

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

DORSEY J. REIRDON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 6:16-cv-113-KEW
	§	
CIMAREX ENERGY CO.,	§	
	§	
Defendant.	§	

ORDER AWARDING ATTORNEYS' FEES

Before the Court is Class Counsel's Motion for Approval of Attorneys' Fees [Doc. No. 72] (the "Motion") and Memorandum of Law in Support Thereof [Doc. No. 71] (the "Memorandum"), wherein Class Counsel seeks entry of an Order approving Class Counsel's request for Attorneys' Fees in the amount of \$3,800,000—the amount set forth in the Notice. The Court has considered the Motion and Memorandum, all matters and evidence submitted in connection therewith and the proceedings on the Final Fairness Hearing. 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. 52-1] 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 \$3,800,000 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. 70-4 at Ex. A, p. 2]. 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) Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, Class Representative's Request for Case Contribution Award, and Notice of Proposed Settlement ("Miller Decl.") [Doc. No. 64]; (3) 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 ("Gensler Decl.") [Doc. No. 63]; (4) Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl.") [Doc. No. 70-2]; (5) Declarations of Bradley E. Beckworth, Patrick Ryan, Barnes & Lewis, Whitten Burrage and Lawrence Murphy [Doc. Nos. 73-74]; (6) Declaration of Dorsey J. Reirdon ("Reirdon Decl.") [Doc. No. 70-1]; (7) JND Decl.; and (7) the Affidavits of Absent Class Members Legacy Royalty LLC, Michael Starcevich, Clear Energy, Ltd., Chieftain Royalty Co., Omega Royalty Co., LLC, Dwayne Sager,

Sagacity, Inc., and G.O. Farms, LLC [Doc. Nos. 70-6—70-13]. 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 \$3,800,000, 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 \$9,500,000 in cash for immediate payment to the Settlement Class, as well as material and binding changes to Cimarex's statutory interest payment practices and policies in Oklahoma, which have a present value of at least \$11 million and which constitute a significant benefit to the Settlement Class. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representative and Class Counsel;

(b) On October 4, 2018, JND caused the Notice of Settlement to be mailed via first-class regular mail using the United States Postal Service to 22,824 unique mailing records identified in the mailing data. *See* JND Decl. at ¶ 8 [Doc. No. 70-4]. The Notice expressly stated that Class Counsel would seek attorneys' fees up to \$3,800,000 (*see id.* at Ex. A, p. 2);

(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) The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the right to and reasonableness of attorneys' fees and reimbursement of expenses:

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 attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions.

Settlement Agreement at ¶11.8;

(e) This choice of law provision should be and is hereby enforced. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing *Restatement 2d of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988)); *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."); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees at 4 [Doc. No. 124]; *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Order Awarding Attorneys' Fees at 5 [Doc. No. 231]; *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018), Order Awarding Attorneys' Fees, Reimbursement of Litigation Expenses, and Case Contribution Award at 5 [Doc. No. 260]; Miller Decl. at ¶¶30-31. 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 that 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); *Usselton 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. *Brown v. Phillips Petroleum Co.*, 838 F.2d 453 (10th Cir. 1988). Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). Here, the requested fees are specifically authorized by law, federal common law, which is specifically authorized by an express agreement of the parties. *See Settlement Agreement* at ¶¶7.1, 11.8. 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. *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) [Doc. No. 52 at 5] (the “*Laredo Fee Order*”). Further, in the Tenth Circuit, in a percentage of the fund recovery 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. *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., 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)); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees [Doc. No. 124]; *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Order Awarding Attorneys' Fees [Doc. No. 231]; *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018), Order Awarding Attorneys' Fees, Reimbursement of Litigation Expenses, and Case Contribution Award [Doc. No. 260].¹ Other Oklahoma federal courts agree. *See, e.g., Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520 (W.D. Okla. July 31, 2014) ("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.") [Doc. No. 150 at n.1]; *see also 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

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

fund method.”); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R (W.D. Okla. Oct. 5, 2012) [Doc. No. 329];

(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. Based upon that analysis, the applicable law, and the evidence submitted to the Court, I have concluded that the requested fee of \$3,800,000 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 attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Gottlieb*, 43 F.3d at 482 n. 4;

(j) I find 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 that the efforts of counsel were instrumental in realizing recovery on behalf of the class.”); FED. R. CIV. P. 23(h), adv. comm. note (explaining for a “percentage” or contingency-based approach to class action fee awards, “results achieved is the basic starting point”);

(k) Here, the evidence shows that, under the results obtained factor, the Fee Request is fair and reasonable. There are two critical components of this Settlement: (1) the Gross Settlement Fund of \$9.5 million, which alone is a significant recovery for the Class, as this immediate cash payment represents approximately 83% of the Settlement Class’ alleged statutory interest underpayment for the entire Class Period; and (2) material, binding changes to Cimarex’s statutory interest payment practices and policies in Oklahoma, which have a minimum present value of \$11 million and which benefit the Settlement Class significantly in the future. Thus, the result obtained here through the Settlement bestows a minimum total economic benefit of \$20.5 million (the Total Settlement Value) upon the Class;

(l) In valuing the result obtained for purposes of determining a reasonable fee to award under the Tenth Circuit’s percentage of recovery method, it is well-established that the fee award should be based on the total economic benefit bestowed on the class. *See, e.g., Fager v. Centurylink Comm’cns*, No. 14-cv-00870 JCH/KK, 2015 U.S. Dist. LEXIS 190795, at *7-8 (D.N.M. June 25, 2015) (collecting cases), *aff’d* by 854 F.3d 1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on “the full value of the benefit to each absentee member” obtained through the “entire judgment fund”). Thus, in making this assessment, “the court should take into account the value of any future relief

under the settlement.” *Feerer v. Amoco Prod. Co.*, No. 95-0012 JC/WWD, 1998 U.S. Dist. LEXIS 22248, at *42-43 (D.N.M. May 28, 1998) (finding fee award of \$20,542,665, which represented 41.9% of \$49,000,000 cash portion of settlement and “approximately 27.7% to 29.5% of the current value of the settlement” based upon the agreed-upon future changes to royalty payment calculations, which had a present value of \$21,000,000 to \$25,600,000) (collecting cases)²;

(m) Here, each component of the Settlement represents significant, concrete monetary benefits to the Settlement Class. And, as Professor Gensler has aptly opined, unlike cases in which absent class members’ recovery is contingent upon their submission

² See also, e.g., *Principles of the Law of Aggregate Litigation*, §3.13(b) (Am. Law Inst. 2010) (“[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, **with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.**”) (emphasis added); *Camden I Condominium Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991) (instructing that courts should consider, among other factors, “**any non-monetary benefits conferred upon the class by the settlement**” in determining reasonable attorneys’ fees to be paid from common fund recovery) (emphasis added); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (holding “where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts may include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees”) (citing *Boeing*, 444 U.S. at 478-79)); *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R [Doc. No. 182] (W.D. Okla. May 31, 2013) (awarding \$46.5 million in attorneys’ fees on a \$155 million gross settlement fund, \$40 million of which constituted future benefits) (the “*QEP* Fee Order”); *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *3-13 (D. Colo. Oct. 20, 2009) (finding, where settlement provided for up-front cash payment of \$12,997,493.00 and future changes to royalty payment calculation methodology valued at approximately \$10,400,00.00, the “Common Fund created” amounted to “approximately \$23,397,493.00” and, thus, a fee award “in the amount of \$5,900,000, which represent[ed] approximately 26% of the total economic benefit of the Class Settlement, net of litigation expenses, [which also represented 45% of the \$12,997,493 initial cash payment]” was “warranted and reasonable” under Tenth Circuit law); *Droegemueller v. Petroleum Dev. Corp.*, No. 07-cv-1362-JLK-CBS, 2009 U.S. Dist. LEXIS 123875, at *11-12 (D. Colo. Apr. 7, 2009) (finding “results obtained” factor was measured by “total economic benefit for the Class,” which included cash payment for past royalty underpayment claims and present value of changes to “method for calculating future royalties”).

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:

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.

Gensler Decl. at ¶46. Accordingly, the “results obtained” factor strongly supports a fee award of \$3,800,000 to be paid from the immediate cash portion of the Settlement that represents no more than 18.5% of the Total Settlement Value³ (Joint Class Counsel Decl. ¶ 54 [Doc. No. 70-2]);

³ The outstanding result obtained is in stark contrast to cases like *Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.3d 662, where fees are based upon coupons or claims made settlements with no guaranteed common fund. *Hess* was a fee-shifting case where defendants contractually agreed to incur liability for the class’ attorneys’ fees, resulting in application of the lodestar method. *See id.* at 666. The concurring opinion even recognized there are other cases where “**the attorney-fee award is based on a percentage of the plaintiffs’ recovery.**” *Id.* at 672, n. 3 (emphasis added). And, that case was an egregious outlier where the entire class got less than \$46,000, but the lawyers were asking for over **\$14 million**—a result that could never pass muster under the “result obtained” factor. *See id.* at 673. On remand, the trial court, as instructed, subtracted the fees generated in the failed Florida litigation from the lodestar fee and “then reduced the lodestar by 70%” to arrive at an attorney fee in the amount of \$983,616.75, together with expenses and postjudgment interest. *Hess v. Volkswagen of America, Inc.*, 2017 OK CIV APP 35, ¶2, 398 P.3d 27. Volkswagen appealed the trial court’s award, arguing that “the new attorney fee award - an award which constitutes a mere 13.6% of the prior attorney fee award - is still too high,” as it “equals approximately ‘21.5 times as much money as . . . recovered for the entire class[.]’” *Id.* The Court of Civil Appeals affirmed the trial court’s *downward* reduction of the lodestar by 70% given the low recovery obtained in the case, even though the fee awarded and affirmed still represented 21.5 times as much money as recovered for the entire class (Fees of \$983,616.75 vs. Class Recovery of \$45,780); *see also, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *2 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding “recovery of 41% of damages within the statute of limitations period” to be “an outstanding benefit to the Settlement Class when compared against other royalty underpayment class action settlements approved by other Oklahoma district courts”). Given the amount involved in this

(n) I find that the other *Johnson* factors also support and weigh strongly in favor of the Fee Request. First, I find that the evidence of the time and labor involved weighs in favor of the Fee Request. The time and labor Class Counsel and Plaintiff's 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. 70-2]. In summary, this evidence proves that for two years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted extensive discovery and document review, reviewing thousands of pages of documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications, internal logs of royalty owner communications, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Class Counsel spent significant time working with engineering, accounting, marketing and lease and title analysis experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy and complex negotiation and mediation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required several months of negotiations, including a formal mediation session, telephone conferences, briefing on substantive factual and legal issues and extensive consultation with experts to evaluate and analyze damages. Overall, Class Counsel and Plaintiff's Counsel dedicated approximately 1,978 hours of attorney and professional time to this Litigation and reasonably anticipate dedicating an additional 339 hours through final approval and distribution;

Litigation and the Settlement achieved for the benefit of the Settlement Class, this highly significant factor strongly supports Class Counsel's Fee Request.

(o) Second, I find 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 nearly two 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. I find 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. Joint Class Counsel Decl. at ¶48; Miller Decl. at ¶45; Gensler Decl. at ¶59. Moreover, Cimarex asserted a number of significant defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Miller Decl. at ¶¶21, 47; Gensler Decl. at ¶22. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, weighs in favor of the Fee Request. Joint Class Counsel Decl. at ¶¶35, 53, 78, 81; Miller Decl. at ¶21; Gensler Decl. at ¶23;

(p) I find that the third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation and ability of the attorneys—supports the Fee Request. I find 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 ¶65; Miller Decl. at ¶¶47-48; Gensler Decl. at ¶¶58-59. I have presided over this case and others where various members of Plaintiffs' Counsel were actively involved. I am familiar with the work of Nix Patterson, LLP, Whitten Burrage, Ryan Whaley Coldiron Jantzen Peters & Webber PLLC, Larry R. Murphy, Jr., P.C., and Barnes & Lewis, LLP and find that these firms possess the type of experience, reputation and ability that supports the Fee Request.

The case required investigation and mastery of highly technical issues regarding statutory interest payments in Oklahoma. *See* Joint Class Counsel Decl. at ¶65. The law firm of Nix Patterson has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. *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. *Id.* at ¶¶ 65-67. Additionally, NP has taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the pharmaceutical industry, the opioid industry, and the energy industry. *See, e.g.*, Joint Class Counsel Decl. at ¶¶65-69. 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.* I witnessed this advocacy first-hand and commended the attorneys at Nix Patterson for their work in the case of *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.): "It was a hard-fought

case, and I think that the legal work on this case has just been absolutely spectacular, and I want to brag on all of you for the work that you put into it.” *See* Doc. No. 70-5. And the same is true here;

(q) Further, I find the skill, reputation and ability of the law firm of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC also supports the Fee Request. *See* Joint Class Counsel Decl. ¶68. The firm has litigated class actions and complex commercial litigations in courts across the country. *Id.* With more than 48 years of experience in Oklahoma state and federal courts, Pat Ryan is best known for successful high-profile cases including his work as U.S. Attorney in the prosecution and conviction of Oklahoma City Bombing defendants Timothy McVeigh and Terry Nichols in Denver, and just recently securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Dept. of Justice. *Id.*;

(r) I find that the quality of representation by counsel on *both* sides of this Litigation was high. *See generally* Declaration of Mediator Bradley A. Gungoll [Doc. No. 62]. Cimarex is represented by skilled class action defense attorneys who spared no effort in the defense of their client. *Compare 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* Miller Decl. at ¶50; Gensler Decl. at ¶60; Joint Class Counsel Decl. at ¶65. I find these factors strongly support the Fee Request;

(s) I find 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 prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were precluded from working on other cases and pursuing otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶77; Miller Decl. at ¶51. This case was filed two years ago in March 2016, and has required the devotion of substantial time, manpower and resources from Class Counsel over that period. *See* Joint Class Counsel Decl. at ¶77. Class Counsel has spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *See id.* Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. *See id.* The schedules of the courts, witnesses and clients were accommodated on a regular basis by Class Counsel. *See id.* A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and works a significant hardship on them over the course of multiple years. *See id.* Class Counsel had to forego taking on numerous additional cases because of this litigation and the burden it placed on their time and resources. *See id.* Indeed, during the period this case has been pending, Nix Patterson states it investigated at least six cases that it ultimately was not able to pursue due to the time and resource constraints imposed by this case, including several oil and gas class cases. Declaration of Bradley Beckworth at ¶32 [Doc. No. 73-1]. Accordingly, I find these factors support the Fee Request;

(t) I find 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 Mr. Reirton negotiated and agreed to prosecute this case based on a 40% contingent

fee. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶56. I find this fee represents the market rate and is in the range of the “customary fee” in oil and gas class actions in Oklahoma state courts over the past 15 years. *See* Joint Class Counsel Decl. at ¶55; Miller Decl. at ¶58 (collecting cases); Gensler Decl. at ¶54; *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 fee awards in similar cases. For example, this Court recently approved a 40% fee in similar royalty underpayment cases. *See Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) [Doc. No. 124]; *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) [Doc. No. 231]; *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) [Doc. No. 260]. Moreover, the Western District of Oklahoma recently approved a 40% fee and a 39% fee in similar royalty underpayment class cases. *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); Miller Decl. at ¶52. The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See* Joint Class Counsel Decl. at ¶54; Miller Decl. at ¶58 (collecting cases); Gensler Decl. at ¶54. Given the outstanding cash recovery plus the substantial binding changes to Cimarex’s statutory interest policies in Oklahoma, I find the

fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval. Miller Decl. at ¶¶52-53;

(v) Moreover, I find a 40% fee is consistent with the market rate for high quality legal services in royalty class actions like this. *See See Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) [Doc. No. 124]; *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) [Doc. No. 231]; *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) [Doc. No. 260]; *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.”); Miller Decl. at ¶53. I have 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 [the] [a]ction.” *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23; *see also 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.”); Miller Decl. at ¶¶53, 58. Here, Class Representative agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See Reirdon Decl.* at ¶7; Miller Decl. at ¶54; Gensler Decl. at ¶51. His declaration demonstrates his continued support of the fairness and reasonableness of the Fee Request. *Reirdon Decl.* at ¶¶16-17. I find 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 Mr. Reiridon is the market rate for such cases. *See* Joint Class Counsel Decl. at ¶¶54-57;

(w) I find 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 ¶80. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys’ fees. *Miller* Decl. at ¶55. As Professor Miller aptly notes, “the 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 their clients and the class.” *See* *Miller* Decl. at ¶55; *see also* Joint Class Counsel Decl. at ¶80. Indeed, Class Counsel expended thousands of hours litigating several similar royalty underpayment actions where the courts denied class certification and thus, Class Counsel received no remuneration whatsoever despite their diligence and expertise.⁴ 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. *See* *Miller* Decl. at ¶55;

(x) Further, as noted above, Class Representative negotiated and agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* *Reiridon* Decl. at ¶7; Joint Class Counsel Decl. at ¶56; *Miller* Decl. at ¶54; *Gensler* Decl. at ¶51.

⁴ *See, e.g., Foster v. Apache*, 285 F.R.D. 632 (W.D. Okla. 2012); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012); *Morrison v. Anadarko Petroleum Co.*, 280 F.R.D. 621 (W.D. Okla. 2012); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646 (W.D. Okla. 2011); *Miller* Decl. at ¶56.

This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25; *Laredo Fee Order* at 8. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶80; *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)⁵; *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, I note 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., 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. Accordingly, I find this factor strongly supports the Fee Request;

(y) I find 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 and no other firms or plaintiffs have asserted these claims against Cimarex. *See* Joint Class Counsel Decl. at ¶¶77, 80; Miller Decl. at

⁵ On February 4, 2010, the Oklahoma Supreme Court issued an Order denying *certiorari* in *Adkisson*.

¶56. Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation for multiple years. *See* Joint Class Counsel Decl., *supra*. Further, Cimarex has proven itself to be a worthy adversary. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. *See* Joint Class Counsel Decl. at ¶80. 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* Joint Class Counsel Decl. at ¶¶77, 80; *see also, e.g., Finnell v. Jebco Seismic*, 2003 OK 35, ¶17 n.36, 67 P.3d 339 (noting this factor also entails consideration of the “risk of non-recovery”). And, this Litigation involved a number of uncertain legal and factual issues. *See* Joint Class Counsel Decl. at ¶63; Gensler Decl. at ¶22. 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. I find the same principle holds true here. Class Counsel reviewed thousands of pages of documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications, internal logs of communications with royalty owners, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Joint Class Counsel Decl. at ¶10. Class Counsel and Plaintiff’s Counsel also

advanced \$174,191.50 in litigation expenses to date. And, Class Counsel and Plaintiff's Counsel expended approximately 1,978 hours of time over the length of this action. I find this factor also supports the Fee Request. *See* Joint Class Counsel Decl. at ¶77; Miller Decl. at ¶56;

(z) I find the eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Mr. Reirdon is a highly educated royalty owner. *See* Reirdon Decl. at ¶¶4-5. He was and remains very active in this litigation. *Id.* at ¶¶8-11. Further, Class Counsel currently represents Mr. Reirdon in other litigation in Oklahoma courts. Joint Class Counsel Decl. at ¶83; Miller Decl. at ¶57. Mr. Reirdon negotiated a 40% fee when he agreed to be class representative in this litigation. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶56. And, he supports the Fee Request. Reirdon Decl. at ¶¶16-17. Accordingly, I find this factor supports Class Counsel's fee request⁶;

(aa) In summary, upon consideration of the evidence, pleadings on file, arguments of the parties, and the applicable law, I find that the *Johnson* factors under

⁶ 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. Indeed, Cimarex denies all allegations of wrongdoing or liability and denies 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, I find this factor also weighs in favor of the Fee Request. Because I find that the evidence submitted here supports approval of the Fee Request under each of the Oklahoma factors, I also find the Fee Request is be fair, reasonable and approved under Oklahoma law as well.

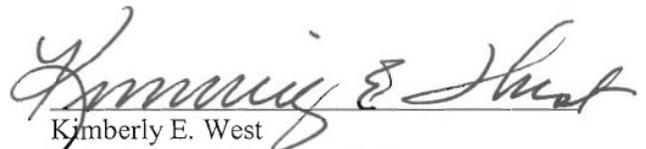
federal common law weigh strongly in favor of the Fee Request and that the Fee Request is fair and reasonable and should be and is hereby approved.

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 18th day of December 2018.


Kimberly E. West
United States Magistrate Judge
Eastern District of Oklahoma