

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

CHIEFTAIN ROYALTY COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-011-177-D
)	
SM ENERGY COMPANY (including)	
predecessors, successors and affiliates),)	
ENERVEST ENERGY INSTITUTIONAL)	
FUND XIII-A, L.P., ENERVEST ENERGY)	
INSTITUTIONAL FUND XIII-WIB, L.P.,)	
ENERVEST ENERGY INSTITUTIONAL)	
FUND XIII-WIC, L.P., ENERVEST)	
OPERATING, L.L.C., and FOURPOINT)	
ENERGY, LLC,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
APPROVAL OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION
EXPENSES, AND CASE CONTRIBUTION AWARD**

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I. INTRODUCTION

In connection with approval of the Settlement¹ in the above-captioned Action, Class Representative and Class Counsel respectfully move the Court for: (1) an award of attorneys' fees constituting 40% of the \$52,000,000 Settlement Cash Amount, plus interest (the "Fee Request"); (2) reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation not to exceed \$900,000, plus interest (the "Expense Request");² and (3) a Case Contribution Award to Class Representative constituting 1% of the Settlement Cash Amount, as compensation for its time and effort. These requests—to be paid out of the Gross Settlement Fund—are fair and reasonable and therefore, should be approved. *See Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. CIV-12-1319, Dkt. No. 52 (W.D. Okla. May 13, 2015) ("*Laredo Fee Order*").

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of a \$52,000,000 Settlement Cash Amount *plus* binding

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated August 5, 2015 (the "Settlement Agreement"), a copy of which was attached as Exhibit 1 to Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Partial Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (Dkt. No. 111).

² To date, Class Counsel has incurred out-of-pocket expenses of \$467,671.17. Class Counsel will incur additional expenses between now and the Final Approval Hearing on November 30, 2015. As such, at the hearing, Class Counsel will seek reimbursement for expenses incurred after the date of this filing, not to exceed \$900,000. *See* Section IV.B *infra*. Class Counsel's Expense Request does not include the Administration, Notice and Distribution Costs associated with effectuating the Settlement, which will be paid from the Settlement Fund. *See* Settlement Agreement at ¶1.1.

changes to the Settling Parties' fee-deduction and royalty calculation policies for a period of thirty-six (36) months from and after the date of the Settlement Agreement, which have an estimated minimum present value of \$2,965,000 (collectively, the "Total Settlement Amount").³ Thus, the Total Settlement Amount is at least \$54,965,000. The \$52 million Settlement Cash Amount alone is an outstanding recovery for Class Members, as it represents approximately 100% of the principal amount of the Class' past claims for royalty underpayment.⁴

Class Counsel are NOT requesting additional fees based on the future benefits. However, the additional benefit conferred on the Class in the form of binding changes to the Settling Parties' royalty payment methodology—a measure of relief not often achieved in royalty underpayment class actions—is also meaningful as it guarantees almost \$3 million in royalty payments to the Class that, absent the Settlement, the Settling Parties would have retained. And, although this future royalty payment methodology is binding on the Settling Parties, it is *not* binding on Class Members, who are free to initiate future litigation seeking to hold the Settling Parties to an even stricter royalty payment methodology than that provided for in the Settlement.

Class Counsel's Fee Request is 40% of the Settlement Cash Amount (which is equivalent to 37.8% of the Total Settlement Amount). In light of the work performed by

³ See Affidavit of Barbara Ley ("Ley Affidavit"), attached as Exhibit 3 to Class Representative's Final Approval Memorandum, at ¶3.

⁴ See Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel ("Class Counsel Declaration"), attached as Exhibit 2 to Class Representative's Final Approval Memorandum, at ¶¶5, 55; Ley Affidavit at ¶3.

Class Counsel, the circumstances of this case, including the risks of further litigation, and the expenses incurred, the Fee Request, Expense Request and Case Contribution Award are fair and reasonable. These requests comport with fee and expense awards granted in similar cases and are fully appropriate under Tenth Circuit precedent. Declaration of Geoffrey P. Miller (“Miller Declaration”), Dkt. No. 119, at ¶¶42-49. Therefore, and for the reasons demonstrated below, Class Counsel and Class Representative respectfully request the Court grant their Motion for Approval of Attorneys’ Fees, Reimbursement of Litigation Expenses and Case Contribution Award (the “Motion”).

II. SUMMARY OF THE ARGUMENT

Class Representative and Class Counsel have achieved an excellent Settlement with the Settling Parties. As demonstrated in Class Representative’s Motion for Final Approval of Settlement and Memorandum in Support thereof, filed contemporaneously herewith, the terms and conditions of the Settlement are fair, reasonable and adequate and in the best interests of the Settlement Class. *See* Class Counsel Declaration at ¶6.

For their considerable efforts in obtaining this result, Class Counsel’s Fee Request of 40% of the Settlement Cash Amount is fair and reasonable. This Court recently approved a 40% fee request in a substantially similar case involving the same parties and the same counsel. *See Laredo Fee Order* at ¶8. As demonstrated below, the Fee Request comports with all factors examined by courts in the Tenth Circuit under the percentage of the fund method for evaluating the reasonableness of attorneys’ fees. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988); *Laredo Fee Order*; *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla.

May 31, 2013) (“*QEP* Fee Order”); Declaration of Steven Gensler (“Gensler Declaration”), Dkt. No. 120, at ¶¶20-25; Miller Declaration at ¶¶31-66.

The Fee Request is particularly appropriate for a number of additional reasons:

First, the Fee Request is within the range of reasonable fees awarded in this District and the Tenth Circuit. *See* Section IV.A.1 *infra*.

Second, the requested fee is at or below the market rate for the high level of representation Class Counsel provided the Class in resolving this Litigation against the Settling Parties. *See* Section IV.A.2 *infra*.

Third, the Honorable Layn R. Phillips, a former federal judge and highly experienced mediator who mediated the Settlement in this Litigation, has filed a declaration stating the Settlement was the result of Class Counsel’s diligent efforts and is appropriate. *See* Section IV.A.3 *infra*; Declaration of Layn R. Phillips (“Phillips Declaration”), Dkt. No. 116, at ¶¶6-10.

Fourth, numerous Class Members support Class Counsel’s Fee Request. For example, regarding the 40% Fee Request, Dan Little, President of Class Member, Sagacity, Inc., states, “[b]ased upon my experience as a royalty owner, class representative in a royalty case, and as an attorney who has worked both hourly and on a contingent basis, I believe such an award is entirely appropriate and squarely in line with fee awards in similar class actions.” *See* Declaration of Dan Little (“Little Declaration”), Dkt. No. 118, at ¶8; *see also* Class Representative’s Final Approval Memorandum, Exhibits 6-11, at ¶6.

In addition to the above, the relevant *Johnson* factors also support the Fee Request

by highlighting Class Counsel's diligent prosecution, and ultimate resolution, of this case for over four years on a contingent basis. *See* Section IV.A.4 *infra*; *see also* Miller Declaration at ¶¶54-66; Class Counsel Declaration at ¶¶9-27.

Put simply, the Fee Request is fully justified by the facts of this case and the law, is consistent with fee awards in similar cases, and is fair and reasonable. Miller Declaration at ¶¶31-66; *see also* Declaration of Michael Burrage ("Burrage Declaration"), Dkt. No. 117, at ¶8. As such, the Court should grant Class Counsel's fee request of 40% of the Settlement Cash Amount from the Settlement Fund.

Class Counsel also seeks reimbursement of reasonable expenses not to exceed \$900,000, plus interest—the amount set forth in the Notice. *See* Section IV.B *infra*.

Finally, Class Representative is entitled to a Case Contribution Award of 1% of the Settlement Cash Amount as compensation for its invaluable efforts and assistance throughout this Litigation. *See* Section IV.C *infra*; *see also* Declaration of Robert Abernathy ("Abernathy Declaration"), attached as Exhibit 1 to Class Representative's Final Approval Memorandum.

III. FACTUAL AND PROCEDURAL SUMMARY

The factual and procedural background of this case is well known to the Court. Additionally, the Class Counsel Declaration provides a thorough description of this background. *See* Class Counsel Declaration at ¶¶7-17. In the interest of brevity, Class Counsel will not recite the factual and procedural background again herein. Instead, Class Counsel respectfully refers the Court to the Final Approval Memorandum, Class

Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated as if set forth fully herein.

IV. ARGUMENT

In their Motion, Class Representative and Class Counsel respectfully move the Court for: (1) attorneys' fees constituting 40% of the Settlement Cash Amount, (2) reimbursement of Litigation Expenses not to exceed \$900,000, and (3) a Case Contribution Award of 1% of the Settlement Cash Amount to compensate Class Representative for its efforts on behalf of the Settlement Class. As demonstrated below, these requests are fair, reasonable and adequate and, therefore, should be granted.

A. The Fee Request is Fair and Reasonable and Should be Approved

The Fee Request is fair and reasonable and should be approved. Under Federal Rule of Civil Procedure 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *Brown*, 838 F.2d at 453. As such, an award of attorneys' fees will only be reversed for abuse of discretion. *Id.*; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994).

As this Court recently held, "[i]n the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method." *See Laredo Fee Order* at 5-6 (*citing CompSource*, 2012 U.S. Dist. LEXIS 185061, at *22-23; *Gottlieb*, 43 F.3d at 483 ("In our circuit . . . *Uselton* implies a preference for the percentage of the fund method.")) (*citing Uselton v. Commercial Lovelace Motor Freight*,

9 F.3d 849 (10th Cir. 1993)); Miller Declaration at ¶¶33-41; Gensler Declaration at ¶9.⁵ Under the percentage of the fund method, an appropriate fee is equal to a reasonable percentage of the common fund. *Laredo Fee Order* at 6 (*citing Brown*, 838 F.2d at 454).

When utilizing the percentage of the fund approach, the trial court must evaluate the reasonableness of the requested fee percentage by analyzing the applicable factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Id.* (citations omitted); *see also* Gensler Declaration at ¶10; Miller Declaration at ¶40. Importantly, this Court and other Oklahoma federal district courts have rejected the lodestar methodology when utilizing the percentage of the fund approach in similar cases. *See Laredo Fee Order* at 5-6 (“In the Tenth Circuit, the preferred approach for determining attorneys’ fees in common fund cases is the percentage of the fund method.”); *QEP Fee Order* at 3 (Judge Russell recognizing the Tenth Circuit’s preference for the percentage of the fund approach and declining to conduct a lodestar analysis). “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.” *CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23 (citations omitted). There is no requirement under Tenth Circuit or Oklahoma law that requires a lodestar cross check or puts a limit on the range of accepted fees in common fund cases. *See* Miller Declaration at ¶¶33-41; Gensler Declaration at ¶26. Further, the prevailing reasonable attorneys’ fee in royalty class actions in Oklahoma

⁵ The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method of determining attorneys’ fees.

state courts is 40%. *See* Miller Declaration at ¶50; Gensler Declaration at ¶23.

Here, the Court should use the percentage of the fund approach to award attorneys' fees. Class Counsel's Fee Request is fair and reasonable for a number of reasons beyond the relevant *Johnson* factors. First, as this Court recently held, 40% of the Settlement Cash Amount is within the acceptable range of reasonable fees awarded. *See Laredo* Fee Order at 7. Moreover, Class Counsel is not seeking any fee from the value of the future benefits.⁶ Second, a fee of 40% was negotiated by and is supported by Class Representative and is within the range of market rates for high-level representation in a complex class action such as this. Third, mediator Judge Phillips endorses the Fee Request as fair and reasonable. Finally, numerous Class Members support the Fee Request. Therefore, the Fee Request is fair and reasonable and should be approved.

1. An Award of 40% is Within the Typical Range of Acceptable Fee Awards

The Fee Request is within the typical range of reasonable fee awards in oil and gas class actions in this Court. *See, e.g., Laredo* Fee Order at 7-8 ("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

⁶ If Class Counsel sought 40% of the Total Settlement Amount, including the value of the future benefits, the fee on that portion would be an additional \$1,186,000, which Class Counsel is not seeking. Class Counsel is only seeking 40% of the Settlement Cash Amount.

settlement). Similarly, the typical fee awarded in Oklahoma state court royalty underpayment class actions is 40%. *See* Miller Declaration at ¶50. Professor Miller states, “the overwhelming trend in fee awards in similar actions in Oklahoma—where oil and gas is a major part of the state’s economy and state courts have adjudicated many royalty underpayment cases—is to award fees of 40% of the cash settlement amount.” *Id.* (citing Oklahoma cases). And, again, based on his experience as a former federal judge and as an expert witness in similar cases regarding the reasonableness of attorneys’ fees, Judge Burrage agrees the Fee Request is typical of fees awarded and is fair and reasonable. *See* Burrage Declaration at ¶¶5, 8. Judge Burrage states:

From my personal experience, which includes, among other things: (a) personally entering into contingent fee agreements in numerous class actions in Oklahoma state and federal court, (b) examining dozens of such agreements as an expert witness on attorneys’ fees in Oklahoma, (c) serving as a federal judge in Oklahoma, and (d) reviewing court awards of common fund percentages in oil and gas class actions in Oklahoma, I know that the typical contingent fee agreement in oil and gas class action litigation in Oklahoma is 40%.

See Burrage Declaration at ¶8.

Here, Class Counsel’s fee request of 40% of the Settlement Cash Amount is undoubtedly within the acceptable range of attorneys’ fees awarded in the Tenth Circuit and this Court, specifically. *See Laredo* Fee Order at 7; Burrage Declaration at ¶8; Miller Declaration at ¶¶42-49; Phillips Declaration at ¶10; Gensler Declaration at ¶23.

2. The Fee Request is Consistent with the Market Rate for Quality Representation in Complex Litigation

“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 attorney fees.” *See*

Laredo Fee Order at 8. To be sure, a 40% fee is consistent with the market rate for the quality representation provided by Class Counsel in this complex class action. *See* Miller Declaration at ¶¶43-49; Little Declaration at ¶8; Gensler Declaration at ¶23.

Here, Class Representative agreed to a contingent fee of 40% of any judgment or settlement amount obtained in this Litigation. The fact that Class Representative negotiated the contingency agreement indicates the value Class Representative placed on the future success of this Litigation. *Laredo* Fee Order at 8; *see also CompSource*, 2012 U.S. Dist. LEXIS 185061, at *14-15 (finding that sophisticated class representatives agreed to the requested fee at the start of litigation, “reflecting the value the Class Representatives placed on the future success of this Action”). Moreover, as noted by Judge Burrage, a prominent Oklahoma attorney, a 40% contingency agreement is typical in royalty owner class actions in Oklahoma. *See* Burrage Declaration at ¶8.

In addition, the contingency fee agreement reflects the quality representation Class Counsel provided to Class Representative and the Settlement Class. Class Counsel, Nix, Patterson & Roach, LLP (“NPR”) and Barnes & Lewis, LLP (“B&L”), have considerable experience successfully litigating oil and gas class actions. *See* Class Counsel Declaration at ¶¶57-59; Miller Declaration at ¶¶58-59. Mr. Abernathy states, “I retained Class Counsel because I believed these firms possessed the requisite expertise in complex litigation and had sufficient legal and financial resources to vigorously prosecute this Action on behalf of all Class Members against a well-funded and well-defended opponent.” Abernathy Declaration at ¶5. As Mr. Abernathy recognized, the resolution of this Action required particular skill in oil and gas law and the advancement of significant

costs related to litigating large class actions of any nature. *See id.* at ¶¶5, 14-15. Thus, the 40% contingency fee to which Class Representative agreed is consistent with the market rate for the representation the Settlement Class received in this Litigation.

Additionally, Class Representative continues to endorse the Fee Request as fair and reasonable. *See id.* at ¶¶13-15. Indeed, Robert Abernathy, President of Chieftain Royalty Company, states in his declaration, “[a]s a result of Class Counsel’s extensive, efficient and excellent work, I have approved Class Counsel’s application for a fee award equal to 40% of the \$52,000,000 Settlement Cash Amount.” *Id.* at ¶¶14-15. Moreover, at least eight absent Class Members, including Judge Burrage and Mr. Little, have filed declarations in support of the Fee Request. *See* Dkt. Nos. 117, 118; Class Representative’s Final Approval Memorandum, Exhibits 6-11.

Because a 40% fee is consistent with the market rate for the representation Class Counsel provided—and Class Counsel’s Fee Request is actually less than 40% of the Total Settlement Amount—the Fee Request should be approved as fair and reasonable.

3. Judge Layn Phillips has Declared the Fee Request is Reasonable and Appropriate

The Fee Request also is endorsed by a well-respected mediator and former federal judge, Layn Phillips, who served as a United States Attorney before being appointed as a United States District Judge for the Western District of Oklahoma. *See* Phillips Declaration at ¶4. Since leaving the bench, Judge Phillips has successfully mediated countless high-stakes class actions. *Id.* at ¶5. Also, Judge Phillips has been appointed Special Master in a number of complex civil actions and has received national

recognition from the Center for Public Resources Institute for Dispute Resolution. *Id.* Judge Phillips supports the Fee Request here. *Id.* at ¶10. Class Counsel respectfully submits Judge Phillips' opinion in this matter should be afforded considerable weight.

4. The *Johnson* Factors Support the Fee Request

In *Brown*, the Tenth Circuit expressly adopted twelve factors from a Fifth Circuit case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, to be considered when determining a reasonable fee in common fund cases. 838 F.2d at 454-55.⁷ The twelve *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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. *Id.* The weight assigned to each *Johnson* factor is within the court's discretion depending on the facts and issues of the case. *Id.* at 456; *Gottlieb*, 43 F.3d at 482 n.4. And, "rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation." *Brown*, 838 F.2d at 456.

A number of these factors and related considerations already have been shown to

⁷ The Fifth Circuit has now joined the majority of circuits in recognizing 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. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012).

support the Fee Request in the above sections. *See* Gensler Declaration at ¶¶10-15, 20-25; Miller Declaration at ¶¶54-66. As demonstrated below, an analysis of the remaining relevant *Johnson* factors support the Fee Request.

a. The Amount Involved and the Results Obtained Support the Fee Request

The amount involved and the substantial recovery obtained here support the Fee Request. “Courts have consistently held that the most important factor within this analysis is what results were obtained for the class.” *Lane v. Page*, 862 F. Supp. 2d 1182, 1254 (D.N.M. 2012) (citations omitted); *Brown*, 838 F.2d at 456 (noting that this factor may properly be given greater weight than others in some cases); *see also* Gensler Declaration at ¶¶12, 14. Here, the \$52,000,000 Settlement Cash Amount represents a significant percentage of the damages estimated by the Parties. *See* Ley Affidavit at ¶3. Additionally, Class Counsel has obtained future benefits for the Class that have a minimum present value of at least \$2,965,000. *See id.*; Settlement Agreement at ¶11.19.

As noted by Professor Miller, “the results obtained are remarkable in several respects.” Miller Declaration at ¶55.

First, as discussed above, the Settlement Cash Amount of \$52 million alone represents a substantial portion of past royalty Chieftain and the Class allege they are owed. Second, Class Counsel also obtained substantial and material binding changes to the Settling Parties’ royalty payment methodology for 36 months for Class Members having a present value of at least \$2,965,000.

Id.

Given the amount involved in this Litigation and the Settlement achieved for the benefit of the Settlement Class, this *Johnson* factor supports the Fee Request.

b. The Time and Labor Involved Supports the Fee Request

The time and labor Class Counsel have expended in the research, investigation, prosecution and resolution of this Litigation fully support the Fee Request. As described below, Class Counsel has worked diligently on behalf of the Settlement Class from the outset of this Litigation.⁸ See Class Counsel Declaration at ¶¶7-27. Therefore, this *Johnson* factor supports the Fee Request.

i. Pleading and Motion Practice

Class Representative initiated this Action on January 27, 2011 by filing a class action petition in the District Court of Beaver County, Oklahoma against SM. Class Counsel Declaration at ¶7. SM subsequently removed this Action and filed its Answer. See Dkt. Nos. 1, 4. After conducting certain discovery, Class Representative sought leave to amend its complaint, which the Court granted despite SM's opposition. Dkt. No. 60, 65; see also Class Counsel Declaration at ¶¶7-8. Class Representative later amended its complaint again to join the Settling Parties after learning that SM sold a large part of the oil and gas leases and related properties at issue in this case to EnerVest. See Class Counsel Declaration at ¶15; Dkt. No. 98.

While originally preparing class certification briefing, Class Representative was also forced to respond to SM's motion to strike the existing deadlines for class certification briefing pending the outcome of two appeals in the Tenth Circuit, which the

⁸ Again, a more detailed description of the efforts undertaken by Class Counsel in the prosecution of this Litigation may be found in the Class Counsel Declaration.

Court ultimately granted. Dkt. Nos. 69, 70, 76-79; Class Counsel Declaration at ¶13. Following the rulings in the appeals, Class Representative notified the Court, withdrew its prior Motion for Class Certification without prejudice, and the parties continued litigating this Action. Dkt. No. 80; Class Counsel Declaration at ¶14.

On April 15, 2015, the Parties jointly moved to extend the scheduling order for several reasons, including so that Class Representative could continue to explore settlement possibilities with the Settling Parties. Dkt. No. 108. After the mediation process, the Settling Parties eventually settled this Action, and Class Counsel began preparing the necessary documents for preliminary approval of the Settlement, including Class Representative's Preliminary Approval Motion. *See* Dkt. No. 111. After the Court granted this motion (Dkt. No. 115), Class Counsel and the Settling Parties continued to work diligently to carry out the terms of the Settlement and move toward seeking final approval. Class Counsel Declaration at ¶¶18-27.

ii. Depositions and Document Production and Review

Class Representative took substantial discovery in this case. *See* Class Counsel Declaration at ¶¶9-15. Over the course of discovery, Class Representative served seventy-seven document requests, fifty interrogatories, and eight requests for admission, to obtain critical information related to Class Representative's allegations and class certification. *Id.* In response to the written discovery, SM and/or the Settling Parties produced, and Class Counsel reviewed, nearly 1,000,000 pages of documents including leases, contracts, maps, royalty check stubs, communications, payment statements,

organizational documents, production volume documents, and well data. *Id.* Class Representative also responded to interrogatories and requests for production. *Id.* Class Representative also took three critical depositions of SM's corporate designees pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, including the deposition of SM's Vice President of Marketing, David Whitcomb. *Id.* at ¶10.

Class Representative, Class Counsel, and their experts used the documents, discovery responses, and deposition transcripts to examine the Class' leases and further verify SM's royalty calculation and payment methodology. *Id.* at ¶12. Class Counsel and their experts reviewed *all* leases for the wells SM sold to EnerVest (approximately 8,473 leases total) and the lease analysis EnerVest prepared for mediation. *Id.*

iii. Experts

This case required extensive legal research and expert analysis on both liability and damages. *Id.* at ¶11. Class Representative's experts, Barbara Ley, Alyce Hoge and Daniel Reineke, relied on the documents SM produced and the testimony of its corporate representatives to determine how Defendants have paid royalty owners in the past, the nature and extent of past royalty underpayments, and the damages sustained by the Settlement Class as a result of such underpayments. *Id.* This expert analysis, as detailed in their respective expert reports, provided Class Counsel with valuable information going into settlement negotiations. *Id.*

iv. Mediation

The Parties initiated settlement negotiations under the supervision of former federal judge, Layn Phillips, an experienced and highly respected mediator. *Id.* at ¶16.

Judge Phillips' qualifications and extensive experience are well known to the Court, as Judge Phillips has successfully mediated a number of royalty owner class actions involving alleged royalty underpayment. *See, e.g., Laredo Petroleum, Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015); *see also* Phillips Declaration at ¶¶4-5. Accordingly, Judge Phillips provided invaluable assistance and experience to the parties during their arm's length negotiations, which included a formal mediation session, extensive mediation briefing, and three months of follow-up negotiations. *See* Class Counsel Declaration at ¶16; Phillips Declaration at ¶¶6-10.

v. Notice Campaign

After preliminary approval, Class Counsel, in conjunction with Counsel for the Settling Parties, conducted an extensive campaign to distribute the Notice to the Settlement Class. *See* Class Counsel Declaration at ¶19. This campaign was thorough and necessary because there are numerous Class Members in each Class Well, many Class Wells are operated by energy companies other than the Settling Parties, and substantial information must be located to send notice to the Class. *Id.* at ¶¶19-22. Thus, Class Representative and the Settling Parties were saddled with the task of tracking down all of the Class Member information needed to disseminate the Notice. *See id.*

vi. Summary

The above description of Class Counsel's dedication of time and labor to this Litigation is sufficient for the Court to determine the reasonableness of the Fee Request. *See* Miller Declaration at ¶¶31-41, 56; Gensler Declaration at ¶¶25-26; *see also Laredo Fee Order* at 5 (finding that the fact that "[t]he Litigation involved complex factual and

legal issues and was actively prosecuted for almost three years” supported the fee request). While “time and labor” is a factor to be considered, the Court need not conduct a lodestar analysis to assess it. *See Northumberland Cnty. Retirement Sys. v. GMX Resources Inc.*, Case No. CIV-11-520-D (Order Awarding Attorneys’ Fees and Litigation Expenses, Dkt. No. 150 at n.1); *see also* Section IV.A *supra* (discussing lodestar analysis).

c. The Novelty and Difficulty of the Questions at Issue Support the Fee Request

The Fee Request also is reasonable in light of the complexity of the issues raised in this class action. As the Court knows, this Litigation involved a number of complex and disputed questions of law and fact that placed the ultimate outcome of the Litigation in doubt. Class Counsel Declaration at ¶¶35, 57; Miller Declaration at ¶57. And, the Settling Parties asserted a number of significant defenses to the Settlement Class’ claims that would have to be overcome if the Litigation continued to trial. Miller Declaration at ¶57. As such, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and appeal, clearly weigh in favor of the Settlement and, consequently, favor the Fee Request.

d. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys Support the Fee Request

This Litigation called for considerable skill and experience, requiring 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* Miller Declaration at

¶¶58-59. Class Counsel are highly experienced in oil and gas class actions, commercial, *qui tam*, mass tort, securities, and other complex litigation and have successfully prosecuted and settled numerous class actions in Oklahoma.⁹ Class Counsel Declaration at ¶¶57-59. Class Counsel employed this prior experience and knowledge in successfully litigating and resolving this complex Litigation. *See id.*

Moreover, the quality of representation by counsel on *both* sides of this Litigation was high. *See Phillips Declaration* at ¶7. Indeed, the Settling Parties have been represented by skilled class action defense attorneys who spared no effort in the defense of their clients. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976) (also considering the reputations of defense counsel in determining the fee, as defense counsel's stature reflects the challenge faced by the plaintiffs' attorneys).

Simply put, without the experience, skill and determination displayed by all counsel involved, the Settlement simply would not have been obtained. *See Miller Declaration* at ¶¶58-59; *Gensler Declaration* at ¶¶25, 27. Therefore, this *Johnson* factor also strongly supports the Fee Request.

e. The Preclusion of other Employment and Time Limitations Imposed by the Client or the Circumstances Support the Fee Request

The Fee Request is further supported by the fact that the time and effort required to properly prosecute this Litigation precluded Class Counsel from other employment

⁹ For example, NPR and B&L recently served as co-counsel in *Laredo Petroleum, Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015), which resulted in a \$6.65 million settlement, and in *QEP Energy Co.*, No. CIV-11-212-R (W.D. Okla. May 31, 2013), which resulted in a total settlement value of \$155 million to the class.

opportunities. “Class litigation of this magnitude inherently entails significant opportunity costs.” *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9-10. Here, Class Counsel were necessarily 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* Miller Declaration at ¶60. Moreover, because Class Counsel’s work was entirely contingent, they worked on this case without receiving any compensation for their efforts for over four years. *See* Class Counsel Declaration at ¶65. Therefore, this fourth *Johnson* factor also supports the Fee Request.

f. The Fee is in Line with Customary Fees

As discussed more fully in Section IV.A.1-2 above, the Fee Request of 40% of the Settlement Cash Amount comports with customary fee awards in similar cases. *See Laredo* Fee Order at 7; Phillips Declaration at ¶10; *see also QEP* Fee Order at 6; *CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23; Burrage Declaration at ¶8. Therefore, this factor supports approval of the Fee Request.

g. The Fact that the Fee Represents a Prearranged Fee Negotiated by a Sophisticated Client Supports the Fee Request

As discussed above, Class Representative negotiated and agreed to a fee of 40% at the outset of the Litigation, and this factor supports the Fee Request. *See* Section IV.A.2 *supra*. 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 *14-15. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement

for expenses). Class Counsel Declaration at ¶45. Therefore, this *Johnson* factor also supports the Fee Request. *See Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *10.

h. The Undesirability of the Case Supports the Fee Request

The Fee Request is further supported by the fact that taking on this Litigation was undesirable. “Attorneys must have incentive to take undesirable cases in order to assure access to the courts for all people....” *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *41. Here, the prospect of long, expensive litigation was clear from the beginning, and the risk of no recovery that comes with contingent fee representation only added to the case’s undesirability. *See* Class Counsel Declaration at ¶65. And, as noted above, this Litigation involved a number of uncertain legal and factual issues. *See* Section IV.A.4.c *supra*. Therefore, this *Johnson* factor also supports the Fee Request. *See* Miller Declaration at ¶63; Gensler Declaration at ¶25.

i. The Nature and Length of Class Counsel’s Relationship with Class Representative Support the Fee Request

The nature and length of Class Counsel’s relationship with Class Representative also support the Fee Request. B&L and NPR have a long-standing professional relationship with Class Representative lasting over several years, and continue to represent Class Representative in other matters. *See* Class Counsel Declaration at ¶71. Mr. Abernathy, who also is an attorney, was and is intimately involved in the litigation of each of those actions, just as he was here. *Id.*; *see* Abernathy Declaration at ¶¶7-9, 14-15, 17. And, as noted above, Class Representative fully supports the Fee Request. *See*

Abernathy Declaration at ¶¶14-15. Therefore, this *Johnson* factor also supports the Fee Request. *See Laredo* Fee Order at 5 (finding “Class Representative continues to endorse the forty percent (40%) Fee Request as fair and reasonable.”); Miller Declaration at ¶64.

In sum, the 40% Fee Request is consistent with the market rate for the quality representation the Settlement Class received and is consistent with recent fee awards in this Court. *See Laredo* Fee Order at 4. Class Representative, Judge Phillips, Judge Burrage and many absent Class Members support the Fee Request. Moreover, the relevant *Johnson* factors support the Fee Request. For these reasons, the Court should approve the Fee Request as fair and reasonable.

B. Class Counsel’s Out-of-Pocket Litigation Expenses Should be Reimbursed

Rule 23(h) also allows courts to reimburse counsel for “non-taxable costs that are authorized by law.” FED. R. CIV. P. 23(h). “As with attorneys fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *11.

Class Counsel respectfully request reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Litigation. *See* Class Counsel Declaration at ¶¶65-70. Class Counsel set forth in the Notice that they would seek up to \$900,000 in reimbursement of expenses.

Id. at ¶67. To date, Class Counsel's out-of-pocket expenses are \$467,671.17.¹⁰ All of these expenses were reasonably and necessarily incurred by Class Counsel, and are directly related to their prosecution and resolution of this Litigation. *See* Class Counsel Declaration at ¶66. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, document production and review, and mediation, which are typical of large, complex class actions such as this.¹¹ *Id.*

In addition, several Class Members executed affidavits in support of Class Counsel's Expense Request. *See* Burrage Declaration at ¶9; Little Declaration at ¶8; Class Representative's Final Approval Memorandum, Exhibits 6-11, at ¶8.

Therefore, Class Counsel respectfully request the Court award the Expense Request in full and award any additional amount Class Counsel may incur after the filing of this Memorandum not to exceed \$900,000, upon 14 days' written notice to the Court.

C. Class Representative is Entitled to a Case Contribution Award

Finally, Class Counsel seeks a case contribution award of 1% of the Settlement

¹⁰ For the Court's convenience, the Class Counsel Declaration includes charts summarizing and categorizing Class Counsel's expenses. *See id.* at ¶69. Because additional expenses will continue to be incurred through and after the Final Approval Hearing on November 30, 2015, Class Counsel specifically request reimbursement of \$467,671.17 *plus* the ability to recover additional expenses up to \$900,000—the noticed amount—to the extent such expenses are actually incurred. At the Final Approval Hearing, Class Counsel will provide the Court with updated charts of Class Counsel's actual expenses incurred.

¹¹ Again, Class Counsel's Expense Request does not include the Administration, Notice and Distribution Costs associated with effectuating the Settlement, which will be paid from the Settlement Fund. *See* Settlement Agreement at ¶1.1.

Cash Amount for Class Representative in recognition of the time and expense that it incurred in order to produce such a significant result for the Settlement Class. Case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.” *Laredo Fee Order* at 9 (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)).

Here, the requested Case Contribution Award is directly in line with, if not less than, that typically requested in large actions. *See* Miller Declaration at ¶¶67-68; Burrage Declaration at ¶10; Little Declaration at ¶9.¹² Indeed, this Court recently awarded the same Case Contribution Award in a similar case. *See Laredo Fee Order* at 10 (finding a one percent case contribution award “to be fair and reasonable”).

Moreover, this is not a case where Class Representative merely signed the Petition and then had little or no involvement. *See* Class Counsel Declaration at ¶74. Rather, Class Representative actively and effectively fulfilled its obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon it during the prosecution and settlement of this Action, and provided invaluable assistance to Class Counsel. *Id.* Robert Abernathy, the President of Chieftain, has worked with Class Counsel since the inception of this Litigation, and his experience, knowledge and skill in

¹² *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) (“Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.”)

the oil and gas field, and as an attorney, contributed significantly to the prosecution and resolution of this case. *Id.*; Abernathy Declaration at ¶¶7, 17. In addition, Mr. Abernathy reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, made himself available by telephone during the formal mediation session, and actively participated in the negotiations that led to the settlement of this Action. *See* Class Counsel Declaration at ¶74; Abernathy Declaration at ¶¶7-9, 17.

Finally, numerous Class Members executed affidavits supporting Class Representative's request for a Case Contribution Award. *See, e.g.*, Little Declaration at ¶9; Class Representative's Final Approval Memorandum, Exhibit 6 at ¶7.

Because Chieftain has dedicated its time, attention and resources to this Action, Chieftain is entitled to the requested Case Contribution Award. Class Counsel and Class Representative respectfully request the Court award a 1% Case Contribution Award to reflect the important role that Class Representative played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

V. CONCLUSION

For the foregoing reasons, Class Representative and Class Counsel respectfully request the Court enter an order granting approval of the Fee Request of 40% of the Settlement Cash Amount, reimbursement of Litigation Expenses not to exceed \$900,000 and a Case Contribution Award to Class Representative of 1% of the Settlement Cash Amount.

Dated: October 26, 2015

Respectfully submitted,

s/ Bradley E. Beckworth

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CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: October 26, 2015.

s/ Bradley E. Beckworth

Bradley E. Beckworth

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U.S. District Court

Western District of Oklahoma[LIVE]

Notice of Electronic Filing

The following transaction was entered by Beckworth, Bradley on 10/26/2015 at 3:52 PM CDT and filed on 10/26/2015

Case Name: Chieftain Royalty Company v. SM Energy Company

Case Number: [5:11-cv-00177-D](#)

Filer: Chieftain Royalty Company

Document Number: [124](#)

Docket Text:

[BRIEF IN SUPPORT re \[123\] MOTION for Attorney Fees Class Representative's Motion for Approval of Attorneys' Fees, Reimbursement of Litigation Expenses and Case Contribution Award by Chieftain Royalty Company. \(Beckworth, Bradley\)](#)

5:11-cv-00177-D Notice has been electronically mailed to:

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