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.	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEYS' FEES

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Class Representative Dorsey J. Reirdon ("Plaintiff" or "Class Representative"), by and through his counsel of record, submits the following memorandum of law in support of his Motion for Approval of Attorneys' Fees.

I. SUMMARY OF ARGUMENT

In connection with approval of the Settlement[1] in the above-captioned Litigation, Class Counsel respectfully move the Court for an award of attorneys' fees of $4,000,000.00. The requested award will be paid from the $10,000,000.00 Gross Settlement Fund and represents 40% of the Gross Settlement (the "Fee Request"). This request is fair and reasonable and therefore, should be approved.

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of a cash payment of $10 million to compensate the Settlement Class for past damages.[2] This is an outstanding recovery.[3] Rule 23(h) of the Federal Rules of Civil Procedure requires the Court to assess the reasonableness of any fees "that are authorized by law or by the parties' agreement." Here, the Parties expressly agreed that all fees would be from a common fund as allowed under federal common law. *See* Settlement Agreement at ¶¶7.1, 11.8. Thus, federal

[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 as Exhibit 1 to 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 (the "Preliminary Approval Memorandum") (Dkt. No. 107).

[2] *See* Affidavit of Barbara Ley ("Ley Affidavit"), attached to Final Approval Memorandum as Exhibit 3, at ¶3.

[3] *See* Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel ("Joint Class Counsel Decl."), attached as Exhibit 2 to Final Approval Memorandum, at ¶5; Ley Affidavit at ¶3 (stating the $10 million recovery obtained in this case "yields a gross recovery of approximately 76.6% of the Settlement Class' alleged royalty principal underpayment for Fuel Gas claims asserted by the Class during the Claim Period.").

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common law governs the reasonableness of this agreement and the requested fee.

Class Counsel's Fee Request is reasonable under federal common law. First, the Parties agreed that the Settlement Agreement shall be governed *solely* by federal law regarding the right to and reasonableness of attorney's fees and expenses. *See* Settlement Agreement, ¶¶7.1, 11.8. The Parties' contractual choice of law—the well-developed and consistent body of federal common law that applies to common fund class action settlements where no fee shifting occurs—should be given effect as written. *See Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 4-5); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 4-5); *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 5); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 4-5); *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939); *Restatement 2d of Conflict of Laws*, § 187; 7B Wright, Miller, Kane & Marcus, *Federal Practice and Procedure* § 1803 (3d ed.) ("The court's authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."). Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the fund method in determining the award of attorneys' fees in common-fund cases. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 455-56 (10th Cir. 1988).[4]

[4] Accordingly, the Tenth Circuit's long line of federal common law fee jurisprudence in common fund class actions governs, and *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017) is inapplicable, because the parties here contractually agreed to a choice of law provision. Regardless of the *EnerVest* decision, the opinion is inapplicable here because that case dealt with the application of *state law* choice of law principles while the parties

The Fee Request represents 40% of the Gross Settlement Fund. In light of the exceptional work performed by Class Counsel, the circumstances of this case, including the risks of further litigation, the Fee Request is fair, reasonable, and comports with fee awards granted in similar cases and is fully appropriate under Tenth Circuit precedent. *See* Declaration of Geoffrey P. Miller ("Miller Decl.") at ¶¶41-58.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of brevity, Class Counsel will not recite the background of this Litigation again herein. Instead, Class Counsel respectfully refers the Court to the Final Approval Memorandum, Joint Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated fully herein.

III. ARGUMENT

The Fee Request is fair and reasonable and should be approved.[5] Pursuant to Rule 23(h), Federal Rules of Civil Procedure, "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *Brown*, 838 F.2d at 453. Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb*, 43 F.3d at 486. Here, the requested fees are authorized by an express agreement of the parties. Pursuant to the Settlement Agreement, federal common law governs both the right to, and reasonableness of, attorneys' fees. *See* Settlement Agreement at

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here, unlike in *EnerVest*, contractually agreed that *federal common law* controls the right to, and reasonableness of, attorneys' fees. *See* Miller Decl. at ¶29; Declaration of Steven S. Gensler ("Gensler Decl.") at ¶47 n.4. This Court previously upheld virtually identical choice of law provisions in the federal decisions cited *supra* at 2-3

[5] *See generally* Declarations of Bradley Beckworth; Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch; Michael Burrage; and Lawrence Murphy, attached hereto.

¶¶7.1, 11.8. Under this law, the Tenth Circuit has expressed a clear preference for the percentage of the fund method, the reasonableness of which is determined through application of the *Johnson* factors. *Gottlieb*, 43 F.3d at 483. This methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *Brown*, 838 F.2d at 454.

This Court has previously acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co.,* No. CIV-17-334-SPS (E.D. Okla. March 8, 2019) (Dkt. No. 120 at 5-6); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 5-6); *Cecil v. BP America Production*, No. 16-CV-410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260 at 6); *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 6); *Reirdon v. XTO Energy, Inc.,* No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 5); *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A. G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)).[6] Other Oklahoma federal courts agree. *See supra* at 2-3; *see, e.g.*, *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method.") (Dkt. No. 52 at 5) (the "*Laredo* Fee Order"); *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520-D (W.D. Okla. July 31, 2014) ("The Court is not required to

[6] The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method for determining attorneys' fees.

conduct a lodestar assessment of the hours versus a reasonable hourly rate. Nonetheless, even if such an assessment were made, the Court would reach the same conclusion that the requested fees are reasonable.") (Dkt. No. 150, n.1); *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R (W.D. Okla. May 31, 2013) (Dkt. No. 182 at 4 n.3); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R (W.D. Okla. Oct. 5, 2012) (Dkt. No. 329).

A. The Parties Have Agreed Federal Common Law Controls the Right to, And Reasonableness Of, Attorneys' Fees

The Parties contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the right to and reasonableness of attorneys' fees:

> To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and its nationwide application, this Settlement Agreement shall be governed solely by federal law, both substantive and procedural, as to due process, lass certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, case contribution award, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions.

Settlement Agreement at ¶11.8. The Parties clearly intended to remove any doubt regarding which body of law would apply to certification, notice and overall evaluation of the fairness and reasonableness of the Settlement and associated requests for fees and expenses. Such an agreement directly aligns with the principles of the Class Action Fairness Act ("CAFA"), which was passed with the intent to provide certainty, uniformity and confidence in the application of the class device to cases involving interstate commerce. 28 U.S.C. §1711(a)-(b).

As noted, this Court previously enforced nearly identical choice of law provisions. *See supra* at 2-3. Thus, the Settlement Agreement's choice-of-law provision should be enforced here.

Further, the Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and that courts typically honor the parties' choice. *See Boyd Rosene & Assocs., Inc. v.*

Kansas Mun. Gas Agency, 174 F.3d 1115, 1121 (10th Cir. 1999) ("Absent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'") (citing *Restatement (Second) of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988)); *Yavuz v. 61 MM, Ltd*., 465 F.3d 418, 428 (10th Cir. 2006). The *Restatement* expands on this freedom to contract:

> These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Restatement (Second) of Conflict of Laws § 187, cmt. e; *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (enforcing parties' contractual choice of law); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) (Parties "enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity."). The Parties' contractual agreement should be enforced here. *See* Miller Decl. at ¶¶26-28.

B. Class Counsel's Fee Request Is Reasonable

Under Tenth Circuit law, district courts have discretion to apply either the percentage of the fund method or the lodestar method, but the percentage of the fund method is clearly preferred. *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Laredo* Fee Order at 5. When determining attorneys' fees under this method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. Not all of the factors apply in every case, and some deserve more weight than others depending on the facts at issue. *Id.* at 456. Whether these

factors are applied as a check on the reasonableness of the percentage awarded (federal common law), or in the lodestar context to determine an appropriate multiplier or enhancement factor, the result is the same—the requested fee of $4 million is reasonable.

The twelve *Johnson* factors are: (l) the time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required 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) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy 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. *Gottlieb*, 43 F.3d at 482 n.4.[7]

The *Johnson* factor that should be entitled to the most weight in this common fund case is the eighth factor—the amount involved in the case and the results obtained. *Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."); Fed. R. Civ. P. 23(h), adv. comm. note (explaining for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point").

Here, the results obtained strongly support the Fee Request. The Gross Settlement Fund of $10 million represents a significant recovery for the Class and bestows a substantial economic benefit. In valuing the result obtained for purposes of determining a reasonable fee to award under the Tenth Circuit's percentage of recovery method, it is well-established that the fee award should

[7] An additional factor under Oklahoma law is the risk of recovery. 12 O.S. § 2023(G)(4)(e)(13). Even if the Court applied Oklahoma law, this factor would be easily met.

be based on the total economic benefit bestowed on the class. *See, e.g.*, *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 4-5); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 7-8); *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 8); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 8); *Fager v. Centurylink Comm'cns*, No. 14-cv-00870, 2015 U.S. Dist. LEXIS 190795, at *7-8 (D.N.M. June 25, 2015) (collecting cases), *aff'd* 854 F.3d 1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert,* 444 U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member" obtained through the "entire judgment fund").

Here, the Settlement represents significant, concrete monetary benefits to the Settlement Class. And, as Professor Gensler has aptly opined, unlike cases in which absent class members' recovery is contingent upon their submission of information or some sort of complicated claims process, here, these benefits are ***guaranteed*** and automatically bestowed upon the Settlement Class as a result of the Settlement. *See* Gensler Decl. at ¶55. Accordingly, the "results obtained" factor strongly supports a fee award of $4,000,000.00 to be paid from the immediate cash portion of the Settlement.[8]

[8] The outstanding result obtained is in stark contrast to cases like *Hess v. Volkswagen of Am., Inc.*, 2014 OK 111, 341 P.3d 662, where fees are based upon coupons or claims made settlements with no guaranteed common fund. *Hess* was a fee-shifting case where defendants contractually agreed to incur liability for the class' attorneys' fees, resulting in application of the lodestar method. *See id.* at 666. The concurring opinion even recognized there are other cases where ***"the attorney-fee award is based on a percentage of the plaintiffs' recovery***." *Id.* at 672 n.3 (emphasis added). And, *Hess* was an egregious outlier where the entire class got less than $46,000, but the lawyers were asking for over ***$14 million***—a result that could never pass muster under the "result obtained" factor. *See id.* at 673. On remand, the trial court, as instructed, subtracted the fees generated in the failed Florida litigation from the lodestar fee and "then reduced the lodestar by 70%" to arrive at an attorney fee in the amount of $983,616.75, together with expenses and post-judgment interest.

The other *Johnson* factors also support the Fee Request. First, the time and labor involved supports the fee request. For nearly three years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted extensive discovery and document review, reviewing thousands of pages of documents, including oil and gas leases, and a large amount of electronically produced data, including organizational documents, gas marketing agreements, well data, gas settlement data, fuel usage data, gas allocation summaries, gas payment statements and historical royalty payments for Oklahoma royalty owners. Class Counsel spent significant time working with engineering, accounting, marketing and lease and title analysis experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy and complex negotiation and mediation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required months of negotiations, including two formal mediation sessions, telephone conferences, briefing on substantive factual and legal issues and extensive consultation with experts to evaluate and analyze damages. Overall, as evidenced through their submissions, Class Counsel dedicated substantial hours of attorney and professional time to this Litigation and anticipate dedicating additional hours through final approval and distribution.

Hess v. Volkswagen of Am., Inc., 2017 OK CIV APP 35, ¶2, 398 P.3d 27. Volkswagen appealed the trial court's award, arguing that "the new attorney fee award—an award which constitutes a mere 13.6% of the prior attorney fee award—is still too high," as it "equals approximately '21.5 times as much money as . . . recovered for the entire class[.]'" *Id*. The Court of Civil Appeals affirmed the trial court's *downward* reduction of the lodestar by 70% given the low recovery obtained in the case, even though the fee awarded and affirmed still represented 21.5 times as much money as recovered for the entire class (Fees of $983,616.75 vs. Class Recovery of $45,780); *see also, e.g.*, *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.,* No. CJ-2010-38, 2015 WL 5794008, at *2 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding "recovery of 41% of damages within the statute of limitations period" to be "an outstanding benefit to the Settlement Class when compared against other royalty underpayment class action settlements approved by other Oklahoma district courts"). Given the amount involved in this Litigation and the Settlement achieved for the benefit of the Settlement Class, this highly significant factor strongly supports Class Counsel's Fee Request.

Second, the novelty and difficulty of the questions presented in this action supports the Fee Request. Class actions are known to be complex and vigorously contested. The legal and factual issues litigated in this case involved complex and highly technical issues. The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. The successful prosecution and resolution of the Settlement Class' claims required Class Counsel to work with various experts to analyze complex data to support their legal theories and evaluate the amount of alleged damages. The fact that Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case. Joint Class Counsel Decl. at ¶73; Miller Decl. at ¶44; Gensler Decl. at ¶75. Moreover, Defendants asserted a number of significant defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Miller Decl. at ¶18; Gensler Decl. at ¶27. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, support the Fee Request. Joint Class Counsel Decl. at ¶68; Miller Decl. at ¶19; Gensler Decl. at ¶¶25-29.

The third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation and ability of the attorneys—supports the Fee Request. This Litigation called for Class Counsel's considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. *See* Joint Class Counsel Decl. at ¶70; Miller Decl. at ¶45-47; Gensler Decl. at ¶¶75. The case required investigation and mastery of highly technical issues regarding royalty payments in Oklahoma. *See* Joint Class Counsel Decl. at ¶70. Class Counsel has years of experience

litigating royalty underpayment class actions in Oklahoma state and federal courts. *Id.* at ¶69-74. Class Counsel also is highly experienced in class action, commercial, *qui tam*, mass tort, securities, and other complex litigation and has successfully prosecuted and settled numerous class actions, including oil and gas royalty underpayment class actions. *Id.* Additionally, Class Counsel has taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the pharmaceutical industry, and the energy industry. *Id*. Class Counsel consists of some of the most experienced complex litigation attorneys in the country. Utilizing creativity and zealous advocacy, these attorneys have achieved huge results for their clients. *Id*. For example, the Court commended Nix Patterson for its work in *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.): "It was a hard-fought case, and I think that the legal work on this case has just been absolutely spectacular, and I want to brag on all of you for the work that you put into it." *See* Final Approval Memo. at Ex. 5.

Further, the law firm of Barnes & Lewis has been lead counsel in twelve (12) Oklahoma oil and gas class action cases that have been concluded and resulted in combined Common Funds exceeding $600 million – far more than any other law firm. BL holds the distinction of having been lead counsel in the first oil and gas class action nationwide to have been successfully tried to a jury. That jury verdict was upheld on appeal and resulted in a total Common Fund of approximately $110 million. *See Bridenstine v. Kaiser Francis*, Case No. 97, 117 (unpublished) August 22, 2003, *cert. denied*, June 26, 2006, Okla. Sup. Ct., Case No. DF-01569.

The quality of representation by counsel on *both* sides of this Litigation was high. *See generally* Gungoll Decl. Defendants are represented by skilled class action defense attorneys who spared no effort in the defense of their client. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976). Simply put, without the experience, skill and determination displayed by *all*

counsel involved, the Settlement would not have been reached. *See* Miller Decl. at ¶18; Gensler Decl. at ¶75; Joint Class Counsel Decl. at ¶69. These factors strongly support the Fee Request.

The fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—support the Fee Request. The Declarations prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were precluded from working on other cases and pursuing otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶61; Miller Decl. at ¶48. This case was filed three years ago in October 2016, and has required the devotion of substantial time, manpower and resources from Class Counsel over that period. *See* Joint Class Counsel Decl. at ¶61. Class Counsel has spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *Id*. Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. *Id*. The schedules of the courts, witnesses and clients were accommodated on a regular basis by Class Counsel. *Id*. A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and works a significant hardship on them over the course of multiple years. *Id*. Class Counsel had to forego taking on numerous additional cases because of this litigation and the burden it placed on their time and resources. *Id*. During the period this case has been pending, NP investigated many cases, including some oil and gas class cases, that it ultimately was not able to pursue due to the time and resource constraints imposed by its case load in pending oil and gas litigation including this case. *Id.* Accordingly, these factors support the Fee Request.

The fifth and twelfth *Johnson* factors—the customary fee and awards in similar cases—further supports the Fee Request. Class Counsel and Mr. Reirdon negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶56. This fee represents the market rate and is in the range of the customary fee in oil and gas class actions in Oklahoma state courts. *See* Joint Class Counsel Decl. at ¶57; Gensler Decl. at ¶63 (collecting cases); *see also, e.g.*, *Fitzgerald Farms,* 2015 WL 5794008, at *3 (collecting Oklahoma cases to find in "the royalty underpayment class action context, the customary fee is a 40% contingency fee" and awarding 40% fee of $119 million common fund).

Federal and state courts in Oklahoma, including this Court, have approved similar fee awards in similar cases. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105); *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124). Moreover, the Western District of Oklahoma approved a 40% fee and a 39% fee in similar royalty underpayment class actions. *See Laredo* Fee Order ("Class Counsel's request of forty percent (40%) of the $6,651,997.95 Settlement Amount is within the acceptable range of attorneys' fees approved by Oklahoma Courts as being fair and reasonable in contingent fee class action litigation . . ."); *QEP* Fee Order at *6 (awarding a fee of $46.5 million, which represented approximately 39% of the cash portion of a $155 million settlement); Miller Decl. at ¶67. The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See* Joint Class Counsel Decl. at ¶57; Gensler Decl. at ¶63 (collecting cases). Given the outstanding cash recovery, the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval.

Moreover, a 40% fee is consistent with the market rate for high quality legal services in royalty underpayment class actions like this. *See Laredo* Fee Order at 8 ("The market rate for Class Counsel's legal services also informs the determination of a reasonable percentage to be awarded from the common fund as attorneys' fees."); Miller Decl. at ¶50. This Court has held a contingency fee negotiated at arms' length at the outset of the litigation "reflect[s] the value the Class Representatives placed on the future success of [the] [a]ction." *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23; *see also Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of this Litigation."); Miller Decl. at ¶50. Here, Class Representative agreed Class Counsel would represent him on a contingency fee basis not to exceed 40%. *See* Reirdon Decl. at ¶7; Miller Decl. at ¶51; Gensler Decl. at ¶62. And, his declaration demonstrates his continued support of the fairness and reasonableness of the Fee Request. Reirdon Decl. at ¶14. This factor supports the Fee Request.

The sixth *Johnson* factor—the contingent nature of the fee—also supports the Fee Request. Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Joint Class Counsel Decl. at ¶56. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. Miller Decl. at ¶52. As Professor Geoffrey Miller aptly notes, the "risk of no recovery in complex cases of this type is very real and is heightened when plaintiffs' counsel press to achieve the very best results for those they represent." *Id.*; *see also* Joint Class Counsel Decl. at ¶56. Class Counsel expended thousands of hours litigating several similar royalty underpayment actions where the courts denied class certification and thus, Class Counsel received no

remuneration whatsoever despite their diligence and expertise.[9] Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates. *See* Miller Decl. at ¶52.

Further, Class Representative negotiated and agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶56; Miller Decl. at ¶54; Gensler Decl. at ¶62. This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25; *Laredo* Fee Order at 8. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶56. Accordingly, this factor strongly supports the Fee Request.

The tenth *Johnson* factor—the undesirability of the case—also supports the Fee Request. Compared to most civil litigation, this Litigation clearly fits the "undesirable" test. *See* Joint Class Counsel Decl. at ¶88; Miller Decl. at ¶53. Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation for multiple years. *See* Joint Class Counsel Dec. at ¶88. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. *Id*. at ¶88. The investment by Class Counsel of their time, money and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. And, this Litigation involved a number

[9] *See*, *e.g.*, *Foster v. Apache*, 285 F.R.D. 632 (W.D. Okla. 2012); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012); *Morrison v. Anadarko Petroleum Co.*, 280 F.R.D. 621 (W.D. Okla. 2012); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646 (W.D. Okla. 2011); Miller Decl. at ¶55.

of uncertain legal and factual issues. *See* Joint Class Counsel Decl. at ¶67; Gensler Decl. at ¶27. For example, in another complex royalty class action, one Oklahoma state court explained:

> Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels.

Fitzgerald Farms, 2015 WL 5794008, at *8. The same principle holds true here. Class Counsel reviewed thousands of pages of documents including oil and gas leases, and a large amount of electronically produced data, including organizational documents, gas marketing agreements, well data, gas settlement data, fuel usage data, gas allocation summaries, gas payment statements and historical royalty payments for Oklahoma royalty owners. Joint Class Counsel Decl. at ¶66. Class Counsel and Plaintiff's Counsel also advanced $199,471.92 in litigation expenses to date. *Id*. at ¶88. And, Class Counsel and Plaintiff's Counsel expended substantial hours of time over the length of this action. *Id*. at ¶81. This factor also supports the Fee Request. *Id*. at ¶87; Miller Decl. at ¶53.

The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Mr. Reirdon is a highly educated royalty owner. *See* Reirdon Decl. at ¶¶4-5. He was and remains very active in this litigation. *Id.* at ¶¶8-11. Further, Class Counsel has represented Mr. Reirdon in other litigation. Joint Class Counsel Decl. at ¶91; Miller Decl. at ¶54. Mr. Reirdon negotiated a 40% fee when he agreed to be class representative in this litigation. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶56. He also supports the Fee Request. Reirdon Decl. at ¶¶16-17. Accordingly, this factor supports Class Counsel's fee request.

In summary, analysis of the *Johnson* factors under federal common law strongly demonstrates that the Fee Request should be approved.

Moreover, while not required, Plaintiff's Counsel total attorney and staff hours in this litigation to date are at least 2,158.57, for a total lodestar of at least $1,709.252.25. *See generally* Declarations of Bradley Beckworth; Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch; Michael Burrage, and Lawrence Murphy, attached hereto; *see also* Gensler Decl. at ¶73. Moreover, Plaintiff's Counsel anticipates spending at least another 398 hours to this case through Final Approval and distribution, for a total combined lodestar (including past and anticipated future hours) of $2,008,252.25.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order granting approval of the Fee Request of $4,000,000.00.

DATED: December 23, 2019.

Respectfully submitted,

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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: December 23, 2019

s/ Bradley E. Beckworth
Bradley E. Beckworth

Subject: Activity in Case 6:16-cv-00445-SPS Reirdon v. Cimarex Energy Company et al Brief in Support of Motion

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Case Number: 6:16-cv-00445-SPS

Filer: Dorsey J. Reirdon

Document Number: 119

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BRIEF in Support of Motion (Re: [118] MOTION *Class Counsel's Motion for Approval of Attorneys' Fees*) by Dorsey J. Reirdon ;(Beckworth, Bradley)

6:16-cv-00445-SPS Notice has been electronically mailed to:

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