

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA**

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

**ORDER AWARDING CASE CONTRIBUTION AWARD**

Before the Court is Class Representative’s Motion for Approval of Case Contribution Award (the Motion) [Doc. No. 110] and Memorandum of Law in Support Thereof (the Memorandum) [Doc. No. 111], wherein Class Representative seeks a Case Contribution Award of \$50,000.00 to be paid from the Gross Settlement Fund. The Court has considered the Motion and Memorandum, all matters submitted in connection therewith, and the proceedings on the Final Fairness Hearing held April 27, 2021. For good cause shown and based on the evidence and other materials in the record, the Court GRANTS the Motion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement [Doc. No. 96-1], and all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.
2. The Court, for purposes of this Order, incorporates its findings of fact and conclusions of law from its Order and Judgment Granting Final Approval of Class Action Settlement as if fully set forth herein.
3. The Court has jurisdiction to enter this Order and over the subject matter of the

Litigation and all parties to the Litigation, including all Settlement Class Members.

4. The Notice stated that Class Representative intended to seek a Case Contribution Award of up to \$50,000.00 to be paid from the Gross Settlement Fund. *See* Declaration of Jennifer M. Keough on Behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement (JND Decl.) [Doc. No. 105-4]. Notice of Class Representative's request for a Case Contribution Award was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the request for a Case Contribution Award is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23, Federal Rules of Civil Procedure, and due process.

5. Class Representative provided the Court with abundant evidence in support of its request for a Case Contribution Award, including, among other things: (1) the Case Contribution Motion and Memorandum; (2) the Declaration of Robert Abernathy, President of Chieftain Royalty Company (Chieftain Decl.) [Doc. No. 105-1]; (3) the Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel (Joint Class Counsel Decl.) [Doc. No. 105-2]; (4) the Declaration of Geoffrey P. Miller (Miller Decl.) [Doc. No. 103]; and (5) the 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; and Robert E. Gonce, Jr. on behalf of Castlerock Resources, Inc. [Doc. Nos. 105-5 through 105-8]. This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was objected to or otherwise refuted by any Settlement Class Member.

6. Class Representative is hereby awarded a Case Contribution Award of \$50,000.00

to be paid from the Gross Settlement Fund. In making this Case Contribution Award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of \$10,000,000.00 in cash, which is a significant benefit to the Settlement Class. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representative and Class Counsel.

(b) On February 23, 2021, JND caused the Short Form Notice of Settlement to be mailed to 4,638 Class Members in the Class Mailing List. *See* JND Decl. at ¶6. The Notice expressly stated that Class Representative intended to seek a Case Contribution Award of up to \$50,000.00 to be paid from the Gross Settlement Fund. The Notice also directed class members to a website for further information, including the Long Form Notice, and also provided the option of requesting a Long Form Notice be sent via U.S. Mail;

(c) Class Representative filed its Motion fourteen (14) days prior to the deadline for Settlement Class Members to object. No objections were filed regarding Class Representative's Request for a Case Contribution Award;

(d) The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

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 expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal

equitable common fund class actions.

See Settlement Agreement at ¶11.8 (emphasis added) [Doc. No. 96-1];

(e) This choice of law provision should be and is hereby enforced. 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)); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006); 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."). Oklahoma federal courts have enforced similar language in prior settlements. See, e.g., *McClintock v. Enterprise Crude Oil LLC*, No. 6:16-cv-00136-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); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-445-SPS (E.D. Okla. Jan. 29, 2020) (Dkt. No. 134); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 230); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260);

(f) Applying federal common law,<sup>1</sup> federal courts regularly grant incentive awards to compensate named plaintiffs for the work they performed. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 F. App'x 232, 235 (10th Cir. 2009) (unpublished) (“Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.”) (citations omitted); *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award[.]”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class . . . .”); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L,

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<sup>1</sup> Because the Parties here contractually agreed that federal common law controls the Case Contribution Award, the Court finds that the opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative of 0.5%, does not govern or dictate the outcome here. Moreover, Class Representative here seeks a flat award based on its hours spent times a reasonable rate and the personal financial risk Class Representative has taken on for the benefit of the Class, as opposed to a percentage-based award that was requested and awarded by the district court in *EnerVest*. And as found herein, sufficient evidence in the record supports the reasonable amount of time for which and the reasonable hourly rate at which Class Representative is being compensated through this Case Contribution Award. *See, e.g., id.* at 1196-97 (reversing and remanding “for further fact-finding” as to amount of incentive award, noting that incentive award may be provided to compensate class representative “at a reasonable rate for reasonable time expended on services rendered that were helpful to the litigation” that is “supported by sufficient evidence” in the record, and that “[t]his evidence might be provided through ‘affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award’” or “‘by live testimony at the fairness hearing’” (quoting Newberg §17:12)).

2012 U.S. Dist. LEXIS 147197, at \*9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (“There is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at \*56 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *see also, e.g., McClintock v. Enterprise Crude Oil LLC*, No. 6:16-cv-00136-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); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-445-SPS (E.D. Okla. Jan. 29, 2020) (Dkt. No. 134); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 119); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 103); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 126); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 230); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov.

19, 2018) (Dkt. No. 260);

(g) The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” 5 *Newberg on Class Actions* § 17:3 (5th ed.) (*Newberg*). The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (noting that if the lead plaintiff’s services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be “untethered to any service or value [the lead plaintiff] will provide to the class”); *Newberg* at § 17:18;

(h) Here, Class Representative seeks a modest, dollar-based award of \$50,000.00. This request is supported by the abundant evidence submitted by Class Representative, including declarations from Chieftain, Class Counsel and numerous Absent Class Members. *See Newberg* at § 17:12 (evidence might be provided through “affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”). This evidence demonstrates Class Representative has dedicated approximately 350 hours to this Litigation to date, and thus is seeking payment at an hourly rate of approximately \$142.00 based on its extensive experience in the oil and gas industry for reasonable time expended on services that were helpful and non-duplicative to the Litigation. *See, e.g.,* Chieftain Decl. at ¶16;

(i) Class Representative’s significant experience with royalty interests in Oklahoma and in the oil and gas industry more broadly, including the experience, education

and work history background of Chieftain's President, Robert Abernathy, more than justify this hourly rate. *See generally* Chieftain Decl. Chieftain actively purchases producing and non-producing mineral and royalty interests in eleven states and owns hundreds of mineral and royalty interests in over 12,000 acres. *See id.* at ¶3. Mr. Abernathy received a B.A. from Tulane University and a Juris Doctorate from Oklahoma City University School of Law. *See id.* He is licensed to practice law in Oklahoma, where he practiced for over 20 years, specializing in oil and gas, real estate, bankruptcy, and probate law. *See id.* He is an experienced oil and gas royalty owner, who has purchased, sold, and managed significant royalty interests across the State of Oklahoma and is a nationally recognized speaker on royalty ownership issues. *See id.* He has spent over 11 years speaking to thousands of mineral interest owners around the country on all aspects of mineral ownership, including Oklahoma Corporation Commission rulings and regulations. *See id.* He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter. *See id.* He is also a founding member of the American Royalty Council. *See id.* In addition, he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *See id.*;

(j) As demonstrated by its Declaration, both the rate and efforts of Chieftain are reasonable and supported by sufficient evidence in the record. Specifically, as stated above, at the time of Mr. Abernathy's Declaration, he had dedicated approximately 350 hours to this Litigation on behalf of Class Representative and for the Class. *See* Chieftain Decl. at ¶16. These hours were spent collecting documents for discovery, reviewing emails and draft pleadings, motions, briefs, and other court documents from Class Counsel, reviewing depositions, preparing for, and giving his deposition, consulting and/or meeting



with Class Counsel and traveling to and from meetings. *See id.* at ¶¶6, 16. All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *See id.* He also continued to work on behalf of the Settlement Class by making himself available to participate in the final fairness hearing. In the coming weeks and months, he will assist the Court and Class Counsel in administrating the Settlement; and, if there is an appeal in this case, he will remain involved throughout the proceedings to continue his work as Class Representative. *See id.* However, even if Mr. Abernathy never worked another hour on this case, the request of \$50,000.00 would be justified based on the reasonable hourly rate of approximately \$142.00 and the personal financial risk associated with a potentially unfavorable outcome — all of which materially and substantially benefitted the Class;

(k) Chieftain (through Mr. Abernathy) was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition in January of 2011. *See* Chieftain Decl. at ¶¶5-6. He actively and effectively fulfilled his obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon him during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *See id.* at ¶16. Mr. Abernathy's active participation has contributed significantly to the prosecution and resolution of this case. *See id.* In addition, Chieftain collected documents for discovery, reviewed pleadings, motions, and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages and actively participated in the negotiations that led to the Settlement of this Action. *See id.* at ¶¶6, 16;

(l) Chieftain was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See id.* at ¶17. In fact, Chieftain

understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on its request. *See id.* In other words, Chieftain fully supports the Settlement as fair, reasonable and adequate, even if it is awarded no case contribution award at all. *See id.* Chieftain has no conflicts of interest with Class Counsel or any absent class member. *See id.* Finally, Absent Class Members have executed affidavits supporting Class Representative's request for a Case Contribution Award. *See* Dkt. Nos. 105-5 through 105-8;

(m) Because Class Representative has dedicated its time, attention and resources to this Action and taken on the financial risk of an unfavorable result, which all benefit the Settlement Class, the Court finds it is entitled to the requested Case Contribution Award of \$50,000.00 to reflect the important role it played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement. This Case Contribution Award of \$50,000.00 reasonably compensates Class Representative for approximately 350 hours of time reasonably expended on services rendered that were helpful to this Litigation at a reasonable hourly rate of approximately \$142 per hour, each of which are supported by sufficient evidence in the record;

(n) Thus, Class Representative's request for a Case Contribution Award of \$50,000.00 is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness.

7. Any appeal or any challenge affecting this Order Awarding Case Contribution Award shall in no way disturb or affect the finality of the Order and Judgment Granting Final

Approval of Class Action Settlement, the Settlement Agreement or the Settlement contained therein.

8. Exclusive jurisdiction is hereby retained over the parties and the Settlement Class Members for all matters relating to this Litigation, including the administration, interpretation, effectuation or enforcement of the Settlement Agreement and this Order.

9. There is no reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS SO ORDERED this 27<sup>th</sup> day of April, 2021.



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BERNARD M. JONES  
UNITED STATES DISTRICT JUDGE

**Subject:** Activity in Case 5:18-cv-01225-J Chieftain Royalty Company v. SM Energy Company Order on Motion for Order

**Date:** Tuesday, April 27, 2021 at 12:30:58 PM Central Daylight Time

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U.S. District Court

Western District of Oklahoma[LIVE]

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**Case Name:** Chieftain Royalty Company v. SM Energy Company

**Case Number:** [5:18-cv-01225-J](#)

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**Document Number:** [117](#)

**Docket Text:**

**ORDER ~ Awarding Case Contribution Award. re Class Representative's Motion for Approval of Case Contribution Award (the Motion) [110] and Memorandum of Law in Support Thereof (the Memorandum) [111]. The Court has considered the Motion and Memorandum, all matters submitted in connection therewith, and the proceedings on the Final Fairness Hearing held April 27, 2021. For good cause shown and based on the evidence and other materials in the record, the Court GRANTS the Motion. Signed by Honorable Bernard M. Jones on 4/27/2021. (dwl)**

**5:18-cv-01225-J Notice has been electronically mailed to:**

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