer to Plaintiff's Amended Complaint (Dkt. No. 99). On June 25, 2019, the Court granted Defendants' Motion for Partial Summary Judgment on Plaintiff's Non-Contract Claims as to Plaintiff's equitable, quasi-contract claims of unjust enrichment, constructive fraud, accounting, and injunction, but denied this Motion as to Plaintiff's claim of actual fraud (Dkt. No. 100).

Plaintiff served his First Requests for Production of Documents, First Requests for Admission, and First Set of Interrogatories on February 9, 2017. These requests included seventeen requests for production, fifteen requests for admission, and fourteen interrogatories, to which Defendants responded. On June 9, 2017, Plaintiff served his second set of Requests for Production of Documents and Interrogatories, to which Defendants also responded. Defendants served, and Plaintiff responded to, fifteen requests for production and fifteen interrogatories. Defendants subsequently served two additional interrogatories to Plaintiff, to which he answered. In response to this written discovery, Defendants produced, and Plaintiff's Counsel reviewed, thousands of pages of written documents and many gigabytes of electronically produced data, including emails, organizational documents, check stubs, royalty owner communications, contracts, and historical royalty for Oklahoma royalty owners. Plaintiff's Counsel took critical depositions of Defendants' land administration manager and revenue accounting manager in Oklahoma, which required significant preparation. The testimony Plaintiff's Counsel elicited in these depositions—which was the result of extensive preparation, document review, legal research and expert analysis on class certification, liability, and damages—contributed to the outstanding Settlement now before the Court.

This Settlement is the byproduct of the Parties' dedicated efforts at reaching a settlement over the course of two separate mediations with two separate mediators. As stated above, the Parties participated in the first mediation in 2018 with mediator Steve McNamara, during which the Court stayed the case (Dkt. Nos. 77-78). Although the Parties were unable to reach an agreement at that time, they continued to explore settlement possibilities and prepared for a second mediation session. After the Parties had obtained and analyzed sufficient information and following the Court's orders on the various motions to dismiss and motions for summary judgment described above, the Parties initiated a second round of settlement negotiations under the supervision of Bradley A. Gungoll, an experienced and respected mediator. Mr. Gungoll is a founding shareholder of Gungoll, Jackson, Box & Devoll, P.C. He practices litigation in all jurisdictions, state and federal. His peers have recognized him as a fellow in the American College of Trial Lawyers. Mr. Gungoll practices primarily in the areas of energy and natural resources law, environmental law, personal injury and product liability. He further serves regularly as a mediator with Dispute Resolution Consultants and also serves as an Arbitrator. He frequently mediates cases involving energy law, contract law, insurance law and property issues.

On September 10, 2019, the Parties met for a full-day formal mediation session in Oklahoma City, Oklahoma. Prior to this session, the Parties submitted extensive mediation briefs to Mr. Gungoll outlining their respective positions on liability, damages, and the strengths and weaknesses of their respective cases, including class certification. The Parties were ultimately able to reach an agreement in principle, which was documented in a Memorandum of Understanding. Thereafter, the Parties then spent significant time extensively negotiating and drafting the terms of a formal settlement, which are documented in the Settlement Agreement attached hereto as Exhibit 1.

The Settlement would not have been possible without the extensive discovery campaign, document review and royalty payment analysis conducted by Plaintiff's Counsel and their experts.

III. ARGUMENT

A. The Court Should Certify the Settlement Class For Settlement Purposes

One of the Court's functions in reviewing a proposed settlement before the putative class has been certified is to determine whether the action may be maintained as a class action under Federal Rule of Civil Procedure 23 ("Rule 23").[2] *See, e.g., Tennille v. Western Union Co*., 785 F.3d 422, 430 (10th Cir. 2015); *see also In re Motor Fuel Temperature Sales Practices Litig*., 271 F.R.D. 263, 278 (D. Kan. 2010); *Lucas v. Kmart Corp*., No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 21521, at *5 (D. Colo. Mar. 22, 2006). Trial courts have "considerable discretion" in making class certification decisions. *DG v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010). The Tenth Circuit defers to a trial court's certification ruling "if it applies the proper Rule 23 standard and its 'decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand.'" *Id*. (citation omitted). However, in the settlement context, courts need not inquire into trial manageability under Rule 23(b)(3)(D). *Motor Fuel*, 271 F.R.D. at 269.

Here, Plaintiff and Defendants have stipulated to: (i) the certification, for settlement purposes only, of the Settlement Class (as defined below), pursuant to Rules 23(a) and (b)(3); (ii) the appointment of Plaintiff as class representative; and (iii) the appointment of Nix Patterson, LLP, and Barnes & Lewis, LLP as Class Counsel and Whitten Burrage and Lawrence R. Murphy,

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[2] Rule 23(a) sets out four prerequisites to class certification, which are referred to as (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. Additionally, Rule 23(b) requires a showing that common questions predominate the dispute and that the class action, as a tool of dispute resolution, is superior to other methods.

Jr. as liaison local counsel. *See* Settlement Agreement, ¶¶ 1.37 and 3.1, Exhibit 1. Accordingly, Plaintiff moves the Court to certify a Settlement Class consisting of:

a. All non-excluded persons or entities who are or were royalty owners in Oklahoma wells where Defendants, including their predecessors, subsidiaries, or affiliates, are or were the well operator and working interest owner (or, as a non-operating working interest owner, Defendants separately marketed gas), and who, from January 1, 2013 are or were entitled to share in royalty proceeds payable under oil and gas leases that contain an express provision stating royalty will be paid on gas used off the lease premises and/or in the manufacture of products.

b. The persons or entities excluded from the Settlement Class are: (1) agencies, departments or instrumentalities of the United States of America and the State of Oklahoma; (2) officers of the Court involved in this action; (3) publicly traded oil and gas exploration companies and their affiliates; and (4) persons or entities Plaintiff's counsel is or may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct, including but not limited to, Charles David Nutley, Danny George, Dan McClure, Kelly McClure Callant, and their relatives and any related trusts.

Certification of the Settlement Class for settlement purposes will further the interests of Settlement Class Members and Defendants by allowing this Litigation to be settled on a class-wide basis. Moreover, as demonstrated below, the relevant requirements of Rule 23 are satisfied. Therefore, the Court should certify the Settlement Class for settlement purposes.

1. *Numerosity*

Rule 23(a)(1) requires "the class [be] so numerous that joinder of all members is impracticable." *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 275 (10th Cir. 1977) (holding a class as small as 46 sufficient). Here, the Settlement Class consists of thousands of owners dispersed throughout Oklahoma and other states, making joinder of all Class Members impracticable. Amend. Compl. ¶16. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶1.37 and 3.1, Exhibit 1. Accordingly, numerosity is met.

2. *Commonality*

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *Id.* A "common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Of course, "'[f]actual

differences in the claims of the class members should not result in a denial of class certification where common questions of law exist.'" *Beer v. XTO Energy, Inc.*, No. CIV-07-798-L, 2009 U.S. Dist. LEXIS 23096, at *10 (W.D. Okla. Mar. 20, 2009) (citation omitted); *Heartland Commc'ns, Inc. v. Sprint Corp.*, 161 F.R.D. 111, 116 (D. Kan. 1995). Plaintiff need only show a single issue common to all members of the class. *DG*, 594 F.3d at 1195; 1 Herbert B. Newberg *et al.*, NEWBERG ON CLASS ACTIONS § 3:10, at 272-73 (5th ed. 2011).

Many Oklahoma federal courts, including this Court, have certified similar oil and gas class actions, finding common issues existed, both in the settlement context and in the litigation context. *See, e.g., Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779 (10th Cir. 2019); *Cline v. Sunoco, Inc.*, No. 6:17-cv-313-JAG, 2019 U.S. Dist. LEXIS 171963 (E.D. Okla. Oct. 3, 2019); *Rhea v. Apache Corp.*, No. CIV-14-433-JH, 2019 U.S. Dist. LEXIS 65381 (E.D. Okla. Feb. 19, 2019); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019), Dkt. No. 122 (Order and Judgment Granting Final Approval of Class Action Settlement); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018), Dkt. No. 102 (Order and Judgment Granting Final Approval of Class Action Settlement); *Reirdon v. XTO Energy Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Dkt. No. 122 (Order Granting Final Approval) (certifying class for settlement purposes); *Chieftain Royalty Co. v. XTO Energy Inc.*, Case No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Dkt. No. 229 (Order Granting Final Approval) (certifying class for settlement purposes); *Chieftain Royalty Co. v. SM Energy Co., et al.*, No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015), Dkt. No. 154 (Order of Judgment Granting Final Approval of Class Action Settlement) (certifying class for settlement purposes); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. CIV-12-1319-D, 2015 U.S. Dist. LEXIS 62450 (W.D. Okla. May 13, 2015) (same); *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R, 2012 U.S. Dist. LEXIS 35842 (W.D. Okla. March 12, 2012); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2010 U.S. Dist. LEXIS 133345 (W.D. Okla. Dec. 16, 2010); *Hill v. Kaiser-Francis Oil Co.*, No. CIV-09-07-R, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. June 9, 2010); *Hill v. Marathon Oil Co.*, No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. June 9, 2010); *Naylor Farms v. Anadarko OGC Co.*, No. CIV-08-668-R, 2009 U.S. Dist. LEXIS 127516 (W.D. Okla. Aug. 26, 2009).

Here, many questions of law and fact exist that could be answered uniformly for the Settlement Class using common evidence. Indeed, all of the common issues in this case stem from

a single underlying tenet of Oklahoma law: Defendants' obligation to pay royalty on Fuel Gas. Plaintiff alleges the questions of fact and law common to the Class include, but are not limited to, the following: (1) whether, under the express terms of the oil and gas leases under which Plaintiff and the putative Class are entitled to be paid royalty, Defendants have or had a duty to pay royalty on Fuel Gas; (2) whether Defendants paid the full amount of royalty owed on Fuel Gas; and (3) whether Defendants' royalty payment methodology breached their express duties to pay royalty on Fuel Gas. Amend. Compl. ¶19.

Clearly, there are questions of law and fact common to members of the Settlement Class. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.37 and 3.1, Exhibit 1. As such, the commonality requirement is satisfied.

3. *Typicality*

Rule 23(a)(3) requires "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." However, "'[e]very member of the class need not be in a situation identical to that of the named plaintiff'" to meet the typicality requirement. *DG*, 594 F.3d at 1195 (citation omitted). Rather, "[p]rovided the claims of Named Plaintiffs and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." *Id*. at 1198-99.

Here, Plaintiff's claims are typical of the Settlement Class' because Defendants allegedly treated all owners in the same manner for purposes of paying royalty. That is, the same legal theories and fact issues underlie the Settlement Class' claims because Plaintiff alleges Defendants engaged in a common course of conduct to deprive the Settlement Class of royalty and misrepresent and/or omit the amount of royalty owed to the Settlement Class. *See, e.g.,* Amend. Compl. ¶4. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.37 and 3.1, Exhibit 1. Thus, Plaintiff's claims are typical of the claims of every class member, and the typicality requirement has been fulfilled.

4. *Adequacy of Representation*

Rule 23(a)(4) requires plaintiffs to show they "will fairly and adequately protect the interests of the class." In the Tenth Circuit, the adequacy requirement is satisfied when (i) neither plaintiff nor his counsel has interests that conflict with the interests of other class members, and (ii) plaintiff will prosecute the action vigorously through qualified counsel. *Rutter & Wilbanks*

Corp. v. Shell Oil Co., 314 F.3d 1180, 1187-88 (10th Cir. 2002). First, to defeat certification, a conflict must be fundamental and go to specific issues in controversy; minor conflicts will not suffice. *See Tennille*, 785 F.3d at 430-31; *see also Fankhouser*, 2010 U.S. Dist. LEXIS 133345, at *14-15. Here, there are no conflicts—minor or otherwise—between Plaintiff and other members of the Settlement Class. To the contrary, Plaintiff has had every incentive to vigorously prosecute this Litigation on behalf of the Settlement Class.

Second, as reflected in the above factual background, Plaintiff has prosecuted this Litigation vigorously through qualified counsel. Plaintiff has demonstrated his dedication to this matter through participation in all aspects of the Litigation. Such dedicated conduct demonstrates Plaintiff understands his duties and obligations to the Settlement Class and accepts them willingly.

Further, there is no dispute that Plaintiff's Counsel is adequate and has successfully prosecuted numerous class actions and other complicated litigation in federal courts throughout the country. The Court has previously appointed Plaintiff's Counsel as interim class counsel and can take judicial notice that counsel is qualified and experienced to conduct this Litigation. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.37 and 3.1, Exhibit 1. Accordingly, adequacy is met.

5. *Predominance*

Rule 23(b)(3) requires "questions of law or fact common to class members predominate over any questions affecting only individual members." "'The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation'" by asking "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (citation omitted); *see also, e.g., CGC Holding Co., LLC v. Hutchens*, 773 F.3d 1076, 1087 (10th Cir. 2014) (same); *In re Urethane Antitrust Litig*., 768 F.3d 1245, 1255 (10th Cir. 2014) ("Class-wide proof is not required for all issues. Instead, Rule 23(b)(3) simply requires a showing that the questions common to the class predominate over individualized questions."). Thus, when "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045 (citation omitted); *see also In re Syngenta AG Mir 162 Corn Litig*., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, at

*1369-70 (D. Kan. Sept. 26, 2016) (same). And, where, as here, Plaintiff's claims stem from a common nucleus of operative facts, common issues predominate and certification is appropriate.

Defendants allegedly engaged in a common course of conduct by allegedly underpaying royalty to Plaintiff and the putative Class Members through implementation of a policy of not paying royalty to Plaintiff and the putative Class for all Fuel Gas and by allegedly failing to disclose to Plaintiff and other putative Class Members on their monthly royalty check stubs that Defendants were not paying royalty on the full volume and value of production from the Oklahoma Wells. This allegedly common conduct gave rise to each Class Member's claims, resulting in a sufficiently cohesive Settlement Class to warrant adjudication by representation.[3]

Accordingly, common questions predominate over any individual issues. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.37 and 3.1, Exhibit 1. Accordingly, predominance is met.

6. *Superiority*

Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The matters pertinent to a finding of superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

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[3] Numerous Oklahoma federal courts, including this Court, have certified classes in royalty litigation. *See, e.g., Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779 (10th Cir. 2019); *Cline v. Sunoco, Inc*., No. 6:17-cv-313-JAG, 2019 U.S. Dist. LEXIS 171963 (E.D. Okla. Oct. 3, 2019); *Rhea v. Apache Corp.*, No. CIV-14-433-JH, 2019 U.S. Dist. LEXIS 65381 (E.D. Okla. Feb. 19, 2019); *Chieftain Royalty Co. v. SM Energy Co*., et al., No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015) (Dkt. No. 154) (certifying class for settlement purposes only); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., No. CIV-12-1319-D, 2015 U.S. Dist. LEXIS 177692, at *5-7 (W.D. Okla. Dec. 29, 2014) (certifying class (for settlement purposes only) of over 5,000 royalty owners involving various lease forms); *QEP*, 2012 U.S. Dist. LEXIS 35842, at *7-9 (same); *Fankhouser*, 2012 U.S. Dist. LEXIS 133345, at *10-11, 18 (certifying class of more than 2,000 royalty owners with interests in 290 different wells); *Hill v. Kaiser-Francis Oil Co*., No. CIV-09-07-R, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. June 9, 2010) (certifying a class of 29,000 - 44,000 royalty owners with interests in over 1,000 different wells); *Hill v. Marathon Oil Co*., No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. June 9, 2010) (certifying a class of 11,000 royalty owners involving various lease forms); *Naylor Farms*, 2009 U.S. Dist. LEXIS 127516, at *13-14, 24 (certifying class action involving 15 categories of lease royalty provisions).

Fed. R. Civ. P. 23(b)(3). However, "[i]n deciding whether to certify a settlement class, the Court need not inquire whether the case, if tried, would present difficult management problems under Rule 23(b)(3)(D)." *Motor Fuel*, 271 F.R.D. at 269; *see also Lucas*, 2006 U.S. Dist. LEXIS 21521, at *15.

The superiority requirement is easily met here. No Class Member has filed an individual action. Further, because this case has been litigated in this Court, concentrating the Litigation in this forum is desirable. There are no anticipated difficulties in managing this case as a class action for settlement purposes only. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.37 and 3.1, Exhibit 1. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

B. The Court Should Grant Preliminary Approval of the Proposed Settlement

Courts strongly favor settlement as a method for resolving disputes. *Sears v. Atchison, Topeka & Santa Fe Ry., Co*., 749 F.2d 1451, 1455 (10th Cir. 1984); *see also Trujillo v. Colo*., 649 F.2d 823, 826 (10th Cir. 1981) (citing "important public policy concerns that support voluntary settlements"); *Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354 (10th Cir. 1972). This is particularly true in large, complex class actions such as this one. *See Big O Tires, Inc. v. Bigfoot 4x4, Inc*., 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001).

Under Federal Rule of Civil Procedure 23(e), the trial court must approve a class action settlement. FED. R. CIV. P. 23(e). The procedure for review of a proposed class action settlement is a well-established two-step process. *In re Motor Fuel Temperature Sales Practices Litig*., 258 F.R.D. 671, 675 (D. Kan. 2009); *see also* MANUAL FOR COMPLEX LITIGATION § 13.14 (4th ed. 2004). First, the court conducts a preliminary approval analysis to determine if there is any reason not to notify the class or proceed with the proposed settlement. *Lucas v. Kmart Corp*., 234 F.R.D. 688, 693 (D. Colo. 2006). Second, after the court preliminarily approves the settlement, the class is notified and provided an opportunity to be heard at a final fairness hearing where the court considers the merits of the settlement to determine if it should be finally approved. *In re Motor Fuel*, 258 F.R.D. at 675; *accord* 4 Herbert B. Newberg *et al*., NEWBERG ON CLASS ACTIONS § 11:25, at 38 (4th ed. 2002).

Through his Preliminary Approval Motion, Plaintiff requests the Court take the first step in this two-step process—preliminary approval. "The Court will ordinarily grant preliminary approval where the proposed settlement 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" *In re Motor Fuel*, 258 F.R.D. at 675 (quoting *Am. Med. Ass'n v. United Healthcare Corp*., No. Civ. 2800 (LMM), 2009 U.S. Dist. LEXIS 45610, at *17 (S.D.N.Y. May 19, 2009)). While "[t]he standards for preliminary approval are not as stringent as those applied for final approval," courts frequently refer to the final approval factors to determine whether a proposed settlement should be preliminarily approved. *Id*. at 675-76, 680 ("While the Court will consider these factors in depth at the final approval hearing, they are a useful guide at the preliminary approval stage as well.").

The Tenth Circuit has identified four factors to consider when deciding whether to finally approve a class action settlement:

> (1) whether the proposed settlement was fairly and honestly negotiated;
>
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable.

Rutter, 314 F.3d at 1188; *see also, e.g., Fager v. CenturyLink Commc'ns, LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016) (reciting *Rutter* factors for consideration of whether to finally approve class settlement as fair, reasonable and adequate); *Tennille*, 785 F.3d at 434 (same). As demonstrated below, each of these factors supports preliminary approval of the Settlement.

1. ***The Proposed Settlement Is the Product of Extensive Arm's-Length Negotiations Between Experienced Counsel***

The first prong weighs in favor of preliminary approval because the Settlement was fairly and honestly negotiated. *Reed v. Gen. Motors Corp*., 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid."). Here, prior to reaching the Settlement, Plaintiff, through counsel, conducted extensive investigation and

research into the claims asserted, reviewed extensive data and consulted with numerous experts. Further, the Settlement is the product of arm's-length negotiations between Plaintiff and Defendants and their experienced counsel at a point when Plaintiff and Defendants possessed more than sufficient evidence and knowledge to allow them to make informed decisions about the strengths and weaknesses of their respective cases. As discussed above, the Parties engaged in two separate mediations with two separate mediators. The Parties' dedicated efforts resulted in a settlement following the second mediation, conducted under the supervision of Bradley Gungoll, a seasoned mediator in complex litigation and class actions. During both mediation sessions, the legal issues were fully presented, not only for the mediators' benefit, but also for Plaintiff and Defendants to effectively evaluate class certification, liability and damages. *See In re Motor Fuel*, 258 F.R.D. at 675-76. The Settlement is the product of serious, informed, and well-mediated negotiations among experienced counsel. Therefore, the first factor—that the Settlement be fairly and honestly negotiated—supports preliminary approval.

Additionally, courts in this Circuit have found settlements to be fairly and honestly negotiated when "[t]he completeness and intensity of the mediation process, coupled with the quality and reputations of the Mediators, demonstrate a commitment by the Parties to a reasoned process for conflict resolution that took into account the strengths and weaknesses of their respective cases and the inherent vagaries of litigation."[4] The use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion."[5] As noted above, the Settlement here resulted from a mediation supervised by Mr. Gungoll, an experienced and respected mediator. Without question, Mr. Gungoll's experience as a mediator is substantial, and his involvement here ensured Plaintiff and Defendants engaged in fair, arm's-length negotiations. The Settlement is the product of serious, informed, and well-mediated negotiations among experienced counsel with the assistance of an experienced and

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[4] *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 285 (D. Colo. 1997); *see also Ashley v. Reg'l Transp. Dist.*, No. 05-cv-01567-WYD-BNB, 2008 U.S. Dist. LEXIS 13069, at *15-22 (D. Colo. Feb. 11, 2008) (finding settlement fairly and honestly negotiated where the parties engaged in formal settlement mediation conference and negotiations over four months).

[5] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also D'Amato v. Deutsch Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

respected mediator. Therefore, the first factor—that the Settlement be fairly and honestly negotiated—supports preliminary approval.

2. *Serious Questions of Law and Fact Exist*

Additionally, serious questions of law and fact exist, placing the ultimate outcome of this Litigation in doubt. "Although it is not the role of the Court at this stage of the litigation to evaluate the merits…it is clear that the parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact the case if it were litigated." *Lucas*, 234 F.D.R. at 693-94 (citing *Wilkerson*, 171 F.R.D. at 284). The presence of questions of law and fact "tips the balance in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 U.S. Dist. LEXIS 86741, at *31-41 (W.D. Okla. Oct. 27, 2008); *see also, e.g., Tennille*, 785 F.3d at 435 (affirming final approval of class settlement where "serious disputed legal issues" rendered "the outcome of th[e] litigation...uncertain and further litigation would have been costly").

Here, there are numerous factual and legal issues on which Plaintiff and Defendants still disagree. Had the Parties not settled this Litigation, the Court or a jury would have ultimately been required to decide these issues, placing the ultimate outcome of this Litigation in doubt. To this day, Defendants deny they committed any acts or omissions giving rise to any liability or violation of law. *See* Settlement Agreement at ¶11.1, Exhibit 1. Indeed, Defendants have always maintained their payment policies—which form the basis of Plaintiff's and the Settlement Class's claims—comply with Oklahoma law. Thus, Defendants have entered into this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *See id*. Although Plaintiff is optimistic about his chances of success at trial, there are a number of significant obstacles he would still have to overcome to achieve success on behalf of the Settlement Class. Put simply, serious questions of law and fact are still in dispute. Importantly, however, the meaningful Settlement, which includes the payment of $10,000,000.00 in cash, renders the resolution of these questions unnecessary and provides a guaranteed recovery in the face of uncertainty.

Because serious issues of law and fact remain in dispute, the second factor supports preliminary approval of the Settlement.

3. *The Value of the Immediate Recovery Outweighs the Mere Possibility of Future Relief After Long and Expensive Litigation*

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also support approval of the proposed Settlement. This third factor is based on the premise that the Settlement Class "is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37. Here, the $10,000,000.00 Settlement is a significant and meaningful recovery that eliminates the risk and additional expense of further litigation. *See, e.g., Tennille*, 785 F.3d at 435 (finding the fact that "without this class action, [the defendant] would have had no incentive to change its business practices" supported final approval of class settlement). Moreover, the immediate $10,000,000.00 Settlement must be compared to the risk the Settlement Class may recover nothing after hard-fought class certification, summary judgment, a grueling trial, and inevitable appeals likely extending years into the future. *See, e.g., id.* at 434-36 (affirming final approval of settlement where district court balanced and "considered the serious legal questions that placed the litigation's outcome in doubt and the value of the immediate recovery provided by this settlement with only the possibility of a more favorable outcome after further litigation").

Although Plaintiff is confident in his ability to achieve certification of the Class and succeed at trial, class certification and liability are never certain, and the potential obstacles to obtaining a final, favorable verdict are daunting. In addition, even assuming Plaintiff succeeded in establishing liability at trial, the amount of damages would be hotly disputed, and Defendants would likely argue the Settlement Class is entitled to far less than the $10,000,000.00 provided by the Settlement. Moreover, after any final, favorable judgment is obtained, additional appeals would likely follow. When these uncertainties are compared to the immediate and substantial recovery of $10,000,000.00 in cash, it is clear the Settlement is in the best interest of Plaintiff and the Settlement Class.

Accordingly, this third factor—the value of the immediate recovery compared to the mere possibility of future relief after long and expensive litigation—also supports preliminary approval of the Settlement.

4. *Plaintiff, Defendants and Their Counsel Believe the Proposed Settlement is Fair, Reasonable, and Adequate*

Finally, Plaintiff, Defendants and their Counsel agree the Settlement is fair, reasonable, and adequate. "Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Lucas*, 234 F.R.D. at 295 (quoting *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002)). "[T]he Court should . . . 'defer to the judgment of experienced counsel who has competently evaluated the strength of his proof.'" *Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 U.S. Dist. LEXIS 26379, *39 (N.D. Okla. May 13, 2003) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983)). In fact, "[w]hen a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus*, 209 F. Supp. 2d at 1182 (citing *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993)) ("[A]bsent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.").

Here, Plaintiff's Counsel—which consists of law firms with considerable experience in Oklahoma class actions—only agreed to settle this Litigation after extensive investigation, written discovery, motion practice, deposition testimony, data analyses, and rigorous arm's-length negotiations. Additionally, as noted above, Plaintiff and Plaintiff's Counsel have compared the substantial recovery the Settlement Class will receive from the resolution of this Litigation against the risks, delays, and uncertainties of continued litigation and appeals. Plaintiff was involved in and stayed apprised of the Litigation and contributed to settlement negotiations. Plaintiff and Plaintiff's Counsel believe the Settlement is fair, adequate, and reasonable and should be approved. Defendants likewise believe the Settlement should be approved. As such, the fourth factor—that counsel believes the settlement is fair, adequate, and reasonable—supports preliminary approval.

Because all four factors weigh in favor of the Settlement here, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement.

C. The Court Should Preliminarily Approve the Proposed Notice of the Settlement to the Settlement Class

Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id*. Additionally, Rule 23(e)(1) instructs courts to "direct notice in a reasonable

manner to all class members who would be bound by the proposal." *Id*. In terms of content, a settlement notice need only be "reasonably calculated, under all of the circumstances, to apprise [the] interested parties of the pendency of the [settlement proposed] and [to] afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950); *see also, e.g., Fager*, 854 F.3d at 1170 (same); *Tennille*, 785 F.3d at 436 (same). "'The hallmark of the notice inquiry . . . is reasonableness.'" *Lucas*, 234 F.R.D. at 696 (quoting *Sollenbarger v. Mountain States Tel. & Tel. Co*., 121 F.R.D. 417, 436 (D.N.M. 1988)).

Plaintiff has submitted to the Court for approval the Notice of Proposed Settlement, Motion for Attorneys' Fees and Fairness Hearing (the "Notice") that will be distributed to the Settlement Class, as well as a summary Notice (the "Summary Notice") that will be published in various newspapers. The Notice and Summary Notice (collectively, the "Notices") are attached to the Settlement Agreement as Exhibits 3 and 4, respectively. As set forth in the Settlement Agreement, Plaintiff and Defendants have agreed that, at such time as is ordered by the Court, the Court-appointed Settlement Administrator shall begin disseminating the Notice by sending a copy of the Notice via first-class mail to the last known mailing address of each Class Member who can be identified with reasonable effort. Settlement Agreement at ¶3.5.[6] Plaintiff and Defendants further agreed that, at such time as is ordered by the Court, the Settlement Administrator also shall publish (or cause to be published) the Summary Notice one time in each of the following newspapers: (a) *The Oklahoman*, a paper of general circulation in Oklahoma; (b) the *Tulsa World*, a paper of general circulation in Oklahoma; (c) *The Daily Ardmoreite*, a paper of local circulation; (d) the *Fairview Republican*, a paper of local circulation; (e) the *McAlester News-Capital*, a paper of local circulation; and (f) the *Holdenville Tribune*, a paper of local circulation. Within 10 days after mailing the first Notice of Settlement and continuing through the date of the Final Fairness Hearing, the Settlement Administrator also will display (or cause to be displayed) on an Internet website dedicated to this Settlement the following documents: (g) the Notice of Settlement, (h) the Complaint and Answer, (i) this Settlement Agreement, and (j) the Preliminary Approval Order. *Id*. The Notices direct Class Members to this website for additional information. And, of course, these documents will also be available on the Court's docket sheet.

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[6] *See also, e.g., Fager*, 854 F.3d at 1173-74 ("The Supreme Court has consistently endorsed notice by first-class mail" and, thus, "[f]irst-class mail sufficed to give notice.").

In accordance with Rule 23(c)(2)(B), the proposed Notice will fully inform Class Members about the Litigation, the proposed Settlement, and the facts they need to make informed decisions about their rights and options in connection with the Settlement. Specifically, the Notices clearly describe: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) Plaintiff's Counsel's intent to request attorneys' fees, reimbursement of expenses, and a case contribution award for Plaintiff; (iv) the procedure and timing for objecting to the Settlement; (v) the procedure and timing for requesting exclusion; (vi) the date, time, and place of the Final Fairness Hearing; and (vii) ways to receive additional information about this Litigation and the proposed Settlement. The Notices also provide Class Members with a toll-free number and email address for Settlement-related inquiries and a URL address for the dedicated Settlement website where Class Members may obtain additional information. Thus, the Notices are reasonably calculated to apprise the interested parties of the pendency of the Settlement and afford them an opportunity to opt out or to object. As such, the form and manner of the proposed Notice meets the requirements of both Rule 23 and due process. The Court should approve the Notices and the manner through which they will be delivered and communicated to the Settlement Class.

D. Appointment of JND Legal Administration as Settlement Administrator Is Proper

To accomplish the processing of requests for exclusion and the distribution of the Net Settlement Fund in accordance with a Court-approved plan of allocation and distribution, Plaintiff respectfully requests the Court appoint JND Legal Administration ("JND") as the Settlement Administrator. JND is a leading class action administration company that has handled many complex class action settlements. *See* www.jndla.com. Further, under the terms of the Settlement Agreement, Plaintiff, Defendants and their Counsel will work directly with the Settlement Administrator for much of the notice, administration, and distribution processes. Thus, Plaintiff respectfully requests the Court appoint JND as the Settlement Administrator.

E. Appointment of Signature Bank as Escrow Agent Is Proper

Additionally, Plaintiff respectfully requests the Court appoint Signature Bank as the Escrow Agent. Signature Bank has acted as escrow agent in numerous complex class action settlements and has significant experience in these matters. Plaintiff's Counsel is confident Signature Bank will properly perform the duties of Escrow Agent as ordered by the Court. Thus,

Plaintiff respectfully requests the Court appoint Signature Bank as the Escrow Agent in this Litigation.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court enter the agreed proposed Preliminary Approval Order, attached to the Preliminary Approval Motion as Exhibit 1, which will, *inter alia*, (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiff as Class Representative for the Settlement Class; (4) appoint Nix Patterson, LLP and Barnes & Lewis, LLP as Class Counsel for the Settlement Class, and Whitten Burrage and Lawrence R. Murphy, Jr. as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notice; (6) appoint JND Legal Administration as Settlement Administrator; (7) appoint Signature Bank as Escrow Agent; and (8) set a hearing date for final approval of the Settlement and application for an award of Attorneys' Fees, Litigation Expenses, and Case Contribution Award to Plaintiff.

DATED: October 15, 2019.

Respectfully submitted,

s/ Bradley E. Beckworth

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CERTIFICATE OF SERVICE

I hereby certify that 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.

DATED: October 15, 2019.

/s/ Bradley E. Beckworth
Bradley E. Beckworth