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

CHIEFTAIN ROYALTY COMPANY, Plaintiff, v. SM ENERGY COMPANY (including Predecessors, successors and affiliates), Defendant.	)))))))))	Case No. CIV-18-1225-J

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

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I. SUMMARY OF ARGUMENT

Class Counsel respectfully move the Court for an award of attorneys' fees of $4 million (the "Fee Request") from the Gross Settlement Fund of $10 million.[1] Pursuant to Rule 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Here, by an express agreement of the Parties pursuant to the Settlement Agreement, the Parties have agreed that federal common law should govern many issues regarding the Settlement, including attorneys' fees. *See* Settlement Agreement at ¶¶7.1, 11.8. However, whether the Court ultimately chooses to apply federal common law or state law, the outcome will be the same because the Fee Request is fair and reasonable under either approach.[2]

As a threshold matter, federal common law and the Tenth Circuit's preferred percentage-of-the-fund methodology[3] should govern the reasonableness inquiry here because the Parties negotiated and included a provision in the Settlement Agreement to that precise effect. In light of the uncertainty surrounding Oklahoma law on class action attorneys' fees[4] and to avoid any such confusion in this case, the Parties contractually

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[1] All 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 generally* Declaration of Bradley E. Beckworth on Behalf of Nix Patterson, LLP ("NP Decl.") and Declaration of Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch ("BL Decl."), attached as Exhibits 1 & 2 to the Motion for Attorneys' Fees; *see also* Declaration of Geoffrey P. Miller ("Miller Decl."); Declaration of Steven S. Gensler in Support of Class Counsel's Request for Attorneys' Fees ("Gensler Decl.").

[3] *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993).

[4] *See Strack v. Continental Resources, Inc.*, Case No. 117,276, 2020 Okla. Civ. App. LEXIS 3 (Feb. 21, 2020) (cert. granted September 28, 2020); *Chieftain Royalty Co. v.*

agreed that the right to and reasonableness of attorneys' fees (among other things) "shall be governed solely by any federal law…including federal law regarding federal equitable common fund class actions." Settlement Agreement at ¶11.8. This choice-of-law provision materially distinguishes this case from *EnerVest* and permits this Court to apply the familiar fee-award standards of federal common law.

This approach is appropriate because the source of Class Counsel's substantive right to an award of attorneys' fees—federal common law—is expressly set forth by agreement of the parties in the Settlement Agreement. And a court presiding over a class action, in federal court or Oklahoma state court, is authorized to award reasonable attorneys' fees in such a case, when authorized by the parties' agreement. Indeed, Oklahoma federal courts have approved and followed this sensical approach many times after *EnerVest*.[5] This Court should do the same and give effect to the Parties' contractual choice of law.

EnerVest Energy Inst'l Fund XIII-A, L.P., 888 F.3d 455 (10th Cir. 2017) (as amended by Order *Nunc Pro Tunc* on April 11, 2018) ("*EnerVest*"); Gensler Decl. at ¶20 (("Until the Oklahoma Supreme Court issues its decision [in *Strack*], however, federal judges in the Western District remain in the untenable situation of having been instructed, in the name of *Erie* uniformity, to use a fee-award methodology that the Oklahoma trial courts (1) have uniformly held is not required by Section 2023(G); and (2) have uniformly rejected as bad policy in common fund contingency fee class actions.").

[5] *See, e.g., McClintock v. Enterprise Crude Oil LLC*, No. 16-cv-00136-KEW (E.D. Okla. Mar. 26, 2021) (Dkt. No. 120 at ¶¶6(d)-(e)); *Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, No. 17-cv-336-KEW (E.D. Okla. Mar. 3, 2020) (Dkt. No. 71 at 3-4); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-445-SPS (E.D. Okla. Jan. 29, 2020) (Dkt. No. 132 at 4); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. 17-cv-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 4); *Reirdon v. Cimarex Energy Co.,* No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 4)*; Reirdon v. XTO Energy, Inc.,* No. 16-cv-87-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 4); *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. 11-cv-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 5).

But, even if this Court were to choose to disregard the contractual agreement of the Parties, the outcome would be no different. As mentioned above, and as the Court is aware,[6] there is some uncertainty among Oklahoma state courts regarding the current state of class action attorney fee law. Oklahoma trial courts uniformly apply the percentage of the fund method in common fund cases under 12 OKLA. STAT. § 2023(G). However, one appellate court has held that the analysis in *Hess v. Volkswagen of America, Inc.,* 2014 OK 111, 341 P.2d 662—a fee shifting case—should also apply in common fund class actions. *Strack v. Continental Res., Inc.*, Case No. 117,276, 2020 Okla. Civ. App. LEXIS 3 (Feb. 21, 2020). The Oklahoma Supreme Court has decided to review the *Strack* decision. So, the current state of class action attorney fee law in Oklahoma state courts is as follows: (1) in common fund class settlements such as these, trial courts apply a percentage of the fund method when conducting the analysis required under §2023; (2) one Court of Civil Appeals opinion (*Strack*) states that trial courts must arrive at a lodestar-based fee as a threshold matter before conducting the remaining §2023 analysis to determine whether an enhancement multiplier should be applied—but the Oklahoma Supreme Court has granted cert to review that holding; and (3) the Oklahoma Supreme Court (*Hess*) requires a threshold lodestar analysis in a case where the parties agreed that the defendant must pay the fee in a claims made (not common fund) class action settlement.

Fortunately, here, if the Court elects to disregard the Parties' agreement regarding the application of federal common law, it does not matter which approach the Court

[6] *See, e.g.,* Dkt. No. 67 at n.2

applies. This is so because of the substantial amount of work done in this case over many years, resulting in Counsel's base lodestar alone being over $3.7 million. Here, a multiplier of 1.06 is all that is required to arrive at a total fee of $4 million, and that is far less than the 5-8 multipliers often approved by Oklahoma courts.[7] Thus, even under an approach requiring a threshold lodestar amount, the requested $4 million fee is fair and reasonable.[8]

In sum, either path leads to the same conclusion: Class Counsel's Fee Request is reasonable and should be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of brevity, Class Counsel will not recite the background of this Litigation again. Instead, Class Counsel respectfully refer 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

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

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

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[7] *See Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008 at *8 (Okla. Dist. Ct. Beaver Co. July 2, 2015) (finding that, in "a large common fund case such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7"; awarding a multiplier of 5; and declaring the award to be "well-within the parameters of Oklahoma case law").

[8] *See Hess v. Volkswagen of America, Inc*, 341 P.3d 662, 667, 669 (Okla. 2014); *see also* NP Decl. at ¶33 and Exhibit 2 (discussing/attaching Declaration from Justice Joseph Watt, the author of the *Hess* decision, in which he explains how Oklahoma courts construe and apply Section 2023, and how they perform a lodestar analysis).

> 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 (emphasis added). 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).

The Settlement Agreement also materially and dispositively distinguishes this matter from *EnerVest*. Rule 23(h) allows a court to award attorneys' fees "that are authorized by law ***or*** by the parties' agreement." FED. R. CIV. P. 23(h) (emphasis added). Here, the parties' agreement—the Settlement Agreement—authorizes and creates Class Counsel's right to an award of reasonable attorneys' fees; it says the fees shall come from the common fund in an amount to be determined by the Court using fee-award standards from federal common law. Whereas, in *EnerVest* and other cases where there was no such agreement, Rule 23(h) required the court to look to "law"—*i.e.*, a state or federal statute, case law, or equitable concepts—that "authorized" an award of attorneys' fees in the first instance. Then, once that source of fee-authorizing "law" was identified, the court would

turn to the method or factors provided by that source of law for determining the reasonableness of the fee award. This multi-step process is unnecessary here because of the Settlement Agreement. Not only does the agreement establish the source of Class Counsel's right to attorneys' fees, it also identifies the standards for determining and evaluating the fee award: "federal law…including federal law regarding federal equitable common fund class actions." Settlement Agreement at ¶11.8.

As noted, Oklahoma federal courts have previously enforced nearly identical choice of law provisions. *See* n.5, *supra*. Further, the Tenth Circuit has recognized parties' freedom to contract regarding choice-of-law issues. *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) (the "*Restatement*"); *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). The Parties' contractual agreement should be enforced here. *See* Miller Decl. at ¶¶30-36.

B. The Fee Request Is Reasonable Under Federal Common Law

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. *See Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *see also 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) (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); *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. 16-CV-87-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); Miller Decl. at ¶45-46;

Gensler Decl. at ¶29.[9]

When determining attorneys' fees under the preferred percentage 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. 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. Notably, these factors are identical, with one exception, to those required under Oklahoma's state law class action fee law.[10] 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.

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*,

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[9] The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method for determining attorneys' fees. Professors Gensler and Miller have repeatedly noted the Tenth Circuit's preference for the percentage of the fund method. *See, e.g., Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶37; Dkt. No. 64 at ¶27).

[10] 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.

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."); *see also* Gensler Decl. at ¶33; Miller Decl. at ¶50.

Here, the results obtained strongly support the Fee Request. The Gross Settlement Fund of $10 million bestows a substantial economic benefit to the Class under the circumstances presented here, particularly given the state of the oil and gas industry and economy during the COVID-19 pandemic and the financial and operational impacts it had on Defendant. *See* Settlement Agreement at 3; Gensler Decl. at ¶¶39-41; Miller Decl. at ¶¶21-23; *see also, e.g., Taha v. Bucks Cty. Pa.,* No. 12-6867, 2020 U.S. Dist. LEXIS 222655, at *21 (E.D. Pa. Nov. 30, 2020) (analyzing approval of class settlement in light of COVID-19 pandemic and stating "'it should be noted that these are difficult economic times,' and while Bucks County may be able to withstand greater judgment, 'it is more preferable to have a settlement that Defendants consider a funding priority, as opposed to the potential for an unfunded judicial mandate following a trial and appeals years from now.'"). Indeed, during the pendency of this Litigation from 2011 to 2020, Defendant's market capitalization has deteriorated by over ***$3 billion***, and its common stock has lost ***over 90%*** of its value.[11] Thus, the certainty of this Settlement and the benefit of an immediate cash payment to the Class cannot be overstated. *See* Gensler Decl. at ¶36

[11] *See, e.g.*, https://finance.yahoo.com/quote/SM/history?p=SM.

("[T]he $10,000,000 face value of the Settlement is a real number. It is not puffed up by including the value of claims that will never be filed or coupons that will never be redeemed."); Miller Decl. at ¶24.[12]

The other *Johnson* factors also support the Fee Request. First, the time and labor involved supports the fee request. As Professor Gensler observes:

> Having reviewed the history of this case and the docket, and having reviewed selected critical pleadings and filings, it seems beyond any question that the time and labor factor of the *Johnson* test supports approval of Class Counsel's fee request. Class Counsel invested significant time and money over a period of ten years with no guarantee of reimbursement or recovery.

Gensler Decl. at ¶52; *id.* at ¶54 ("I don't think it can be seriously disputed that Class Counsel made a significant investment of time and labor in this case, instrumentally contributing to its successful conclusion."); *see also* Miller Decl. at ¶51. For over nine years, Class Counsel vigorously prosecuted the Settlement Class' claims. Class Counsel took substantial fact discovery in this case, including reviewing thousands of pages of documents; taking numerous depositions; and exchanging written discovery. Class Counsel also engaged in substantial expert discovery, including consulting with, and preparing expert witnesses; preparing expert reports; accounting review and analysis; land and lease examination and analysis; and engineering evaluation and analysis. Also, Class Counsel engaged in substantial motion practice. *See generally* Joint Class Counsel Decl.

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[12] *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").

Class Counsel spent significant time working with accounting experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy negotiation process to obtain this Settlement. The process necessary to achieve this Settlement required years of negotiations and extensive consultation with experts to evaluate and analyze damages, as well as two formal settlement conferences with a federal judge. Overall, as evidenced through their submissions, Class Counsel dedicated a substantial number of attorney and professional hours to this Litigation and anticipate dedicating additional hours through final approval and distribution. *See* NP Decl. at ¶27; BL Decl. at ¶¶13-14; Gensler Decl. at ¶52-55; Miller Decl. at ¶51.

Second, the novelty and difficulty of the questions presented in this action supports the Fee Request. *See* Miller Decl. at ¶52. The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. The successful resolution of these required Class Counsel to work with 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. *See* Joint Class Counsel Decl. at ¶11. Moreover, Defendant asserted a number of significant defenses that would have to be overcome if the Litigation continued to trial. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a trial and possible appeal, and in light of the current state of the oil and gas market during the COVID-19 pandemic and its impact on Defendant, support the Fee Request. *Id*. at ¶30-31; Miller Decl. at ¶¶21-24, 52.

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. *See* Miller Decl. at ¶53. 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 ¶68. The case required investigation and mastery of highly technical issues regarding proceeds payments in Oklahoma. *Id*. Class Counsel has years of experience litigating royalty underpayment class actions and statutory interest class actions in Oklahoma state and federal courts. *Id.* at ¶¶69-71. As Professor Gensler observed:

> ***The firms that brought this case and secured this settlement include firms that have been the pioneers and the leaders in the field of class action royalty litigation.*** Having worked with all of them on multiple occasions, and based on my knowledge of their work in those cases, and having served as a consultant or expert in many other class actions, ***it is my opinion that they are excellent lawyers well-deserving of their reputation as being among the very best in the field.***

Gensler Decl. at ¶56 (emphasis added).

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. *See* Joint Class Counsel Decl. at ¶69. 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*. As Professor Miller opines:

> In my opinion, Class Counsel consists of some of the most experienced complex litigation attorneys in the country. I have worked with NP, and Jeff Angelovich, Brad Beckworth, Susan Whatley and Lisa Baldwin specifically, for well over a decade on many different cases, tackling a variety of novel and complex factual and legal issues in courts across the country. Utilizing tremendous creativity and zealous advocacy, these attorneys have achieved huge results for their clients.

Miller Decl. at ¶53. And NP partners Brad Beckworth and Drew Pate recently won the largest royalty litigation class action verdict in Oklahoma history. *See Cline v. Sunoco, Inc.*, 479 F. Supp. 3d 1148 (E.D. Okla. 2020).

Further, the law firm of Barnes & Lewis has been lead counsel in at least fourteen (14) Oklahoma oil and gas class action cases that have been concluded and resulted in combined Common Funds exceeding $700 million. 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 (Okla. Ct. Civ. App., August 22, 2003) (unpublished), *cert. denied*, March 8, 2004. *See generally* BL Decl.; Miller Decl. at ¶54.

The quality of representation by counsel on *both* sides of this Litigation was high. Defendant is 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* Joint Class Counsel Decl. at ¶71. These factors strongly support the Fee Request. *See* Miller Decl. at ¶¶53-55.

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. *See* Miller Decl. at ¶56. 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* NP Decl. at ¶8; BL Decl. at ¶13; Joint Class Counsel Decl. at ¶72; Miller Decl. at ¶56. This case was filed in state court over nine years ago, and has required the devotion of substantial time, manpower and resources from Class Counsel over that period. *See* Joint Class Counsel Decl. at ¶72. 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*. A case of the size and complexity of this one deserves and requires the commitment of a significant percentage of the total time and resources of firms the size of those of Class Counsel. *Id*. Accordingly, these factors support the Fee Request. *See* Miller Decl. at ¶56.

The fifth and twelfth *Johnson* factors—the customary fee and awards in similar cases—further supports the Fee Request. *See* Miller Decl. at ¶¶57-59, 63. Class Counsel and Mr. Abernathy negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* Abernathy Decl. at ¶4; Joint Class Counsel Decl. at ¶77; Gensler Decl. at ¶44; Miller Decl. at ¶59. 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 ¶¶75-77; Gensler Decl. at ¶45; Miller Decl. at ¶58; *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").

Federal and state courts in Oklahoma, including this Court, have approved similar fee awards in similar cases. *See, e.g., 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); *see also 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). The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See* Joint Class Counsel Decl. at ¶¶74-75; Gensler Decl. at ¶¶45, 48, 68, Exhibit 2 thereto; Miller Decl. at ¶63. Given the significant cash recovery, the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval.

Moreover, the Fee Request is in line with the typical 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."); *see also* Gensler Decl. at ¶¶45, 48, 68, Exhibit 2 thereto; Miller Decl. at ¶58. 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." *Laredo* Fee Order at 8. Here, Class Representative agreed Class Counsel would represent it on a contingency fee basis not to exceed 40%. *See* Chieftain Decl. at ¶4. Mr. Abernathy's Declaration demonstrates Chieftain's continued support of the fairness and reasonableness of the Fee Request. *Id*. at ¶¶13-14. This factor supports the Fee Request.

The sixth *Johnson* factor—the contingent nature of the fee—also supports the Fee Request. *See* Miller Decl. at ¶60. Class Counsel undertook this Litigation on a purely contingent fee basis, assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Joint Class Counsel Decl. at ¶79. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees, and as Professor Miller has aptly noted, "[t]he 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." Miller Decl. at ¶60; *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 64 at ¶55); *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.,* CJ-2010-38, 2015 WL 5794008, at *2 (D. Ct. Beaver Cty. July 2, 2015) ("[W]here, as here, the legal representation is undertaken on a contingent fee basis and that representation results in a common fund recovery for the benefit of a class, Oklahoma applies a percentage analysis."); *see also* Joint Class Counsel

Decl. at ¶79. Simply put, it would not have been economically feasible for Class Counsel to pursue this case on any basis other than a contingency agreement.

Further, Class Representative negotiated and agreed Class Counsel would represent it on a contingency fee basis, not to exceed 40%. *See* Chieftain Decl. at ¶4; Joint Class Counsel Decl. at ¶77; Gensler Decl. at ¶44; Miller Decl. at ¶59. This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See Laredo* Fee Order at 8. If Class Counsel had not been successful, they would have received zero compensation or reimbursement for expenses. Joint Class Counsel Decl. at ¶79. 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* Miller Decl. at ¶61; Joint Class Counsel Decl. at ¶79. Few law firms would be willing to risk investing the time, trouble, and expenses necessary to prosecute this Litigation for multiple years. *Id*. As Professor Gensler observes:

> Lawyers who take on big oil and gas companies seeking tens of millions of dollars in damages must be prepared for a long and expensive battle. They must also have the expertise and acumen needed to get the case certified as a class action despite the inevitable and often extraordinary efforts the defendant will make to keep that from happening. Moreover, the oil and gas defendant must know and appreciate that class counsel is sufficiently expert and resourced to not just survive but thrive in that environment. Any hint of weakness on the part of class counsel will embolden the defendant's procedural resistance and undermine settlement. To get top dollar in a settlement, class counsel has to be—and must be seen to be—as well-funded and as legally formidable as the oil and gas companies and the "big law" firms they retain.

Gensler Decl. at ¶57; *see also Fitzgerald Farms*, 2015 WL 5794008, at *8.

There was no doubt from the beginning that this lawsuit would be a lengthy undertaking. Joint Class Counsel Decl. at ¶¶72, 79. 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 of uncertain legal and factual issues. *Id*. at ¶¶43, 67. Class Counsel reviewed large amounts of electronically produced data, organizational documents, well data, and historical proceeds payments for Oklahoma owners. Joint Class Counsel Decl. at ¶¶11, 61-62. Class Counsel and Plaintiff's Counsel also advanced $731,591.57 in litigation expenses to date. *See* NP Decl. at ¶35; BL Decl. at ¶18. And, Class Counsel expended substantial hours of time over the length of this action. NP Decl. at ¶27; BL Decl. at ¶13; Joint Class Counsel Decl. at ¶¶61-63; Gensler Decl. at ¶¶52, 54; Miller Decl. at ¶51. This factor also supports the Fee Request.

The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. *See* Miller Decl. at ¶62. Class Counsel and Chieftain's President, Robert Abernathy, have a long-standing professional relationship lasting many years. *See* Joint Class Counsel Decl. at ¶¶80, 94; Miller Decl. at ¶62. Class Counsel has in the past and currently is representing Chieftain in several royalty underpayment actions in Oklahoma state and federal court. *See* Joint Class Counsel Decl. at ¶94; Miller Decl. at ¶62. Further, as discussed above, Class Representative agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Chieftain Decl. at ¶4; Gensler Decl. at ¶44; Miller Decl. at ¶62. And, Mr. Abernathy supports the fee

request. Chieftain Decl. at ¶¶13-14. Accordingly, this factor supports Class Counsel's fee request. Miller Decl. at ¶59.

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

C. Class Counsel's Fee Request Is Reasonable Under Oklahoma State Law

As discussed above, because the Parties contractually agreed that federal common law governs any fee and expense request here, the Court should apply the common fund approach. *See* Gensler Decl. at ¶23; Miller Decl. at ¶68. However, if the Court declines to enforce the Parties' agreement, and instead chooses to apply Oklahoma state law *and* concludes that Oklahoma fee law requires a lodestar calculation, "it does not lead to a different result." Gensler Decl. at ¶24. As Professor Gensler opines:

> [I]t is my opinion that Section 2023(G) gives Oklahoma trial courts discretion to select which method to use based on the circumstances of the case. However, the choice between the POF method and the lodestar method is academic in this case because Class Counsel's fee request would be fair and reasonable under either approach.

Gensler Decl. at ¶61; *see also* Miller Decl. at ¶30 ("[I]t is my opinion that the fee request here is fair and reasonable under either the percentage of the fund method or the lodestar method."); *see also id.* at ¶64.

Under Oklahoma law, Section 2023 controls the award of attorney's fees. *See* 12 OKLA. STAT. § 2023(G); *see also* Gensler Decl. at ¶62; Miller Decl. at ¶69. This statute was amended in 2013 to add a new subsection governing the calculation of attorney's fees, which includes the 12 *Johnson* factors discussed above, plus one additional factor. "Notably, Section 2023 does *not* say that the court must perform a lodestar calculation first,

and then adjust the fee based on the other factors." Miller Decl. at ¶69. Professor Miller opines that "that the amendments to Section 2023 were intended to supplant *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 661-62 (Okla. 1979), an opinion predating the amendments by almost 35 years, and to align Oklahoma practice with prevailing Tenth Circuit practice." *Id*. Professor Gensler agrees:

> [T]he Oklahoma Legislature codified class-action fee-award practices thirty years after *Burk* when it enacted 12 O.S. 2023(G) in 2009. Since then, Oklahoma trial judges have consistently rejected the argument that Section 2023(G) dictates the use of any particular method of determining class action counsel fees. Moreover, Oklahoma trial judges have uniformly concluded that best practice under Section 2023(G) is to use the POF approach to determine class counsel fees in common fund contingency-fee cases.

Gensler Decl. at ¶18; *see also id.* at ¶73 ("In summary, it is unquestionably clear that the Oklahoma trial courts have understood Section 2023(G)(4) as giving them discretion to choose what calculation methodology to employ, and they have uniformly selected the POF method when determining class counsel fees in royalty underpayment common fund contingency-fee cases. The practice 'on the ground' in Oklahoma could not be clearer.").

In applying Section 2023, Oklahoma district courts have held that in common fund cases, the primary factor is the percentage of recovery. *See Fitzgerald Farms*, 2015 WL 5794008, at *2 ("Oklahoma courts have long preferred the percentage method for awarding fees in Oklahoma oil and gas class actions[.]"); *see also Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45, at 8 (Okla. Dist. Ct. Washita Cty. Aug. 30, 2017) ("When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee."); Gensler Decl. at ¶72;

Miller Decl. at ¶69. Here, Class Counsel's fee request of $4,000,000 would be fair and appropriate under Section 2023(G). *See* Gensler Decl. at ¶74.

First, the 13 factor analysis under Section 2023(G) "would be all but identical to the factor-by-factor analysis under Tenth Circuit law." *Id.* at ¶75. Twelve of the Section 2023(G) factors are essentially identical to the *Johnson* factors incorporated by the Tenth Circuit in *Brown*. *Id.* The thirteenth factor—the litigation risk—is taken into account in federal court by the 6th *Johnson* factor—"whether the fee is fixed or contingent." *Id.*

Second, the Fee Request is well within the range of percentage-based fee awards made under Section 2023(G). *Id.* at ¶76. As Professor Gensler's comprehensive study concludes, "every oil-and-gas common-fund contingency-fee award made since Section 2023(G) was enacted has been granted at 40% of the common fund" (*id.*):

> I am aware of fifteen (15) oil and gas royalty class action settlements in Oklahoma state courts since Section 2023(G)(4) first took effect in September 2009. Of those, thirteen (13) have fee orders that explain the methodology used to arrive at the fee award. Every one of those 13 fee orders awarded class counsel fees on a POF basis. In every case, the court awarded fees at 40% of the common fund.

Id. at ¶68.

Third, Class Counsel's fee request falls well within the range of lodestar calculations approved under Section 2023(G). *Id.* at ¶76. The first element of the lodestar calculation is the number of hours expended in the pursuit of the litigation. *See* Miller Decl. at ¶71. In contingency-fee cases (like this one), where hourly billing invoices are not submitted to a paying client, Oklahoma courts often have found testimony based on the review of pertinent case files sufficient. *See Root v. Kamo Elec. Co-op*, 1985 OK 8, ¶¶46-47, 699 P.2d 1083

(Oklahoma Supreme Court holding that "testimony of the expert witnesses" that the contingency agreement was "reasonable for this case" sufficiently supported the trial court's fee award); *Unterkircher v. Adams*, 1985 OK 96, ¶¶3, 10-11, 714 P.2d 193 (finding attorneys' and expert witnesses' testimony that the contingency contract was reasonable in light of the *Burk* and ORPC 1.5(a) factors "ample evidence" to support the trial court's fee award); *Abel*, 1983 OK 109 at ¶¶6-8 (finding, after *Burk*, that "testimony of several practicing attorneys" supported time and labor factor under ORPC 1.5(a) and established reasonableness of one-third contingency-fee agreement); *Hamilton*, 1981 OK 22 at ¶¶23-27 (finding testimony of attorneys based on examination of "litigation file" and "time records" justified base hourly fee calculation). Following *Burk*, Oklahoma trial and appellate courts also have found that testimony in class action cases taken pursuant to a contingent fee agreement can support "the trial court's decision to award an incentive or bonus fee by extending the contingent fee agreement to the Class." *Adkisson, et al. v. Koch Indus. Inc., et al.*, Case No. 106,452 (Okla. Ct. Civ. App. Aug. 7, 2009) (unpublished), at ¶¶12-22 (upholding Oklahoma trial court's attorneys' fee award in class action settlement and finding the "Oklahoma Supreme Court's directive in *Burk* is consistent with federal cases allowing the extension of contingent fee agreements to the class")[13]; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294 ("once a class is certified and a decision on the merits is had, the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class

[13] The Oklahoma Supreme Court issued an Order denying *certiorari* in *Adkisson v. Koch Industries, Inc.*, No. 106,452, on February 4, 2010.

members"); *Fitzgerald Farms*, 2015 WL 5794008, at *7-8 (finding counsel's declaration supplied a summary of class counsel's hourly fees to support time and labor factor or lodestar analysis); *see also* Miller Decl. at ¶71.

Consistent with the foregoing Oklahoma precedent, Class Counsel is submitting declarations regarding the time they spent litigating this case in support of their fee request that include the number of hours worked. *See* NP Decl. at ¶27; BL Decl. at ¶13. These declarations show Class Counsel's time in this Litigation is 5,562 hours.

The second element of a lodestar calculation is the hourly rate for the work performed. *See* Miller Decl. at ¶73. Class Counsel has provided hourly rates for each attorney and staff member for the services performed for different types of legal work. These rates are "predicated on the standards within the local legal community." *Burk*, 598 P.2d at 663; *see also Finnell v. Seismic,* 2003 OK 35, ¶17, 67 P.3d 339, 346. "The legal community in which Class Counsel practices is a national complex litigation firm." Miller Decl. at ¶73; *see also, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (explaining that, in the lodestar context, courts generally look to the current billing rates of the attorneys in "the relevant marketplace, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" (quoting *Blum*, 465 U.S. at 896 n.11)).

The hourly rates submitted by Class Counsel here are in line with fee awards recently approved by Oklahoma federal courts. *See* n.5, *supra*. These rates also align with the rates approved by the Honorable Lee R. West of the U.S. District Court for the Western District of Oklahoma in a complex shareholder derivative action, *In re Sandridge Energy,*

Inc. S'holder Derivative Litig., No. CIV-13-102-W, 2015 U.S. Dist. LEXIS 180740, *10-11 & n.10 (W.D. Okla. Dec. 22, 2015) (citing counsel's declarations for amount of time expended in litigation). And, these rates are in line with the $875 hourly rate recently approved by the Oklahoma Court of Civil Appeals. *See Strack v. Continental Res., Inc.*, Case No. 117,276, 2020 Okla. Civ. App. LEXIS 3, at *19 (noting Class Representatives' evidence that senior attorneys in complex oil and gas class actions in Oklahoma charge hourly rates ranging from $550 to $900 per hour, and finding the "$875 per hour rate approved by the trial court has a rational basis in the evidence presented" and leaving it "undisturbed"). Professor Miller's empirical studies also support the hourly rates submitted here. *See* Miller Decl. at ¶¶76-82.

The third element of a lodestar calculation is to "apply a multiplier to reflect the fact that plaintiffs' lawyers in common fund cases only get paid if they win." *Id.* at ¶83. When Class Counsel's reasonable hourly rates are multiplied by the number of hours expended in this Litigation, Class Counsel's base lodestar is equal to $3,763,456.25. *See* NP Decl. at ¶27; BL Decl. at ¶13; Joint Class Counsel Decl. at ¶90. Thus, the Fee Request of $4 million is only 1.06 times their base lodestar. This is well below the range of "multipliers" approved by federal and Oklahoma state courts in class action cases litigated pursuant to a contingency fee agreement. Indeed, as Professor Gensler notes, "since Section 2023(G) was enacted Oklahoma courts have approved seven (7) lodestar multipliers averaging 3.23, including multipliers of 5 and 6.3." Gensler Decl. at ¶77. Thus, the multiplier in this case of 1.06 is "well below what Oklahoma courts have found acceptable when they have applied Section 2023(G) in other oil-and-gas common fund contingency fee cases." *Id.*;

see also, e.g., *Fitzgerald Farms*, 2015 WL 5794008, at *8 (holding that, in "large common fund case[s] such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7" and, thus, concluding that "a multiplier of around 5 supports the 40% fee request and is well-within the parameters of Oklahoma case law" (citing similar class action fee awards in Oklahoma state court royalty underpayment common fund settlements)); *see also, e.g.*, *Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181-JLK, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6 (D. Colo. April 28, 2017) (finding that "[t]ypical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds" and collecting federal cases to support conclusion that "multiplier of 2.41 is within the range of those frequently awarded in common fund cases.").

In conclusion, even if the Court applies Oklahoma state law (despite the Parties' choice of law clause in the Settlement Agreement), the result is the same—Class Counsel's Fee Request is reasonable. *See* Gensler Decl. at ¶78.

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, which is reasonable under federal common law or Oklahoma state law.

DATED: March 29, 2021.

Respectfully submitted,

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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
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