

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

CHIEFTAIN ROYALTY COMPANY,)

Plaintiff,)

v.)

Case No. CIV-18-1225-J

SM ENERGY COMPANY (including)
Predecessors, successors and affiliates),)

Defendant.)

**CLASS COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR APPROVAL OF REIMBURSEMENT OF LITIGATION EXPENSES**

Class Representative Chieftain Royalty Company (“Plaintiff” or “Class Representative”), by and through its counsel of record, submits the following memorandum of law in support of its Motion for Approval of Reimbursement of Litigation Expenses.

I. SUMMARY OF ARGUMENT

In connection with approval of the Settlement¹ in the above-captioned Litigation, Class Counsel respectfully move the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation not to exceed \$800,000.00 (the “Expense Request”)—the amount set forth in the Notice. Class Counsel also respectfully move the Court for approval of reimbursement of Administration, Notice and Distribution Costs associated with effectuating the Settlement in an amount not to exceed \$225,000.00. These requests are fair and reasonable, and, therefore, Class Counsel respectfully requests that they be approved.

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of a cash payment of \$10,000,000.00 (the “Gross Settlement Fund”) to compensate the Settlement Class for past damages. The \$10,000,000.00 Gross Settlement Fund is an outstanding recovery for Class Members.²

In order to achieve this remarkable recovery for the Class, Class Counsel was required to incur out-of-pocket expenses that were necessary and reasonable for the

¹All capitalized terms not defined herein shall have the meaning given to them in the Stipulation and Agreement of Settlement (“Settlement Agreement”) (Dkt. No. 96-1).

² See Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel at ¶5 (“Joint Class Counsel Declaration”), attached as Exhibit 2 to Plaintiff’s Final Approval Memorandum; *see also* Affidavit of Barbara Ley at ¶4 (“Ley Aff.”), attached as Exhibit 3 to Plaintiff’s Final Approval Memorandum.

prosecution of this action. Class Counsel now seeks reimbursement of those reasonable expenses, in an amount not to exceed \$800,000.00—the amount set forth in the Notices.³ To date, Class Counsel have advanced \$731,591.57 in prosecuting and resolving this case. *See* Declaration of Bradley E. Beckworth in Support of Motion for Attorneys’ Fees and Reimbursement of Expenses Filed on Behalf of Nix Patterson, LLP (“NP Decl.”) at ¶35; Declaration of Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch (“BL Decl.”) at ¶18. In addition to these expenses, Class Counsel may incur additional expenses between now and the Final Approval Hearing. *See id.* As such, at the hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$800,000.00 *Id.* In addition, Class Counsel reserve their right to make additional expense requests following the Final Approval Hearing; however, in no event will Class Counsel’s cumulative expense requests exceed the \$800,000.00 stated in the Notice. Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted.

In order to facilitate the settlement, provide notice, and distribute funds, Class Counsel stated they would request approval of Administration, Notice and Distribution Costs associated with effectuating the Settlement in an amount not to exceed \$225,000.00 to be paid from the Gross Settlement Fund. *See* JND Decl. These costs will include those

³ A copy of the Short Form and Long Form Notices (the “Notices”) are attached as Exhibits A and C to the Declaration of Jennifer M. Keough on behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement (“JND Decl.”), which is attached as Exhibit 4 to Plaintiff’s Final Approval Memorandum.

of the Settlement Administrator JND, accounting expert Barbara Ley, and land experts. As with the Litigation Expenses, Class Counsel only seeks approval of payment of Administration, Notice and Distribution Costs actually incurred and not to exceed \$225,000.00.

II. FACTUAL AND PROCEDURAL SUMMARY

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

III. ARGUMENT

A. The Parties Have Agreed Federal Common Law Controls the Reasonableness of Any Requests for Expenses

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

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, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, Case Contribution Award, *the right to and reasonableness of Plaintiff's Attorneys' Fees and Litigation 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 (Dkt. No. 96-1) (emphasis added).

Oklahoma federal courts routinely enforce this contractual language. *See, e.g., McClintock v. Enterprise Crude Oil LLC*, No. 6:16-cv-136-KEW (E.D. Okla. Mar. 26, 2021) (Dkt. No. 122); *Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, No. 17-cv-336-KEW (E.D. Okla. Mar. 3, 2020) (Dkt. No. 70); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. 17-cv-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 230); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-87-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-445-SPS (E.D. Okla. Jan. 29, 2020) (Dkt. No. 134 at ¶¶6(d)-(e)); *Cecil v. BP America Production Co.*, No. 16-cv-410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260).

Moreover, the Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and also the fact that courts typically honor the parties' choice of law. Indeed, the Tenth Circuit has explained, "[a]bsent 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.'" *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing *Restatement 2d of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988) (the *Restatement*)); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006). Further expanding on this freedom to contract, the *Restatement* states:

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 2d of Conflict of Laws § 187, cmt. e (Am. Law Inst. 1988); *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (concluding that parties’ contractual choice of law should be given effect because it does not violate Oklahoma’s constitution or public policy); *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 choice of law should be enforced here.

B. The Request for Reimbursement of Litigation Expenses Is Reasonable Under Federal Common Law

Applying the Parties’ chosen law—federal common law—Rule 23(h) allows courts to reimburse counsel for “non-taxable costs that are authorized by law or by the parties’ agreement.” *See* FED. R. CIV. P. 23(h). “As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000) (citations omitted). Similarly, should the Court choose to disregard the Parties’ choice of law and instead apply Oklahoma state law, the Oklahoma class action statute provides “the court may award . . . nontaxable costs that are authorized by law or by the parties’ agreement.” 12 O.S. § 2023(G)(1).

Class Counsel respectfully request reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Litigation. *See* Joint Class Counsel Decl. at ¶¶91-93.⁴ Class Counsel set forth in the Notice that they would seek up to \$800,000.00 in reimbursement of expenses. *See* JND Decl. at Exhibit A, p. 2. To date, Class Counsel’s out-of-pocket expenses are \$731,591.57.⁵ All of these expenses were reasonably and necessarily incurred by Class Counsel and are directly related to their prosecution and resolution of this Litigation. *See* Joint Class Counsel Decl. at ¶¶91-93. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, and document production and review, which are typical of large, complex class

⁴ Oklahoma federal courts routinely approve litigation expense requests in similar actions. *See, e.g., Reirdon v. Cimarex Energy Co. & Cimarex Energy Co. of Colorado*, No. 16-cv-445-SPS (E.D. Okla. Jan. 29, 2020) (Order Awarding Reimbursement of Litigation Expenses) (Dkt. No. 133) (awarding litigation expenses in an amount not to exceed \$225,000.00); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Order Awarding Reimbursement of Litigation Expenses) (Dkt. No. 104) (awarding litigation expenses in an amount not to exceed \$250,000.00); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. 11-cv-29-KEW (E.D. Okla. Mar. 27, 2018) (Order Awarding Reimbursement of Litigation Expenses) (Dkt. No. 232) (awarding litigation expenses in an amount not to exceed \$3,250,000.00); *Reirdon v. XTO Energy Inc.*, No. 16-cv-87-KEW (E.D. Okla. Jan. 29, 2018) (Order Awarding Reimbursement of Litigation Expenses) (Dkt. No. 125) (awarding litigation expenses in an amount not to exceed \$300,000.00); *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. 12-cv-1319-D (W.D. Okla. May 13, 2015) (Order Awarding Attorneys’ Fees, Litigation Expenses and Case Contribution Award) (Dkt. No. 52) (awarding litigation expenses in an amount not to exceed \$350,000.00).

⁵ Because additional expenses will continue to be incurred through and after the Final Approval Hearing, Class Counsel specifically request reimbursement of \$731,591.57 *plus* the ability to recover additional expenses up to \$800,000.00—the noticed amount—to the extent such expenses are actually incurred. At the Final Approval Hearing, Class Counsel will provide the Court with updated charts of Class Counsel’s actual expenses incurred.

actions such as this. *See* NP Decl. at ¶35. As such, the Expense Request is fair, reasonable and should be granted.

In addition, absent Class Members have executed affidavits in support of Class Counsel's Expense Request. *See* Affidavits of Absent Class Members: Dan Little on behalf of Sagacity, Inc.; Mike J. Weeks on behalf of Pagosa Resources, LLC; Ben Barresi on behalf of Cosmo Energy, LLC; Robert E. Gonce, Jr. on behalf of Castlerock Resources, Inc., Exhibits 5-8 to Class Representative's Memorandum in Support of Motion for Final Approval.

C. The Request for Approval of Administration, Notice and Distribution Costs Is Reasonable and Should be Approved

In the Notices, Class Counsel stated they would request approval of Administration, Notice and Distribution Costs associated with effectuating the Settlement in an amount not to exceed \$225,000.00 to be paid from the Gross Settlement Fund. *See* JND Decl. These costs will include those of the Settlement Administrator JND, accounting expert Barbara Ley, and land experts. As with the Litigation Expenses, Class Counsel will only seek approval of payment of Administration, Notice and Distribution Costs actually incurred, and in no event will their request exceed the noticed amount of \$225,000.00.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court (1) award the Expense Request of \$731,591.57, *plus* any additional amount Class Counsel incurs after the filing of this Memorandum, not to exceed the noticed amount of \$800,000.00, and

(2) approve payment of Administration, Notice and Distribution Costs in an amount not to exceed the noticed amount of \$225,000.00.

DATED: March 29, 2021.

Respectfully submitted,

/s/ Bradley E. Beckworth

Bradley E. Beckworth, OBA No. 19982

Jeffrey Angelovich, OBA No. 19981

Lisa Baldwin, OBA No. 32947

Trey Duck, OBA No. 33347

Nathan Hall, OBA No. 32790

NIX PATTERSON, LLP

3600 North Capital of Texas Highway

Building B, Suite 350

Austin, TX 78746

Telephone: (512) 328-5333

Facsimile: (512) 328-5335

bbeckworth@nixlaw.com

jangelovich@nixlaw.com

lbaldwin@nixlaw.com

tduck@nixlaw.com

nhall@nixlaw.com

Susan Whatley, OBA No. 30960

NIX PATTERSON, LLP

P.O. Box 178

Linden, Texas 75563

Telephone: (903) 215-8310

swhatley@nixlaw.com

Robert N. Barnes, OBA No. 537

Patranell Lewis, OBA No. 12279

Emily Nash Kitch, OBA No. 22244

BARNES & LEWIS, LLP

208 NW 60th Street

Oklahoma City, OK 73118

Telephone: (405) 843-0363

Facsimile: (405) 832-1007

rbarnes@barneslewis.com

plewis@barneslewis.com

ekitch@barneslewis.com

CLASS COUNSEL

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: March 29, 2021.

/s/ Bradley E. Beckworth

Bradley E. Beckworth