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

(1) DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:16-cv-00113-KEW
	)	
(1) CIMAREX ENERGY CO.,	)	
	)	
Defendant.	)	

DECLARATION OF STEVEN S. GENSLER IN SUPPORT OF THE STIPULATION AND AGREEMENT OF SETTLEMENT, NOTICE OF THE PROPOSED SETTLEMENT, AND AWARD OF ATTORNEY'S FEES

I, Steven S. Gensler, declare as follows:

1. I am the Gene and Elaine Edwards Family Chair in Law at the University of Oklahoma College of Law, where I teach Civil Procedure and related classes. I am the author of Federal Rules of Civil Procedure: Rules and Commentary (Thomson Reuters) and a wide range of articles on federal practice and procedure. My curriculum vitae is attached as Exhibit 1.

2. I have been retained by Class Counsel to provide an opinion as to: (1) the fairness, reasonableness, and adequacy of the Stipulation and Agreement of Settlement ("Settlement Agreement"); (2) the adequacy of the Notice of Proposed Settlement; and (3) the reasonableness of Class Counsel's attorney's fee request.

3. In forming these opinions, I have reviewed, among other things: (1) pleadings, filings, and orders in this case; (2) the Settlement Agreement; (3) the Declaration of Mediator Bradley A. Gungoll; (4) the Declaration of Jennifer M. Keough on Behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement ("JND Decl."); (5) the Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl."); (6) the Declaration of Dorsey J. Reirdon

("Reirdon Decl."); (7) the Affidavit of Barbara Ley ("Ley Affidavit"); and (8) the Affidavits of class members Legacy Royalty, LLC; Michael P. Starcevich; Clear Energy, Ltd.; Chieftain Royalty Co.; Omega Royalty Co., LLC; and Dwayne Sager.

Summary of Opinions

4. It is my opinion that (a) the Settlement Agreement submitted for approval is fair, reasonable, and adequate; (b) the manner of distribution and form of the Notice of Proposed Settlement is fair and adequate; and (c) the fee award of $3.8 million requested in this case—representing 40% of the immediate cash payment from the defendant to the Class Members—is fair and reasonable compensation for the services provided to the Class Members and the benefits bestowed upon the Class Members by the terms of the settlement.

The Settlement

5. Plaintiff Dorsey J. Reirdon ("Reirdon") initiated this lawsuit against Defendant Cimarex Energy Co. ("Cimarex") in Marshall County, Oklahoma on March 11, 2016. Cimarex removed the case to federal court pursuant to 28 U.S.C. § 1332(d), the class-action jurisdictional provisions enacted by the Class Action Fairness Act of 2005 ("CAFA").

6. In his Original Petition, Reirdon alleged that Cimarex failed to pay statutory interest on late royalty payments as required by the Oklahoma Production Revenue Standards Act ("PRSA"). Rather than pay interest automatically, Cimarex only paid interest to the handful of royalty owners who had specifically demanded the payment of statutory interest in writing. Reirdon alleged that Cimarex's failure to pay statutory interest automatically and without prior demand breached its duties under the PRSA, giving rise to claims for breach of the PRSA, actual and constructive fraud, deceit, and unjust enrichment. The Original Petition sought money damages, disgorgement, accounting, punitive damages, and injunctive relief. As to the latter, the

Original Petition sought an order requiring Cimarex to change its payment practices to pay statutory interest automatically as required by law.

7. At the start of the lawsuit, Reirdon and Class Counsel expended considerable time and resources responding to Cimarex's effort to derail this class action by filing a Motion to Dismiss for Failure to State a Claim. Class Counsel's efforts proved successful when, on September 16, 2016, the Court denied Cimarex's Motion to Dismiss.

8. Class Counsel investigated, analyzed, and litigated the claims against Cimarex for over two and a half years. This work included extensive discovery, reviewing thousands of pages of written materials and gigabytes of electronic records. The documents obtained and reviewed included Cimarex's communications with royalty owners and Cimarex's internal records showing how interest payments were made and when, and how they were not made and when. Class Counsel also responded to discovery propounded by Cimarex and traveled to Colorado and Oklahoma to take the depositions of four of Cimarex's key employees. In pursuing and evaluating the Class' claims, Class Counsel also worked extensively with experts on subjects including accounting, marketing, and lease and title analysis.

9. On March 24, 2017, the Parties stipulated to an Application to Stay for the purpose of exploring settlement, though they continued to engage in limited discovery by agreement as needed to further their settlement discussions. They ultimately agreed to participate in formal mediation before Brad Gungoll. Mr. Gungoll is a founding shareholder of Gungoll, Jackson, Box & Devoll, P.C. and a fellow in the American College of Trial Lawyers, practicing primarily in the areas of energy and natural resources law, environmental law, personal injury and product liability. He is also an experienced mediator, with extensive experience mediating energy law cases, among others. *See* Declaration of Mediator Bradley A. Gungoll, at ¶4.

10. In preparation for the mediation session, the parties submitted extensive mediation briefs outlining their respective positions on class certification, liability, and damages. *Id.* at ¶7. The parties then met for a full-day mediation session on July 25, 2018, in Tulsa. *Id.* at ¶8. While this session did not result in a settlement, the parties continued to work together through Mr. Gungoll and were ultimately able to reach an agreement in principle on August 9, 2018. *Id.* at ¶10.

11. The Settlement Agreement provides the Class Members with two substantive benefits. First, the Class Members will receive an immediate economic benefit of $9.5 million in cash. Second, Cimarex has agreed to change its interest-payment practices going forward, yielding an estimated $11 million in future economic benefits. In sum, the total present value conferred by the Settlement Agreement is estimated to be at least $20,500,000. Ley Affidavit at ¶3.

The Settlement is Fair, Reasonable, and Adequate

12. Under Federal Rule of Civil Procedure 23(e), the court must approve any settlement of a class action, and to do so must find that the settlement is "fair, reasonable, and adequate."

13. The Tenth Circuit has identified four factors that must be considered in approving a class action settlement:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002).

14. The four-factor test set forth in *Rutter* represents the Tenth Circuit's way of focusing attention on the cues a judge has available to determine whether a proposed compromise is fair, reasonable, and adequate. As the Advisory Committee on Civil Rules explains in the Committee Notes to the proposed amendments to Rule 23 set to take effect in a few weeks, there are two ways for a judge to approach that question.[1] One way is to examine the terms of the deal. The other way is to examine the process that led to the deal. *See* **Exhibit 2** (Committee Note to Proposed Amendments to Rule 23, at 23-25).

15. The most important consideration in whether a settlement is fair, reasonable, and adequate is whether the benefits provided by the settlement are commensurate with the present, uncertain value of the claims, taking into account the cost, delay, and risk of litigating to judgment. *See* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 607 (Thomson Reuters 2018 edition) ("In most cases, the key question is whether the value of the relief provided by the settlement is commensurate with the value of the claims to be released."). Making this type of forecast is not something that can be done "with arithmetic accuracy." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 25). That is why the Advisory Committee couches it in terms of "the likely *range* of possible classwide recoveries and the likelihood of success in obtaining such results." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 24-25).

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[1] After a five-year study period, the Advisory Committee on Civil Rules proposed a package of amendments to Rule 23. The package has been approved by the U.S. Judicial Conference, adopted by the U.S. Supreme Court, and forwarded to Congress. The amendments will take effect on December 1, 2018 unless Congress takes contrary action.

The amendment package includes amendments to Rule 23(e), with accompanying Committee Notes. Both the changes and the Committee Notes are consistent with current Tenth Circuit practice. Some of the Committee Notes provide valuable insight into what really matters—and what judges meaningfully and usefully can do—when judges are asked to approve a proposed settlement.

16. In other words, deciding whether the terms of the deal are fair involves, in part, deciding on a range of what the claims might be worth, based on the apparent strength of the claims and defenses. The settlement posture, of course, adds to the uncertainty and underscores the need to guard against second-guessing whether the class could have held out for more. Defendants do not volunteer information about how high they would go to settle. Of course, neither does the class volunteer information about what would be the lowest offer it would accept. To the contrary, both sides have every incentive to conceal that information from the other. In this environment of strategic misinformation, lawyers and clients do the best they can with the information available.

17. On top of forecasting a likely range of claim values, the fairness question also takes into account the cost and delay of litigating to judgment and the value of certainty. When parties settle, they trade the chance of total victory later for a known and certain result today. Plaintiffs take less than they would hope for; defendants pay more than they would like to. But in the process, they avoid the risk of a worse outcome later. As the Tenth Circuit itself put it in the class-action approval setting, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015).

18. The other lens through which judges can try to assess the fairness of a settlement is to examine the process that led to it. Does it appear to be the product of vigorous advocacy? Did class counsel take the steps one would expect of a vigorous advocate to gather the information needed to assess the strengths and weaknesses of the claims and defenses, and to gain the leverage needed to press for the best result possible in settlement negotiations? "Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 23).

19. Because the district court judge overseeing the case has the best vantage point to consider all of the myriad considerations, the determination of whether a proposed settlement is fair, reasonable, and adequate is committed to the discretion of the district court judge. *See Fager v. CenturyLink Communs., LLC*, 854 F.3d 1167, 1174-75 (10th Cir. 2016); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186-87 (10th Cir. 2002).

20. Applying the four factors identified by the Tenth Circuit, it is my opinion that the settlement in this case falls well within the range of compromises that would be fair, reasonable, and adequate.

21. *The first factor: "whether the proposed settlement was fairly and honestly negotiated."* By any account, the Settlement was the result of a vigorous, intensive, arms-length, adversarial process. Cimarex moved aggressively to start with its motion to dismiss. Class Counsel vigorously and successfully opposed that motion and undertook significant discovery to build its case. Class Counsel also began developing the expert resources customarily needed in this type of high-stakes class-action litigation. These efforts, together with Class Counsel's considerable experience litigating oil-and-gas royalty class actions, allowed Class Counsel to evaluate the strengths and weaknesses of the claims and defenses and thoroughly and skillfully advocate for the Class during settlement negotiations. The parties then conducted mediation before an experienced and highly-regarded mediator. Eventually, the mediation brought the parties to an agreement in principle, and the parties then kept working to hammer out the remaining terms and draft the final Settlement Agreement.

22. *The second factor: "whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt."* During the course of this case, Cimarex steadfastly denied that it violated its interest-payment obligations under the PRSA. In the Settlement

Agreement, Cimarex continues that denial and disclaims any future duty under the PRSA to pay statutory interest automatically. Cimarex asserted numerous affirmative defenses, including that the class claims are barred in whole, or in part, by the applicable statute of limitations.[2] Whether Cimarex violated its interest-payment obligations under the PRSA, what damages would result, and how far back damages could run were all vigorously contested questions placing the ultimate outcome of the litigation in doubt.

23. Moreover, Cimarex gave every indication that it would aggressively oppose certification for litigation purposes. Indeed, the Settlement Agreement provides that "[b]y agreeing to settle the claims of the Settlement Class in the Litigation, Defendant does not admit that the Litigation could have been properly maintained as a contested class action." SA, ¶ 11.1. In a class action, uncertainty about whether a case will be certified for litigation (as opposed to settlement) is another factor placing the ultimate outcome of the litigation in doubt. *See, e.g.*, *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015) (listing obstacles to proceeding as a class action among those that placed the outcome of future litigation in doubt); *see also* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 25) ("If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.").

24. *The third factor: "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation."* Despite Cimarex's continuing assertion that the PRSA did not and does not require automatic interest on late royalty

[2] The class definition in the Original Petition contained no temporal limitation. As proposed, the Settlement Class extends back to a period of over seven years, encompassing non-excluded persons who received royalty payments from Cimarex (or Cimarex's designee) between March 15, 2011 and July 31, 2018.

payments, it has agreed to pay $9.5 million in back damages and to change its payment practices to conform to the Class's view of what is required under the PRSA. Both elements of recovery represent a substantial victory for the Class Members. The $9.5 million in cash that Cimarex has agreed to pay represents approximately 75% of the principal underpaid and unpaid statutory interest claimed by the Settlement Class. Ley Affidavit at ¶3. Cimarex's agreement to pay statutory interest going forward amounts to a *de facto* full recovery for future damages. The total estimated net present value of these benefits is at least $20.5 million. *See* Ley Affidavit at ¶3.

25. It was reasonable for Reirdon and Class Counsel to value this package of immediate and certain benefits as outweighing the value of any relief they might or might not get through continued litigation. Is it possible that the Class might have succeeded in obtaining litigation certification and then prevailed entirely on the merits, securing a greater recovery? It is possible but irrelevant, because it is also possible that, had the case not settled, the Class might have lost at class certification, lost on the merits, been awarded only a fraction of the damages sought, or won at trial but lost it all on appeal. Is it possible that the Class could have held out for more in settlement? Again, it is possible but irrelevant because it is also possible that this was the best offer Cimarex was ever going to make and that, had the Class not accepted it, events in the case might have turned leading Cimarex to greatly reduce the amount of any future offers.

26. It is precisely because of these unknowables that the question is not whether the settlement is perfect, or even the best possible, but whether it is a fair, reasonable, and adequate one, taking into account the uncertainties and adversarial dynamics of settlement negotiations. As the Tenth Circuit emphasized when affirming a settlement approval over an objector's speculation that some better terms might have been attained, it was not unreasonable for the class to accept the terms of the settlement "instead of deciding to undertake expensive litigation, with an uncertain

outcome, in order to try to obtain these additional recoveries." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015).

27. *The fourth factor: "the judgment of the parties that the settlement is fair and reasonable."* Finally, it is evident that the parties believe that the settlement they reached, after contested litigation and arms-length negotiation, is fair and reasonable. Mr. Reirdon, as named plaintiff, explains his full support for the settlement in his declaration. *See* Reirdon Decl. Class Counsel also describe their full support for the settlement in their declaration. *See* Joint Class Counsel Decl. Further, as of the time I executed this declaration, several absent Class Members had signed affidavits supporting the Settlement. *See, e.g.,* Affidavits of Legacy Royalty, LLC; Michael P. Starcevich; Clear Energy, Ltd.; Chieftain Royalty Co.; Omega Royalty Co., LLC; and Dwayne Sager.

The Form and Manner of Notice

28. In a class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).[3]

29. For known class members with a known address, it is both customary and sufficient to give individual notice by first-class mail. *See Fager v. CenturyLink Communications, LLC*, 854 F.3d 1167, 1173-74 (10th Cir. 2016). Courts often supplement first-class mail notice with other means, including publication in newspapers and the creation of websites providing information about the action and the proposed settlement. The use of a multi-modal notice program is

[3] Effective December 1, 2018, Rule 23(c)(2)(B) will be amended to explicitly apply its notice provisions to cases proposed to be certified for settlement under Rule 23(b)(3). *See* Exhibit 2 (amended rule text, at 11). This change enshrines into rule text the practice courts have been following for many years. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 17).

discussed very favorably in the Committee Notes to the amendments to Rule 23(c)(2)(B) scheduled to take effect on December 1. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 18-19).

30. The parties retained JND Legal Administration to administer the settlement. JND is an established class-action claims administrator with extensive experience and expertise in handling class-action settlement administration. *See* JND Decl. at ¶¶2-5. In accordance with the Preliminary Approval Order, and at the direction of the parties, on October 4, 2018, JND mailed the Notice of Proposed Settlement, Motion for Attorneys' Fees, and Fairness Hearing via first-class mail to the last known mailing address (verified and updated for changes of address through the U.S. Postal Service's database) of each class member who could be identified from the payment history data provided by Cimarex pursuant to the Settlement Agreement. *Id.* at ¶8. For notices returned as undeliverable, JND will conduct follow-up investigation to try to get an updated address for re-mailing. *Id.* at ¶9. However, Cimarex did not have the necessary information to distribute the Notice to royalty owners in wells in which Cimarex was not the operator. The contact information for the royalty owners in these non-operated wells is maintained by the respective third-party operators of such wells. As such, the Parties will distribute the settlement proceeds to the third-party operators, who will then distribute their respective settlement allocations to royalty owners in their wells. On October 11-15, 2018, JND arranged for the Summary Notice to be published in *The Oklahoman* and *The Tulsa World*, the two largest general circulation papers in Oklahoma, and in four papers of local circulation: *The Daily Armoreite*, *The Fairview Republican*, *The McAlester News-Capital*, and *The Holdenville Tribune*. *Id.* at ¶11. Finally, on October 5, 2018, the settlement administrator established a website dedicated to this litigation, which hosts

copies of important case documents, gives answers to frequently asked questions, and provides Class Members with contact information. *Id.* at ¶12.

31. Rule 23(c)(2)(B) also lists seven topics that the notice "must clearly and concisely state in plain, easily understood language." The Notices identified above address all of the required topics and do so in language that, in my opinion, is clear, concise, plain, and easily understood.

32. It is my opinion that the form and content of the notice given, and manner in which notice was given, satisfied the requirement of giving the best notice that is practicable under the circumstances. It is also my opinion that the procedures for requesting exclusions and filing objections are fair and reasonable, as approved by the Court in the Preliminary Approval Order.

33. The practices employed in this case and carried out by JND are industry standard and are routinely approved as part of administering oil-and-gas royalty class action settlements. The combination of first-class mail with other methods of giving notice, including newspaper publication and the creation of a case-specific website, illustrates the type of multi-modal notice program that represents best practice in the federal courts and has been implicitly endorsed by the Civil Rules Advisory Committee. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 18) ("Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court.").

The Fee Request

34. In this common-fund class action, the Court is authorized to make a fee award to Class Counsel to recognize the work done on behalf of, and the benefit conferred upon, all Class Members. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also* STEVEN S.

GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 613 (Thomson Reuters 2018 edition).

35. Both case law and Fed. R. Civ. P. 23(h) establish that the standard for setting the fee award is reasonableness. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988); Fed. R. Civ. P. 23(h) advisory committee's note (2003) (stating that "reasonableness" is the customary measurement for common fund fees). That is to say, the amount the Court awards as a fee must be reasonable. The fee decision "is a matter uniquely within the discretion of the trial judge." *Brown*, 838 F.2d at 453.

36. In this case, the parties have agreed to use federal-law standards to measure reasonableness. Settlement Agreement, ¶¶7.1, 11.8.[4]

37. Under the federal-law standards followed in the Tenth Circuit, the preferred method for determining the reasonableness of a fee award in a common fund case is the percentage of recovery method. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *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. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (Dkt. No. 52) ("*Laredo* Fee

[4] The choice-of-law clause avoids the current uncertainty in the Tenth Circuit about what law governs the determination of class counsel fees when the settlement agreement does not specify the law to be applied. In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P., et al.*, 888 F.3d 455 (10th Cir. 2017), a panel of the Tenth Circuit held that, in diversity class-action cases, the federal court should look to state law for determining the reasonableness of class counsel's fee award. As I have written in other materials submitted to this court, the panel opinion departs from longstanding federal-court class action practice not just in the Tenth Circuit but in all of the federal circuits.

Order"); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010) (endorsing the percentage of recovery method for common fund cases).

38. Since 1988, the Tenth Circuit has instructed district courts to analyze the reasonableness of fee awards under the factors developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. The *Johnson* factors are (1) the time and labor required, (2) the novelty and difficulty of the questions presented by the case, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any 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.*

39. Because the *Johnson* factors were developed in the context of statutory fee-shifting, the Tenth Circuit held that the scheme should be modified when applied in a common fund case to better fit the setting. *See Brown*, 838 F.2d at 453. Not all of the factors will apply in every case. *Id.* at 456; *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998) (trial courts need not specifically address each factor in every case). And the weight to be given each factor varies when the court is awarding fees from a common fund. *Brown*, 838 F.2d at 456.

40. The most important difference in the application of the *Johnson* factors in common fund cases is the emphasis placed on the eighth factor—the result obtained by Class Counsel. In a common fund case, the result obtained is the most important factor and deserves the greatest weight. *Brown*, 838 F.2d at 456. As the Advisory Committee later put it when adopting the 2003

amendments to Rule 23, "[f]or a percentage fee approach to fee measurement, results achieved is the basic starting point." FED. R. CIV. P. 23(h) advisory committee's note (2003).

41. The other important difference is the diminished role of the first *Johnson* factor—the time and labor involved. In *Brown* itself, the Tenth Circuit recognized that the differences between common fund cases and statutory fee cases cautioned against importing a formal lodestar requirement—the usual starting point in statutory fee-shifting cases—into common fund cases. Accordingly, the Tenth Circuit recast the nature of the "time and labor" inquiry in common fund cases. While "time and labor" is a factor to be considered, the court need not conduct a lodestar analysis to assess it. *Brown*, 838 F.2d at 456 & n.3; *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 6, ¶6(f) (neither lodestar analysis nor lodestar cross-check is required); *Reirdon v. XTO Energy, Inc.,* No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 5, ¶6(f) (same)); *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013) (lodestar analysis is not required); *CompSource Okla. v. BNY Mellon, N.A.*, 2012 WL 6864701, *8 (E.D. Okla. 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."); *Childs v. Unified Life Ins. Co.*, 2011 WL 6016486, *15 n.10 (N.D. Okla. 2011) ("Because the other *Johnson* factors, combined, warrant approval of the common fund fee sought by class counsel, the Court need not engage in a detailed, lodestar-type analysis of the 'time and labor required' factor."). Rather, the court may make a general finding regarding the expenditure of time and labor based on the record as a whole. *See, e.g., Laredo* Fee Order; *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520, Dkt. No. 150 (W.D. Okla. July 31, 2014).

42. In this common fund context, the result achieved should be given the greatest weight in determining the reasonableness of the fee request. *Brown*, 838 F.2d at 456; *see also Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained.") (quotations omitted).

43. In my opinion, the result achieved supports the request for a fee award of $3,800,000, an amount that represents 40% of the up-front cash payment of $9,500,000, but which is less than 19% when calculated as a percentage of the estimated total benefit of $20,500,000.

44. First, the $9.5 million in cash that Cimarex has agreed to pay represents approximately 75% of the principal underpaid and unpaid statutory interest claimed by the Settlement Class. Ley Affidavit at ¶3. That is an excellent result in light of the cost, delay, and risk associated with future litigation.

45. Even when a party has strong claims, it is reasonable to accept the immediate and certain benefit of partial payment rather than face the risks already known—or expose itself to future unexpected setbacks—that come with future litigation. As the Tenth Circuit appreciates, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015). In this case, the Class Members have strong claims. But there are no sure things in high-stakes class-action litigation. The case would still need to be certified for litigation, something Cimarex has indicated it would strenuously oppose. The Class Members would need to prevail on their theory of liability, something Cimarex has vigorously contested. Uncertainties exist as to the measure of damages and the time period for which they are available. Even for strong claims, getting a defendant like Cimarex—who surely wished to pay less up-front cash to settle—to pay 75% of the principal underpaid and unpaid statutory interest claimed by the Settlement Class for the entire Class Period is a strong result.

46. Importantly, this is a cash recovery that will be distributed to Class Members automatically. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members need to do is not opt out and wait for their checks to be distributed after the Court grants final approval of the Settlement.

47. The Settlement also provides a very substantial future benefit to Class Members. During the course of this litigation, Cimarex has asserted that it does not need to pay statutory interest until an individual royalty owner specifically makes a demand for it in writing. In the Settlement Agreement, Cimarex continues to take that position. As history has shown, few royalty owners have been experienced or savvy enough to make the demand that Cimarex says is required to trigger statutory interest payments. As part of the Settlement, however, Cimarex has agreed to change its practices and automatically pay statutory interest to all, without the need for a specific demand. To put it plainly, Cimarex has agreed to implement the very thing that the Class Members asked for by way of injunctive relief. Class Counsel's conservative estimate of the net present value of this future benefit is at least $11 million dollars.

48. It is well established that the value of future benefits should be included when determining the size of the recovery obtained for the class. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010); *see also See Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Order Awarding Attorneys' Fees (Dkt. No. 231) ("*Chieftain* Fee Order"); *Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees (Dkt. No. 124) ("*Reirdon* Fee Order") at ¶6(l); *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013). Thus, even though Class Counsel is not

asking the Court to award a fee from the future benefit, the existence of the future benefit is still relevant to the fee request because it is a part of the Class' recovery and therefore speaks to the overall quality of the result.

49. In my opinion, the future benefit is a valuable part of the overall Class recovery. Class Counsel could have limited their negotiations to past damages. But that would mean, from the Settlement date going forward, Class Members would be in the same position they had been in before. This Settlement protects them going forward and achieves for the future one of the principal objectives of the lawsuit—to obtain payment of statutory interest on late royalty payments.

50. Six of the *Johnson* factors examine, in different ways, whether the fee request is consistent with the market for legal representation of this type.[5] This makes sense in that absent Class Members do not have an express, pre-existing attorney-client relationship with Class Counsel. In determining how much Class Counsel should be paid for the work done on absent Class Members' behalf, it is appropriate to consider what clients agree to pay their lawyers when a direct attorney-client relationship exists.

51. Here, after arm's-length negotiations with Class Counsel, Plaintiff agreed Class Counsel would represent Plaintiff on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7. At the time this agreement was reached, Plaintiff understood a 40% contingency fee was at or below the market rate. *Id.* The typical fee agreement in similar royalty class actions in Oklahoma is a contingency fee of 40%. *See Chieftain* Fee Order at ¶6(u); *Reirdon* Fee Order at ¶6(u); *see also Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015

[5] These factors are: (5) the customary fee; (6) whether the fee is fixed or contingent; (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.

WL 5794008, at *3 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding that, under Oklahoma law, "[i]n the royalty underpayment class action context, the customary fee is a 40% contingency fee.") (collecting cases); *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. August 30, 2017) ("In the royalty underpayment class action context, the evidence revealed the customary contingency fee is forty (40) percent."); *Strack, et al. v. Continental Oil, Inc.,* No. CJ-10-75 (Okla. Dist. Ct., Blaine County, Jul 13, 2018), Judgment and Order Approving Attorneys' Fees and Class Representatives' Case Contribution Award at ¶11(e) ("The prevailing customary fee in these types of royalty owner class actions is a contingency fee of 40% of the common fund...).

52. A fee agreement negotiated at arm's-length in advance is particularly relevant in a contingency case because it reflects the value of the service to be provided before the full difficulty and uncertainty of the case is known and while the risk of a loss still exists. *See Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of this Litigation.").

53. Another way of comparing the fee request to the market for comparable legal services is to consider awards in similar cases (*Johnson* factor #12). The 40% fee request in this case is consistent with what many federal and state courts[6] in Oklahoma have awarded in other royalty class actions.

54. In work done for the remand proceedings before Judge DeGiusti in the *Chieftain v. Enervest* case, I recently reviewed the fee orders in Oklahoma state-court oil and gas royalty class

[6] Oklahoma state court awards provide an appropriate point of comparison because Oklahoma law considers the same factors. *See* 12 O.S. 2023(G)(4)(e) (listing thirteen factors, the first twelve of which are the *Johnson* factors).

actions going back to 1995. The most common fee award, by far, in those cases was an award of 40% of the common fund. Of particular relevance, I identified thirteen (13) fee orders issued after the current class action fee statute, 12 O.S. §2023(G)(4), took effect in 2009, and for which the fee order explains the basis for the award. In every one of those cases, the court awarded fees in the amount of 40% of the common fund. *See* **Exhibit 3** (listing cases). Those fee awards, made by ten different judges in cases filed in ten different counties, provide compelling evidence that Oklahoma judges across the state view a 40% fee award as the going rate in oil-and-gas royalty class action contingency fee cases.

55. Five of the *Johnson* factors examine, in different ways, Class Counsel's dedication of its time, effort, skill, and commitment to the case.[7] As noted above, these factors are less important in a common fund case (rather than a fee-shifting case) because the most important determinant of the lawyer's contribution—and therefore the most important factor in setting the fee—is the outcome the lawyer was able to achieve. *See Brown*, 838 F.2d at 456. However, a few of these factors deserve specific attention.

56. Having reviewed the history of this case and the docket, and having reviewed selected critical pleadings, filings, and orders, I find that the time and labor factor of the *Johnson* test supports approval of Class Counsel's fee request. Class Counsel invested significant time and money over two and a half years of litigation with no guarantee of reimbursement or recovery. As experienced oil-and-gas royalty-payment class action litigators, Class Counsel knew exactly what needed to be done and what tasks were best calculated to advance the likelihood of certification

[7] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; and (7) any time limitations imposed by the client or the circumstances.

and to marshal the proof needed to prevail in court or in a favorable settlement. That said, the Court knows as well as anyone the challenges and complexity of cases like this and the risk Class Counsel undertook in representing the Class.

57. There is no need for the Court to employ a lodestar cross-check to assess whether the "time and labor" factor has been met. The Tenth Circuit made clear in *Brown* that a cross-check is not required, and this Court has followed suit. What *Brown* instructs the judge to do is to satisfy herself that the time and effort of Class Counsel instrumentally contributed to the result achieved for the Class Members. *Brown*, 838 F.2d at 456. *See also, e.g.*, *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013).

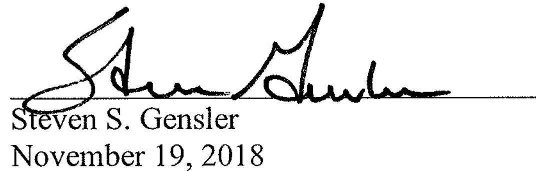
58. Though I suspect the Court does not need me to attest to the skill and reputation of Class Counsel, it is nonetheless true that the firms that brought this case and secured this settlement include firms that have been the pioneers and the leaders in the field of class action royalty litigation. Having worked with all of them on multiple occasions, and based on my knowledge of their work in those cases, and having served as a consultant or expert in many other class actions, it is my opinion that they are excellent lawyers well-deserving of their reputation as being among the very best in the field.

59. The skill, experience, resources, and reputation of Class Counsel are critically important in high-stakes oil-and-gas-royalty class action litigation. This is no place for dabblers or dilettantes. Lawyers who take on big oil and gas companies seeking tens of millions of dollars in damages must be prepared for a long and expensive battle. They must also have the expertise and acumen needed to get the case certified as a class action despite the inevitable and often extraordinary efforts the defendant will make to keep that from happening. Moreover, the oil and gas defendant must know and appreciate that class counsel is sufficiently expert and resourced to

not just survive but thrive in that environment. Any hint of weakness on the part of class counsel will embolden the defendant's procedural resistance and undermine settlement. To get top dollar in a settlement, class counsel has to be—and must be seen to be—as well-funded and as legally formidable as the oil and gas companies and the "big law" firms they retain.

60. It is my opinion that Class Counsel exhibit all of these qualities. They are experienced class action lawyers with a demonstrated ability and willingness to press their cases to their best possible end, including trial if needed. And because of that, they are well positioned to negotiate vigorously and secure high quality settlements on behalf of the class members they are appointed to represent.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.



Steven S. Gensler
November 19, 2018