

**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 ATTORNEYS' FEES

Before the Court is Class Counsel’s Motion for Approval of Attorneys’ Fees [Doc. No. 106] (the Motion) and Memorandum of Law in Support Thereof [Doc. No. 107] (the Memorandum), wherein Class Counsel seeks entry of an Order approving Class Counsel’s request for Attorneys’ Fees in the amount of \$4,000,000.00. The Court has considered the Motion and Memorandum, all matters and evidence submitted in connection therewith and the proceedings on the Final Fairness Hearing held April 27, 2021. As set forth more fully below, the Court finds the Motion should be GRANTED.

IT IS THEREFORE ORDERED 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 herein 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.

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 Counsel would seek attorneys' fees up to \$4,000,000.00 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 Counsel's request for attorneys' fees 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 attorneys' fees 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 Counsel provided the Court with abundant evidence in support of their request for attorneys' fees, including but not limited to: (1) the Motion and Memorandum; (2) the Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel (Joint Class Counsel Decl.) [Doc. No. 105-2]; (3) the 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.) [Doc. No. 106-1]; (4) the Declaration of Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch (BL Decl.) [Doc. No. 106-5]; (5) the Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, Class Counsel's Application for Attorneys' Fees, Class Representative's Request for Case Contribution Award, and Notice of Proposed Settlement (Miller Decl.) [Doc. No. 103]; (6) the Declaration of Steven S. Gensler in Support of Class Counsel's Request for Attorneys' Fees (Gensler Decl.) [Doc. No. 102]; (7) the Declaration of Robert Abernathy, President of Chieftain Royalty Company (Chieftain Decl.) [Doc.

No. 105-1]; (8) JND Decl. [Doc. No. 105-4]; and (9) 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 Counsel is hereby awarded Attorneys' Fees of \$4,000,000.00, to be paid from the Gross Settlement Fund. In making this 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 for immediate payment to the Settlement Class. The Settlement is not a "claims-made settlement," meaning that Settlement Class Members who do not opt out will automatically receive individual distribution payments without any "need to fill out claim forms or locate old records to prove up their claims." Gensler Decl. at ¶36; Joint Class Counsel Decl. at ¶6. 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 Counsel would seek attorneys' fees up to \$4,000,000.00. The Short Form Notice also directed class members to a website for further information, including the Long Form Notice, and provided the option of requesting a Long Form Notice be sent via U.S. Mail;

(c) Class Counsel filed its Motion fourteen (14) days prior to the deadline for

Settlement Class Members to object. No objections were filed in opposition to Class Counsel's Motion for Approval of Attorneys' Fees by the listed deadline and thus, any objections to the requested fees are waived;

(d) Class Counsel seek an award of attorneys' fees in the amount of \$4,000,000.00 (the Fee Request) to be paid out of the \$10,000,000.00 Gross Settlement Fund that Class Counsel obtained for the Settlement Class. 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, the parties have expressly agreed, pursuant to the Settlement Agreement, that federal common law shall govern many issues regarding the Settlement, including the right to, and reasonableness of, attorneys' fees. *See* Settlement Agreement at ¶¶7.1, 11.8. However, based on the evidence in the record and for the reasons set forth in more detail below, the Court finds that, under the facts and circumstances here, Class Counsel's Fee Request is reasonable under either federal common law or Oklahoma state law, and regardless of whether the Court applies the percentage-of-the-fund approach or a lodestar analysis. This is because the Fee Request, expressed mathematically, is equal to 1.06 times Class Counsel's base lodestar or 40% of the Gross Settlement Fund. *See* Joint Class Counsel Decl. at ¶47; *see also, e.g.*, Gensler Decl. at ¶59 (opining "that a fee award of \$4,000,000 [here] would be fair and reasonable under Tenth Circuit federal common law standards, whether viewed under the [percentage-of-fund] approach or under the lodestar approach (either on its own or a cross-check)"); *id.* at ¶78 (opining that "Class Counsel's fee request in this case . . . falls well within the lodestar range under Oklahoma law"); Miller Decl. at ¶70 ("Regardless of what role this Court determines a lodestar

calculation should play in the fee analysis (none, cross-check, or a baseline subject to a multiplier), it is my opinion that the fee award in this case is reasonable.”).

But to remove any doubt, the Parties entered into a Settlement Agreement that specifically authorizes Class Counsel’s right to attorneys’ fees and selects the law—federal common law—that governs and provides the standards for evaluating the requested fees. *See* Settlement Agreement at ¶¶7.1, 11.8; Miller Decl. at ¶¶30-37; Joint Class Counsel Decl. at ¶¶47-60. Specifically, the Parties here contractually agreed that the right to and reasonableness of attorneys’ fees (among other things) shall be governed solely by federal common law:

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);

(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 (Second) 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.”). 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); *see also* Miller Decl. at ¶¶30-36. The Court is aware of the Tenth Circuit's holding in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017). The Court finds the *EnerVest* decision does not bear on the Court's decision here because the Settlement Agreement in this case specifically includes the choice of law language set forth above and, as such, the Court's analysis is governed by the Tenth Circuit's long line of jurisprudence in common fund class actions under the common fund doctrine. *See 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);

(f) Federal Rule of Civil Procedure 23(h) states "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.

See Brown v. Phillips Petroleum Co., 838 F.2d 453 (10th Cir. 1988). Such an award will only be reversed for abuse of discretion. *See id.*; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). Under the Parties' chosen law (federal common law), district courts have discretion to apply either the percentage of the fund method or the lodestar method—but, in the Tenth Circuit, the percentage of the fund method is clearly preferred. *See Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (Dkt. No. 52 at 5) (the “*Laredo Fee Order*”). Further, in the Tenth Circuit, in a percentage-of-the-fund case such as this where federal common law is used to determine the reasonableness of the attorneys' fee under Rule 23(h), neither a lodestar nor a lodestar cross check is required. *See id.*;

(g) This Court has acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *See, e.g., Laredo Fee Order* at 5 (“In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method.”); *see also Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520-D (W.D. Okla. July 31, 2014) (Dkt. No. 150 at n.1) (“The Court is not required to 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.”); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R (W.D. Okla. Oct. 5, 2012) (Dkt. No. 329). Other Oklahoma federal courts are in accord. *See, e.g., 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)); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 21-24); *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); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260); *see also* Gensler Decl. at ¶¶21-59; Miller Decl. at ¶¶39-67.¹

(h) The percentage methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454. 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; *see also* Gensler Decl. at ¶¶26-32; Miller Decl. at ¶¶39-49. Based upon that analysis, the applicable law, and the evidence submitted, the Court concludes that the requested fee of \$4,000,000 is reasonable;

(i) The twelve *Johnson* factors are: (1) 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

¹ The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method for determining attorneys’ fees.

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. *See Gottlieb*, 43 F.3d at 482 n. 4;

(j) The Court finds that the eighth *Johnson* factor—the amount involved in the case and the results obtained—weighs heavily in support of the requested fee. *See Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when “the recovery [is] highly contingent and . . . 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”); Gensler Decl. at ¶¶33-41; Miller Decl. at ¶50;

(k) Here, the evidence shows that, under the results obtained factor, the Fee Request is fair and reasonable under the circumstances. The \$10,000,000.00 Gross Settlement Fund alone is a significant recovery for the Class;

(l) The Settlement represents a significant, concrete monetary benefit to the Settlement Class. 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. Accordingly, the “results obtained” factor strongly supports a fee award of \$4,000,000.00 to be paid from the Gross Settlement Fund. *See generally* Joint Class Counsel Decl.; *see also* Gensler Decl. at ¶¶33-41; Miller Decl. at ¶50;

(m) The Court finds the other *Johnson* factors also support and weigh strongly in favor of the Fee Request. First, the Court finds the evidence of the time and labor involved weighs in favor of the Fee Request. The time and labor Class Counsel have expended in the research, investigation, prosecution, and resolution of this Litigation is set forth in detail in the Joint Class Counsel Declaration [Doc. No. 105-2]. In summary, this evidence proves that for over nine years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted discovery, reviewing documents and a large amount of electronically produced data, including organizational documents, well data, and historical proceeds payments for Oklahoma owners. Class Counsel spent significant time working with accounting experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy and complex 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. Overall, Class Counsel dedicated approximately 5,562 hours of attorney and professional time to this Litigation; *see* Joint Class Counsel Decl. at ¶¶61-66, 83-87; NP Decl. at ¶27; BL Decl. at ¶13; Gensler Decl. at ¶¶50-59, 68-78; Miller Decl. at ¶¶51, 61-72;

(n) Second, the Court finds that the evidence regarding the novelty and difficulty of the questions presented in this action weighs in favor of the Fee Request. Class actions are known to be complex and vigorously contested. The Court notes that in addition to the pleadings on file, declarations and arguments of the parties, the Court has presided over this case for over nine years and finds that this case presented novel difficult issues. 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 Court finds 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. *See* Joint Class Counsel Decl. at ¶67. Moreover, Defendant asserted a number of significant defenses to the Settlement Class' claims 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. *See id.* at ¶30; Miller Decl. at ¶¶21-24, 52-55;

(o) The Court finds that the third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation, and ability of the attorneys—support the Fee Request. The Court finds the Declarations and other undisputed evidence submitted prove that 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; Gensler Decl. at ¶¶56-58; Miller Decl. at ¶¶53-55. Courts in this district are familiar with the work of Nix Patterson, LLP and Barnes & Lewis, LLP, and find that these attorneys possess the type of experience, reputation and ability that supports the Fee Request.

(p) The case required investigation and mastery of complex factual circumstances, 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 law firm of Nix Patterson (NP) has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. *See id.* NP 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 id.* at ¶69. Additionally, NP 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. *See id.* NP 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. *See id.* The same is true here. *See id.*; *see also* NP Decl.;

(q) The Court also finds the skill, reputation, and ability of the law firm of Barnes & Lewis, LLP (BL) also supports the Fee Request. Joint Class Counsel Decl. at ¶70. That firm 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 also 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. *See id.*; *see also generally* BL Decl.;

(r) The Court finds that 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 ¶¶68-71. The Court finds these factors strongly support the Fee Request;

(s) The Court finds that the evidence regarding the fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—weighs in favor of the Fee Request. The Declarations and other undisputed evidence demonstrate Class Counsel necessarily were hindered in their work on other cases due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶72. This case was filed in state court over nine years ago in January 2011, and has required the devotion of significant time, manpower and resources from Class Counsel over that period. *See id.* Class Counsel has spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *See 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. *See id.* Prosecution of this litigation placed a significant burden on counsel’s time and resources. *See id.* Accordingly, the Court finds these factors support the Fee Request;

(t) The Court finds the evidence regarding the fifth *Johnson* factor—the customary fee and awards in similar cases—further weighs in favor of the Fee Request. Class Counsel and Class Representative negotiated and agreed to prosecute this case based on a contingent fee up to 40%. *See* Chieftain Decl. at ¶4; Joint Class Counsel Decl. at ¶77. The Court finds this fee is consistent with the market rate and is in the range of the

“customary fee” in oil and gas class actions in Oklahoma state courts over the past fifteen (15) years. *See* Joint Class Counsel Decl. at ¶¶73-78; Gensler Decl. at ¶¶43-49, 63-78; Miller Decl. at ¶¶57-59, 63-64; *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);

(u) Federal and state courts in Oklahoma often approve similar and higher fee awards in similar cases. For example, this Court 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). Moreover, the Eastern District of Oklahoma recently approved a 40% fee in several similar royalty underpayment cases. *See, e.g., McClintock v. Enterprise Crude Oil LLC*, No. 6:16-cv-00136-KEW (E.D. Okla. Mar. 26, 2021) (Dkt. No. 120) (awarding a fee equal to 40% (\$2.36 million) of the \$5.9 million cash settlement amount); *Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, No. 6:17-cv-00336-KEW (E.D. Okla. Mar. 3, 2020) (Dkt. No. 57) (awarding a fee equal to 40% (\$7.8 million) of the \$19.5 million cash settlement amount); *Reirdon v. Cimarex Energy Co. & Cimarex Energy Co. of Colorado*, No. 6:16-cv-00445-SPS (E.D. Okla. Jan. 29, 2020) (Dkt. No. 132) (awarding a fee equal to 40% (\$4 million) of the \$10 million cash settlement fund); *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 ¶75; *see also* Gensler Decl. at ¶¶43-49, 63-78; Miller Decl. at ¶¶57-59, 63-64; BL Decl. at ¶¶10-11. Given the recovery in this case, the Court finds the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval;

(v) Moreover, the Court finds a 40% fee is consistent with the market rate for high quality legal services in royalty class actions like this. *See, e.g., 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.”); *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); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Doc. No. 260). This Court has previously 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 this Litigation.” *Laredo Fee Order* at 8; *see also CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23 (same). Here, Class Representative agreed Class Counsel would represent it on a contingency fee basis, not to exceed 40%. *See Chieftain Decl.* at ¶4. Class Counsel is

seeking a fee of \$4,000,000.00, which is equal to 40% of the Gross Settlement Fund. *See* Joint Class Counsel Decl. at ¶47. Chieftain’s Declaration demonstrates its continued support of the fairness and reasonableness of the Fee Request. Chieftain Decl. at ¶¶13-14. The Court finds this factor supports the Fee Request. Further, Class Counsel submitted significant evidence regarding the fee and market rate that supports this factor. Class Counsel have specialized skill, experience, and qualifications in the area of market value of attorneys’ fees in complex litigation, generally—and complex oil and gas litigation, specifically—and have submitted significant testimony in their Declarations demonstrating that the fee structure negotiated with Class Representative is the market rate for such cases. *See* Joint Class Counsel Decl. at ¶75;

(w) The Court finds 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 ¶79. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys’ fees. As Professor Geoffrey 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; *see also* Gensler Decl. at ¶¶43-49; NP Decl. 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;

(x) Further, as noted above, 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. 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; *CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶79; *see also Tibbetts v. Sight ‘n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶¶11 & 15-23, 77 P.3d 1042, 1049-53. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in class actions. *See, e.g.*, Opinion at ¶¶ 12-22 in *Adkisson v. Koch Industries, Inc.*, No. 106,452 (Okla. Civ. App. Aug. 7, 2009) (unpublished), *cert. denied*, (Okla. Feb. 4, 2010); *Sholer v. State ex rel. Dep’t of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294, 299-300. Moreover, even though federal law, not Oklahoma law, governs this issue, the Court notes that when the attorneys’ compensation is contingent, Oklahoma law recognizes any attorneys’ fee award must account for the risks inherent in such engagements by adjusting “upward the basic hourly rate” to allow for a “risk-litigation” premium. *See, e.g., Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, ¶14, 977 P.2d 357, 364 n. 30 (citing *Brashier v. Farmers Ins. Co.*, 1996 OK 86, ¶11, 925 P.2d 20, 25 n. 22); *Oliver’s Sports Ctr., Inc. v. Nat’l Std. Ins. Co.*, 1980 OK 120, ¶6, 615 P.2d 291, 294-95; *see also* Gensler Decl. at ¶¶60-78; Miller Decl. at ¶¶68-83. Accordingly, the Court finds this factor strongly supports the Fee Request;

(y) The Court finds the evidence shows that the tenth *Johnson* factor—the undesirability of the case—weighs in favor of the Fee Request. Compared to most civil

litigation, this Litigation clearly fits the “undesirable” test. *See* Joint Class Counsel Decl. at ¶79; Miller Decl. at ¶61. Few law firms would be willing to risk investing the time, trouble, and expenses necessary to prosecute this Litigation for multiple years. *See id.* Further, Defendant has proven itself to be a worthy adversary. There was no doubt from the beginning that this lawsuit would be a lengthy undertaking. *See id.* 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. *See id.* Further, this Litigation involved a number of uncertain legal and factual issues. Indeed, in another complex royalty underpayment 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 Court finds the same principle holds true here. Class Counsel prosecuted the Litigation for more than nine years, which has included discovery of extensive documents and data, research, accounting review and analysis, consultation by and with expert witnesses, settlement negotiations among counsel, multiple mediations, land and lease record review and analysis, engineering review and analysis, damage modeling, extensive motion practice, including class certification briefing, and summary judgment briefing, among other investigations and preparation. *See* Joint Class Counsel Decl. at ¶11. Class Counsel also advanced \$731,591.57 in litigation expenses to date. Additionally, Class Counsel expended approximately 5,562 hours of time over the

length of this action. *See* Joint Class Counsel Decl. at ¶¶85-90; NP Decl. at ¶27; BL Decl. at ¶13; Gensler Decl. at ¶¶52-55, 74-78; Miller Decl. at ¶¶71-72. The Court finds this factor also supports the Fee Request;

(z) The Court finds the eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Mr. Abernathy is a highly educated and experienced royalty owner. *See* Chieftain Decl. at ¶3. He was and remains very active in this litigation. *See id.* at ¶¶5-8, 16. Further, Class Counsel has represented Chieftain in other litigation. *See* Joint Class Counsel Decl. at ¶94. Mr. Abernathy negotiated a 40% fee when he agreed to be class representative in this litigation. *See* Chieftain Decl. at ¶4; Joint Class Counsel Decl. at ¶77. He also supports the Fee Request. *See* Chieftain Decl. at ¶¶13-14. Accordingly, the Court finds this factor supports Class Counsel’s fee request²;

(aa) In summary, upon consideration of the evidence, pleadings on file, arguments of the parties, and the applicable law, the Court finds that the *Johnson* factors under federal common law weigh strongly in favor of the Fee Request and that the Fee

² The foregoing twelve *Johnson* factors are also included in the statutory enhancement factors in Oklahoma and thus, are supported by the same evidence under Oklahoma state law. *See* Okla. Stat. tit. 12, § 2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. As discussed above, this Litigation involved complex issues of law and fact that placed the ultimate outcome in doubt. There was no guarantee Plaintiff and the Class would prevail on their legal theories at class certification, summary judgment and/or trial. Defendant denies all allegations of wrongdoing or liability and that the Litigation could have been properly maintained as a class action. *See* Settlement Agreement at ¶11.1. In the absence of the Settlement, the outcome of the complex issues in this case would remain uncertain until their ultimate resolution by the Court or a jury, thus placing substantial risk on both Parties. Accordingly, if Oklahoma law were applicable here, the Court finds this factor also weighs in favor of the Fee Request. Because the Court finds that the evidence submitted here supports approval of the Fee Request under each of the Oklahoma factors, the Court also finds the Fee Request is fair, reasonable, and approved under Oklahoma law as well. *See* Joint Class Counsel Decl. at ¶¶83-90; Gensler Decl. at ¶¶60-78; Miller Decl. at ¶¶68-83.

Request is fair and reasonable and should be and is hereby approved. The Court further finds that, even if evaluated under a traditional lodestar and multiplier analysis or cross-check, the Fee Request here is fair and reasonable. Sufficient evidence establishes and supports Class Counsel's reasonable time of 5,562 hours and reasonable hourly rates. The Fee Request equates to a lodestar multiplier of 1.06, which the Court finds to be fair and reasonable and well below the range of multipliers approved by Oklahoma courts. *See* Joint Class Counsel Decl. at ¶¶47-90; Gensler Decl. at ¶¶31-78; Miller Decl. at ¶¶49-83.

7. Any appeal or any challenge affecting this Order Awarding Attorneys' Fees 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 27th day of April, 2021.



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 Attorney Fees

Date: Tuesday, April 27, 2021 at 12:19:48 PM Central Daylight Time

From: okwd_ecf_notice@okwd.uscourts.gov

To: okwdecf@okwd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

Western District of Oklahoma[LIVE]

Notice of Electronic Filing

The following transaction was entered on 4/27/2021 at 12:19 PM CDT and filed on 4/27/2021

Case Name: Chieftain Royalty Company v. SM Energy Company

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

Filer:

WARNING: CASE CLOSED on 04/27/2021

Document Number: [115](#)

Docket Text:

ORDER ~ Awarding Attorney's Fees. The Court has considered the Motion and Memorandum, all matters and evidence submitted in connection therewith and the proceedings on the Final Fairness Hearing held April 27, 2021. As set forth more fully set out, the Court finds the Motion should be GRANTED. Signed by Honorable Bernard M. Jones on 4/27/2021. (dwl)

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

Robert N Barnes rbarnes@barneslewis.com, abarnes@barneslewis.com, lbeebe@barneslewis.com

Patranell Britten Lewis plewis@barneslewis.com, abarnes@barneslewis.com, lbeebe@barneslewis.com, lrosales@barneslewis.com

J Kevin Hayes khayes@hallestill.com, ghambrick@hallestill.com, lwest@hallestill.com

Jeffrey J Angelovich jangelovich@nixlaw.com, codyhill@nixlaw.com, ncameron@nixlaw.com, sprince@nixlaw.com

Bradley E Beckworth bbeckworth@nixlaw.com, sprince@nixlaw.com, swhatley@nixlaw.com, tduck@nixlaw.com

Pamela S Anderson panderson@hallestill.com, ghambrick@hallestill.com, lwest@hallestill.com

Emily N Kitch ekitch@barneslewis.com

Lisa P Baldwin lbaldwin@nixlaw.com, ncameron@nixlaw.com, sprince@nixlaw.com

Susan R Whatley swhatley@nixlaw.com, sprince@nixlaw.com

David N Smith dneilsmith@mac.com, tracyrector.nixlaw@me.com

Michael B Angelovich, Sr mangelovich@nixlaw.com, tdean@nixlaw.com

Trey N Duck, III tduck@nixlaw.com, sprince@nixlaw.com

Nathan B Hall nathan@nixlaw.com, nhall@nixlaw.com

5:18-cv-01225-J Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1041971380 [Date=4/27/2021] [FileNumber=4495068-0
] [95e994b52dfa5bfd6995d3b58b2e608a0bb33be1dc09ed441772360f1655ddb0e14
360f6b07ed60b5408d3102e4694a43a2aa8ea1d70204d954b0a05a8f97ed7]]