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

JOHN CECIL, on behalf of himself and all others similarly situated, Plaintiff, vs. BP AMERICA PRODUCTION COMPANY (f/k/a Amoco Production Company) (including BP Amoco Corporation, ARCO, BP Exploration, Inc., BP Corporation North America, Inc., and BP Energy Company), Defendant.	Civil Action No. 16-CV-00410-KEW

CLASS REPRESENTATIVE'S MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Rules

I. INTRODUCTION

Plaintiff and Class Representative John Cecil ("Plaintiff", "Cecil", or "Class Representative"), individually and on behalf of all others similarly situated, respectfully submits this Memorandum of Law (the "Final Approval Memorandum") in support of and in conjunction with Class Representative's Motion for Final Approval (the "Final Approval Motion"). Class Representative and Class Counsel have reached an outstanding Settlement with Defendant BP America Production Company ("BP" or "Defendant"). The Settlement has a total value of at least $221,000,000 to the Settlement Class. Pursuant to the Settlement Agreement, the Settlement provides Class Members the following benefits: (1) a cash payment of $147 million (the "Gross Settlement Fund") to compensate the Settlement Class for past damages; (2) BP's past modification to its policies and procedures for calculating and paying royalty on production from Class Wells, which has a value of at least $38 million; and (3) the future benefit of BP's one-way, binding agreement to continue to implement these procedures and policies for calculating and paying royalty with respect to production from Class Wells going forward for at least seven (7) years (May 1, 2018 to April 31, 2025), which has a present value of at least $36 million. Thus, the total value of the benefits the Settlement affords to Class Members is at least $221,000,000.

On September 5, 2018, the Court entered its Order Granting Preliminary Approval of Class Action Settlement, Certifying the Class for Settlement Purposes, Approving Form and Manner of Notice, and Setting Date for Final Fairness Hearing (Dkt. No. 224) (the "Preliminary Approval Order"). Having carried out the instructions in the Preliminary Approval Order, Class Representative now seeks final certification of the Settlement Class and approval of the Settlement. As demonstrated below, all requirements of Federal Rule of Civil Procedure ("Rule") 23 are satisfied. The Settlement is fair, adequate and reasonable, and, therefore, should be finally

approved. The Settlement here, which was reached only after extensive arm's-length negotiations and formal mediation among competent counsel, provides certain recovery in the face of unanswered and hotly disputed questions of law and fact and avoids prolonged and expensive litigation of the complex issues at hand. As such, Class Representative respectfully requests the Court enter the proposed Order Approving Class Acton Settlement and Final Judgment (the "Final Approval Order"), a copy of which is attached to the Final Approval Motion as Exhibit 1 (and to the Settlement Agreement (Dkt. No. 171-1) as Exhibit 2), and the proposed Initial Plan of Allocation Order, a copy of which is attached to the Final Approval Motion as Exhibit 2.

II. SUMMARY OF THE ARGUMENT

Class Representative and Class Counsel obtained an outstanding Settlement for the Settlement Class worth at least $221,000,000.00. The Settlement provides: (1) a cash payment of $147 million; (2) the past benefit of BP's modification to its royalty payment practices and policies for production from Class Wells beginning in 2009, estimated by Class Representative's oil and gas expert, Daniel T. Reineke, to have a value of at least $38 million; and (3) the future benefit of BP's one-way, binding agreement to carry its royalty payment policies and practices for production from Class Wells for at least seven (7) years, estimated to have a present value of at least $36 million. Declaration of Daniel T. Reineke on Valuation of Past and Future Settlement Benefits ("Reineke Decl. on Valuation") at ¶¶ 5-7.a, attached as Exhibit 9 to the Combined Exhibit Index.[1] The $147,000,000 Gross Settlement Fund will be used to establish a common fund to be allocated and distributed to Class Members in accordance with a Court-approved Initial Plan of Allocation.

[1] Exhibits supporting Class Representative's Final Approval Motion and the contemporaneously filed Class Representative's Motion for Approval of Attorneys' Fees, Litigation Expenses, and Case Contribution Award are attached to the contemporaneously filed Combined Exhibit Index. All exhibits are incorporated as if set forth fully herein.

See Settlement Agreement at ¶6.3. In exchange for these benefits, the Settlement Class will release the Released Claims against Defendant.

In its Preliminary Approval Order, the Court certified the Settlement Class for settlement purposes, and preliminarily approved the Settlement. *See* Preliminary Approval Order at ¶¶2-6. Following the Court's Preliminary Approval Order, and in accordance therewith, Notice of the Settlement was sent to the Settlement Class. With the Final Approval Motion, Class Representative now asks the Court to grant final approval of the Settlement so that the Gross Settlement Fund may be distributed and BP's one-way, binding agreement on the calculation and payment of future royalties can be implemented.

Courts in the Tenth Circuit consider four reasonableness factors when determining whether to finally approve a class action settlement. *See* Order and Judgment Granting Final Approval of Class Action Settlement (Dkt. No. 229), *Chieftain Royalty Company v. XTO Energy, Inc.*, No. 11-CV-00029-KEW (E.D. Okla. Mar. 27, 2018) ("*Chieftain* Order"), a true and correct copy of which is attached to the Combined Exhibit Index as Exhibit 14; Order and Judgment Granting Final Approval of Class Action Settlement (Dkt. No. 122), *Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018); *see also Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). Those factors are whether: (1) the proposed settlement was fairly and honestly negotiated; (2) serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) in the judgment of the parties, the settlement is fair and reasonable. *Fager v. CenturyLink Commc'ns., LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002);

Jones, 741 F.2d at 324; *see also Chieftain* Order at ¶¶7, 9. All four of these factors support final approval of the Settlement.

First, the Settlement was fairly and honestly negotiated through an arm's-length negotiation process between experienced, well-informed counsel and facilitated by an experienced mediator of high-stakes civil disputes, including more than a dozen royalty owner class actions. *See* Declaration of Robert G. Gum ("Gum Decl.") at ¶5. Second, to this day, serious questions of law and fact exist that would place the ultimate outcome of this Litigation in doubt. Specifically, the Parties still disagree about whether BP's royalty payment practices and policies comply with Oklahoma law, the meaning of particular royalty provisions in the Class Leases, the scope of the implied duty to market in Oklahoma oil and gas leases, whether the Class could be certified for litigation purposes under Rule 23, and whether and to what extent the statute of limitations applies to the Litigation, all of which raise legitimate questions of fact and law. Third, the value of the cash recovery, as well as the binding changes to BP's royalty payment practices and policies going forward, far outweigh the mere possibility of future relief after long, expensive litigation, including class certification, inevitable summary judgment motions, an intricate trial, and likely further appeals to the Tenth Circuit. Finally, Class Representative, Named Plaintiffs in the Additional Litigation against BP, and Class Counsel believe the Settlement is fair, adequate, and reasonable and that the Settlement should be approved. *See* Declaration of John Cecil ("Cecil Decl."); Joint Declaration of the *Chockley* Plaintiffs ("Chockley Joint Decl."); Declaration of Robert Abernathy ("Chieftain Decl."), attached to the Combined Exhibit Index as Exhibits 3-5; Joint Declaration of Plaintiff's Counsel Reagan E. Bradford and Rex A. Sharp in Support of Class Representative's Motion for Final Approval of Class Action Settlement and Motion for Approval of Attorneys'

Fees, Litigation Expenses, and Case Contribution Award ("Joint Counsel Decl."), attached to the Combined Exhibit Index as Exhibit 8 at ¶¶75-80.

The Court also should grant final approval of the form and manner of Notice, that is, the Notice of Settlement and Plan of Notice. As noted above, the Court preliminarily approved the proposed form and manner of Notice in its Preliminary Approval Order. Preliminary Approval Order at ¶¶7-8. Specifically, the Court preliminarily approved the proposed long-form Notice that was sent to the Class and the Summary Notice that was published in newspapers of general circulation in Oklahoma. *Id.*; Declaration of Jennifer M. Keough [of JND Legal Administration LLC] Regarding Notice Administration ("JND Decl.") at ¶¶6-8, attached to the Combined Exhibit Index as Exhibit 1. The Notice and Summary Notice (collectively, the "Notice Documents") are the best notice practicable under the circumstances, constitute due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfy the requirements of due process and Rule 23. Declaration of Steven S. Gensler in Support of the Settlement Agreement, Notice of the Proposed Settlement, and Award of Attorney's Fees ("Gensler Decl.") at ¶¶4, 33-38, attached to the Combined Exhibit Index as Exhibit 11. The Notice Documents and procedures are substantially similar to the same procedures this Court recently found fully satisfied due process and Rule 23 in a similar royalty underpayment class action, which involved many of the same parties, counsel, and experts before the Court here. *See Chieftain* Order at ¶¶8(a)-(j).

Finally, the Court should approve the proposed Initial Plan of Allocation, which is attached to the Final Approval Motion as Exhibit 2. Class Representative and Settlement Class Counsel submit that the Initial Plan of Allocation is fair and reasonable as it was formulated by competent counsel, with input from Plaintiff's expert, and is based on assessment of each Class Member's particular loss. *See* Joint Counsel Decl. at ¶¶70-71. Additionally, Class Representative's oil and

gas expert, Daniel Reineke, endorses the Initial Plan of Allocation as fair and reasonable. *See* Declaration of Daniel T. Reineke on Allocation Methodology ("Reineke Decl. on Allocation") at ¶10, attached to the Combined Exhibit Index as Exhibit 10.

III. PROCEDURAL HISTORY

In the interest of brevity, Class Representative will not recite the factual and procedural background of this Litigation again herein, but instead respectfully refers the Court to the Preliminary Approval Memorandum (Dkt. No. 171), the Joint Counsel Decl. at ¶¶1-47, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated as if set forth fully herein.

IV. ARGUMENT

The Court should grant final approval of the Settlement. The procedure for review of a proposed class action settlement is a well-established two-step process. *See Chieftain* Order at 1-5; *see also* Manual for Complex Litigation § 13.14 (4th ed. 2004). First, the Court conducts a preliminary analysis to determine if the settlement should be preliminarily approved such that the class should be notified of the pendency of a proposed settlement. *See Chieftain* Order at 2-3. Manual for Complex Litigation § 21.632 (4th ed. 2004). Second, the class is notified and provided an opportunity to be heard at a fairness hearing before the settlement is finally approved. *See Chieftain* Order at 3-4; *see also* Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.25, at 38 (4th ed. 2002).

The Court already carried out this first step with its Preliminary Approval Order, and the Settlement Class should be finally certified under Rule 23 for the reasons found therein and set forth below. Notice was effectuated pursuant to the terms of the Settlement Agreement and in the form and manner approved by the Court. *See* JND Decl. at ¶¶6-8. As for the second step, courts in

the Tenth Circuit consider four factors when deciding whether to finally approve a class action settlement. *See, e.g.*, *Chieftain* Order at ¶7; *Rutter & Wilbanks*, 314 F.3d at 1188; *Jones*, 741 F.2d at 324. Each factor supports final approval of the Settlement here.

A. The Court Properly Certified the Settlement Class for Settlement Purposes and Should Confirm this Finding by Finally Certifying the Settlement Class Under Rule 23.

The Court already certified the following Settlement Class for the purposes of this Settlement:

> All persons or entities, except as specifically excluded below, who are or were royalty owners in wells located in Oklahoma which had production during any portion of the time period from January 1, 1985 through and including December 31, 2017, where Defendant BP America Production Company (including its affiliated predecessors and affiliated successors) is or was the operator (or a working interest owner) who marketed its share of gas as to production before January 1, 2018. The claims in this matter relate to royalty payments for gas and its constituents (such as residue gas, natural gas liquids, helium, nitrogen, or drip condensate).
>
> Excluded from the Class are: (1) United States agencies and Indian tribes and allottees; (2) the State of Oklahoma or any of its agencies or departments that own royalty interests; (3) Defendant, its affiliates, predecessors, and employees, officers, and directors; (4) the claims of royalty owners to the extent their claims are covered by prior settlement agreements, if any, releasing claims as to all or part of the Class Period, but only to the extent such prior settlements fully released the claims of such royalty owner(s) that would be released by this proposed class settlement as to the Class Wells, Released Parties, and Released Claims (the intent being that this Settlement be and remain effective as to any claims not already released by any such prior settlement agreements); (5) overriding royalty owners and others whose interest was carved out from the lessee's working interest; (6) officers of the Court in this case; (7) persons or entities that the Court determines Plaintiff's Counsel are prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct; (8) any publicly traded company and their affiliated entities that produces, gathers, processes or markets gas; and (9) royalty owners who are suing in their individual capacities only for the alleged underpayment or nonpayment of royalties in *Watts, et al. v. BP America Production*

Company, Case No. C-2001-73 in the District Court for Pittsburg County, Oklahoma.[2]

See Preliminary Approval Order at ¶2. Class certification is proper under Rule 23(a) and (b)(3) for settlement purposes because: (1) Class Representative sets forth extensive evidence and arguments establishing each element of Rule 23 in its Preliminary Approval Memorandum (Dkt. No. 171), which is respectfully incorporated by reference as if set forth fully herein; and (2) Defendant consents to certification of the Settlement Class for the purpose of settlement.

Indeed, for the same reasons set forth in Plaintiff's Preliminary Approval Memorandum, the prerequisites for class certification under Rule 23(a) and (b)(3) are satisfied. *See* Dkt. No. 171 at 3-16; *see also* Preliminary Approval Order at ¶3; *Chieftain* Order at ¶¶4(a)-(g). First, Rule 23(a)(1)'s numerosity requirement is satisfied because the Settlement Class consists of tens of thousands of royalty owners, whose joinder would be impracticable. JND Decl. at ¶6 (Notice mailed to 33,002 possible class members); *see also Trevizo v. Adams*, 455 F.3d 1155, 1161-62 (10th Cir. 2006) (citing Rule 23(a)(1)). Second, Rule 23(a)(2)'s commonality requirement is met because "many questions of law and fact exist that could be answered uniformly for the Settlement Class using common evidence." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016); *see also Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) ("A finding of commonality requires only a single question of law or fact common to the entire class" (internal citations omitted)). Each of these common issues stem from a common body of law—Racketeering Influence and Corrupt Organizations ("RICO") and the statutory and common law of the State of Oklahoma. *See* Gensler Decl. at ¶41. The Class Wells at issue are property located in the State of

[2] The Plaintiffs in the *Watts v. Amoco* case as of the date hereof are: Ronald W. McGee, as Trustee of Watts Ranch, LLC; Nora Ann Watts Enis; Judy R. Durant; Johnye L. Barnes; the Estate of Clara Joann Smith; and the C&J Wilcox Family Trust.

Oklahoma, and the royalty payments at issue are governed by Oklahoma law. Thus, any choice of law analysis would result in the application of Oklahoma law and, as such, there are no other states' laws implicated by this action, nor any other choice of law issues that could affect the Court's commonality analysis here. *See id.* This is particularly true given the RICO cause of action under federal law. Third, Rule 23(a)(3)'s typicality requirement is satisfied because BP treated all royalty owners the same for purposes of paying royalties, the same legal theories and fact issues underlie each Class Member's claims, and all Class Members suffered the same injury arising out of the same facts that can be proven by the same, common evidence. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198-99 (10th Cir. 2010). Finally, Rule 23(a)(4)'s adequacy of representation requirement is satisfied because there are no conflicts—minor or otherwise—between Class Representative and the other Class Members. *See Tennille v. Western Union Co.*, 785 F.3d 422, 430 (10th Cir. 2015) ("Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.") (internal citation omitted). Class Representative and Class Counsel have prosecuted this Litigation vigorously and Class Counsel is unquestionably qualified to represent the Class here. *See* Joint Counsel Decl. at ¶¶10-47; Gum Decl. at ¶¶11, 15. Indeed, just a few months ago, this Court approved the adequate representation of another class of royalty owners by many of the law firms that comprise Class Counsel here. *See Chieftain* Order at ¶4(e).

Additionally, Rule 23(b)(3)'s predominance and superiority requirements are satisfied here. *Tyson Foods*, 136 S. Ct. at 1045; *Menocal*, 882 F.3d 905, 914-15 ("the predominance prong asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues" (citations omitted)); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014); *CGC Holding Co., LLC v. Broad*

& Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014). The predominance requirement is met because the substantive claims are all common—RICO under federal law and Oklahoma law under Oklahoma choice-of-law principles—as are the aggregation-enabling issues of fact—chiefly, BP's common course of royalty underpayment to every Class Member. The common questions under the shared law predominate over and are more important than any potential individual issues that theoretically could arise in this Litigation. And, the superiority requirement is easily satisfied because resolving this Litigation through the classwide Settlement is far superior to any other method for fairly and efficiently adjudicating these claims. Former Chief Justice of the Supreme Court of Oklahoma Steven W. Taylor said it best: "Class certification for settlement purposes is without any doubt the proper course in this case." Declaration of Steven W. Taylor ("Taylor Decl.") at ¶6.

As such, the Court properly certified the Settlement Class and, because Class Representative has proven that each of the requirements for certification under Rule 23(a) and (b)(3) are satisfied, this finding should be confirmed with the final certification of the Settlement Class under Rule 23.

B. The Court Should Grant Final Approval of the Settlement.

The Court should finally approve the Settlement as fair and reasonable. Rule 23(e) requires judicial approval of class action settlements. FED. R. CIV. P. 23(e). The Court has broad discretion in deciding whether to grant approval of a class action settlement. *See generally Chieftain* Order; *see also Jones*, 741 F.2d at 324. "As a general policy matter, federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004)

("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged.").

In the Preliminary Approval Order, the Court took the first step in this two-step process by preliminarily approving the Settlement as fair, reasonable, and adequate. Preliminary Approval Order at ¶5. Notice was effectuated pursuant to the terms of the Settlement Agreement and in the form and manner approved by the Court. *See* JND Decl. at ¶¶6-8. Class Representative now requests the Court take the second step—granting final approval of the Settlement. As demonstrated below, each of the four factors identified by the Tenth Circuit weighs in favor of final approval.

1. The Settlement is the product of extensive arm's-length negotiations between experienced counsel.

The fact that the Settlement was fairly and honestly negotiated by qualified, experienced counsel supports final approval. *See Chieftain* Order at ¶7; *see also Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid."). The fairness of the negotiation process is to be examined with reference to the experience of counsel, the vigor with which the case was prosecuted, and any coercion or collusion that may have affected the negotiations.

Here, the Settlement is the product of extensive arm's-length negotiations between the Parties' experienced counsel. *See* Joint Counsel Decl. at ¶¶34-40; *see also* Gum Decl. at ¶¶7-12, 15; Gensler Decl. at ¶26. Comprehensive examination of the massive amount of information and data produced in this litigation enabled the Parties to make informed decisions about the strengths and weaknesses of their respective cases. *See, e.g.*, Joint Counsel Decl. at ¶¶24-25; *see* Gum Decl. at ¶¶7-8, 12, 14, 16; *Childs v. Unified Life Ins. Co.*, No. 10-CV-23-PJC, 2011 WL 6016486, at *12 (N.D. Okla. Dec. 2, 2011).

Additionally, Class Counsel has unique experience with oil and gas royalty underpayment class actions. Rex A. Sharp, P.A. ("RAS") and The Lanier Law Firm ("LLF") regularly represent plaintiffs in royalty owner class actions, and other complex commercial and consumer class action litigation, and have obtained impressive settlements in a multitude of royalty underpayment class actions in Oklahoma and Kansas state and federal court, including: *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-CV-00029-KEW (E.D. Okla. Mar. 27, 2018) (class settlement approved); *Bollenbach v. Oklahoma Energy Acquisitions LP*, No. 5:17-CV-00134-HE (W.D. Okla.) (class settlement approved); *McKnight v. Bravo Arkoma, LLC*, No. 17-CV-00308-KEW (E.D. Okla.) (settlement class preliminarily approved); *Fitzgerald Farms, Inc. v. Chesapeake Operating Co.*, Case No. CJ-10-38 (Okla. Dist. Ct., Beaver Cty.) (class settlement approved); *Hitch v. Cimarex Energy Co.*, No. CIV-11-13-W (W.D. Okla.) (class certified for settlement purposes); *Hershey v. ExxonMobil*, No. 07-1300-JTM (D. Kan.) (class certified and class settlement approved); *Freebird v. Cimarex Energy Co.*, Case No. 08-CV-93 (Kan. Dist. Ct., Finney Cty.) (class settlement approved and upheld on appeal), *aff'd* 46 Kan. App. 2d 631, 264 P.3d 500 (2011); *Eatinger v. BP America Production Co.*, Case No. 07-1266-EFM-KMH (D. Kan.) (class certified and class settlement approved), *aff'd*, 528 Fed. Appx. 859 (10th Cir. 2013) (unpub); *Freebird v. Merit Energy Co.*, 2013 WL 1151264 (D. Kan. March 19, 2013) (contested class certified and later settlement approved); *Owens v. Dart Cherokee Basin Op. Co., LLC*, Case No. 12-4157-JAR-JPO (D. Kan.) (after Tenth Circuit and U.S. Supreme Court rulings, class settlement approved). *See* Joint Counsel Decl., Ex. 8.A & 8.B. Moreover, Additional Class Counsel have extensive experience in complex litigation and have been appointed lead or class counsel in numerous royalty owner class actions. *See* Exhibits C-I to the Joint Counsel Decl. In short, the legal team

forming Class Counsel are experienced and qualified counsel and represented the Settlement Class honestly and fairly during settlement negotiations and mediation.

Further, Class Representative was intimately involved in the negotiations and believes the mediation process resulted in an excellent Settlement for the Settlement Class. *See* Cecil Decl. at ¶¶11-13, 15. Cecil has been dedicated to serving as Class Representative in this Litigation at all times. *Id.* at 5-15. Cecil expended extensive time and resources prosecuting this Litigation, from producing documents, meeting and communicating regularly with Class Counsel, attending the formal mediation sessions, participating in the negotiations that led to the Settlement, and reviewing pleadings in consultation with the Class' experts and Class Counsel. *Id.* As such, the Parties and their lawyers were well prepared for the serious and intelligent negotiations that led to the Settlement. *See* Gum Decl. at ¶¶7-8; Gensler Decl. at ¶41.

Additionally, the use of a formal mediation process supports the conclusion that the Settlement was fairly and honestly negotiated. *Ashley v. Reg'l Transp. Dist.*, No. 05-CV-01567-WYD-BNB, 2008 WL 384579, at *6 (D. Colo. Feb. 11, 2008) (finding settlement fairly and honestly negotiated where the parties engaged in formal settlement mediation conference and negotiations over four months). And, the assistance of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008).

Here, the Parties were represented by zealous counsel to achieve an outstanding Settlement. The Settlement resulted from two formal mediation sessions with a highly qualified and respected mediator, Bob Gum. *See* Joint Counsel Decl. at ¶¶35-, 37-38; Gum Decl. at ¶¶5, 7-16; Gensler Decl. at ¶¶14, 26. Mr. Gum has mediated numerous, significant cases in Oklahoma. Gum Decl.at

¶5. Thus, his opinions regarding the settlement negotiations and the qualifications of counsel should be accorded great weight.

After beginning settlement discussions in late 2017, and continuing through 2018, the parties held their first formal mediation session before Mr. Gum on January 20, 2018. Joint Counsel Decl. at ¶35; Gum Decl. at ¶9. The parties continued their discussions under Mr. Gum's supervision and held informal meetings with their experts in the months that followed, then engaged in a second full-day mediation before Mr. Gum on February 12, 2018 and reached an agreement in principle shortly thereafter in March 2018. Joint Counsel Decl. at ¶¶38, 40; Gum Decl. at ¶¶9-10. Having read the Parties' mediation briefs regarding class certification and merits issues and the substantial factual, expert, and backup data in support thereof, Mr. Gum is intimately familiar with this Litigation, including the relative strengths and weaknesses of each side's position. *See* Gum Decl. at ¶¶7, 14, 16. Additionally, in his declaration, Mr. Gum endorses the efforts of counsel for both sides, stating:

> After presiding over the mediation process in this case, I am convinced that the parties' settlement agreement is the product of vigorous and independent advocacy and arm's-length negotiation conduced in good faith. There was no collusion between the parties and, in fact, there was quite a bit of acrimony. I have worked extensively with each side's attorney handling these negotiations and I stand firm in my belief in their integrity. Each of them was tough, but in the end satisfied with the settlement as being reasonable under the circumstances.

Id. at ¶11; *see also id.* at ¶15 ("the terms of the settlement are abundantly fair, adequate, reasonable, and in the best interests of the Settlement Class."); *see also* Joint Counsel Decl. at ¶¶76.

These facts demonstrate the Settlement resulted from serious, informed, and non-collusive negotiations between skilled and dedicated attorneys. *See* Gensler Decl. at ¶26. Therefore, the first factor supports final approval. *Id.*

2. Serious questions of law and fact exist, placing the ultimate outcome in doubt.

The existence of serious questions of law and fact place the ultimate outcome of this Litigation in doubt. *See Chieftain* Order at ¶9. Such doubt "tips the balance in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely v. Nat'l Mobile Health Care, LLC*, No. 07-CV-933-M, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008) (internal citations omitted).

In this Litigation, there are numerous factual and legal issues about which the Parties disagree—issues that would ultimately be decided by this Court or a jury. Joint Counsel Decl. at ¶77; *see also* Gensler Decl. at ¶¶27-28. To this day, BP denies it committed any acts or omissions giving rise to any liability or violation of law. *See* Settlement Agreement at ¶11.1. Indeed, BP has always maintained its royalty calculation and payment methodologies—which form the basis of the Class' claims—are entirely appropriate under the Class' oil and gas leases and Oklahoma law. *See id.* Thus, BP has entered into this Settlement solely to eliminate the risk and expense of further litigation. *See id.*

In addition, despite Class Representative's optimism regarding its chances at trial, Class Representative would have to overcome a number of significant obstacles, including prior denials of class certification. *See* Joint Counsel Decl. at ¶77; Taylor Decl. at ¶¶5-8. For example, before reaching the merits of this Action, the Court and the Parties would be required to resolve a number of complex legal questions concerning Oklahoma oil and gas law and the meaning of particular royalty provisions in the Class' leases. Such disputed questions of law include when the gas becomes marketable and what exactly the implied duty to market requires of oil and gas lessees. Further, once these questions of law are resolved, many serious questions of fact would remain,

including when the gas from a particular well became marketable in the past such that BP might be legally permitted to share costs with Class Members. There are also mixed questions of law and fact that would have to be resolved, namely whether and to what extent the statute of limitations applies to the Litigation—an issue that would have an impact on the Class' damages. However, the Settlement renders the resolution of these issues unnecessary and provides a guaranteed recovery in the face of uncertainty.

Because this Litigation still presents serious issues of law and fact that place the ultimate outcome in doubt, the second factor supports final approval of the Settlement. *See* Gensler Decl. at ¶¶26-27; Joint Counsel Decl. at ¶77; Taylor Decl. at ¶¶5-8,

3. The value of immediate recovery outweighs the mere possibility of future relief after long and expensive litigation.

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also supports approval of the proposed Settlement. The immediate value of the $147 million cash recovery alone outweighs the uncertainty, additional expense, and likely duration of further litigation. *See, e.g.*, *Chieftain* Order at ¶¶7, 9. The Settlement Class is "better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *See McNeely*, 2008 WL 4816510, at *13. In addition to the substantial Gross Settlement Fund, the Settlement provides future, tangible benefits to the Settlement Class in the form of binding changes to BP's royalty payment practices and policies, which have a value of at least $36,000,000 from May 1, 2018 through April 31, 2025, as well as past benefits valued at over $38 million. *See* Reineke Decl. on Valuation at ¶¶ 6 & 7.a. Here, the Settlement represents a meaningful recovery for the Settlement Class without the risk or additional expense of further litigation. Joint Counsel Decl. at ¶78. These immediate benefits must be compared to the risk that the Settlement Class may recover nothing after summary judgment,

trial, and likely appeals, possibly years into the future. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261 (D. Kan. 2006).

While Class Counsel is confident in their ability to prove the claims asserted, they also recognize liability is far from certain and many potential obstacles to obtaining a final, favorable verdict exist. Even if Class Representative were able to establish liability at trial, BP would have vigorously argued the Settlement Class' damages are far less than the $147 million Gross Settlement Fund, and it is unlikely the future binding changes could even have been obtained through trial. *See* Joint Counsel Decl. at ¶77. Through the Settlement, the Settlement Class is guaranteed a cash payment without the attendant risks of further litigation. Moreover, Class Members are provided certainty that BP will appropriately pay royalty for gas produced from the Class Wells now and for at least seven (7) years in the future.

Class Counsel is intimately familiar with the risks of proceeding with this Litigation because they have extensive experience prosecuting royalty class actions. *See* Section IV.B.1 *supra*; Joint Counsel Decl. Class Counsel believes the value of the Settlement outweighs the risks of proceeding further with this Litigation. *See id.*; *see also, e.g.*, *Chieftain* Order at ¶¶7, 9. Former Justice of the Supreme Court of Oklahoma, Steven W. Taylor, agrees. Justice Taylor's declaration is particularly noteworthy because he denied certification of a class action against Defendant in *Watts v. Amoco Prod. Co.* (now BP), No. C-2001-73 (Okla. Dist. Ct., Pittsburg County) and recognizes the exceptional result this Settlement achieves for the royalty owners. Taylor Decl. at ¶¶5-9 ("Class certification for settlement purposes is, without any doubt, the proper course for this case."; "There is a total $220,000,000.00 benefit to the Class Members. All the result of historic lawyering done by Plaintiff's Counsel."). Professor Gensler agrees. *See* Gensler Decl. at ¶¶29-31

("It was reasonable for the Class to value this package of immediate and certain benefits as outweighing the value of the relief they might or might not get through continued litigation.").

When the risks and uncertainties of continuing this Litigation are compared to the immediate benefits of the Settlement, it is clear the Settlement is fair, reasonable, and in the best interests of the Settlement Class. The third factor supports final approval of the Settlement.

4. Class Representative and BP agree the Settlement is fair and reasonable.

The fact that Class Representative and BP believe the Settlement is fair and reasonable supports final approval. *See* Gensler Decl. at ¶32; Cecil Decl. at ¶15 ("I fully support this Settlement as fair, reasonable and adequate for the Settlement Class and Class Members."). Class Counsel and Cecil only agreed to settle this Litigation after considering the substantial benefits the Settlement Class will receive, the risks and uncertainties of continued litigation, and the desirability of proceeding under the terms of the Settlement Agreement. *See* Cecil Decl. at ¶¶7-15; Joint Counsel Decl. at ¶79.

In addition, several absent Class Members signed declarations supporting the Settlement. *See* Joint Decl. of Plaintiffs in *Chockley v. BP* at ¶ 4, attached to the Combined Exhibit Index as Exhibit 4; Declaration of Robert Abernathy on behalf of Chieftain Royalty Company at ¶4, attached to the Combined Exhibit Index as Exhibit 5; Declaration of Joseph E. Hancock on behalf of the Baptist Foundation of Oklahoma at ¶4, attached to the Combined Exhibit Index as Exhibit 6; and Declaration of Dan Little on behalf of Sagacity, Inc. at ¶4, attached to the Combined Exhibit Index as Exhibit 7.

Class Counsel's judgment as to the fairness of the Settlement also supports final approval. *See Chieftain* Order at ¶7. "Counsels' judgment as to the fairness of the [settlement] agreement is entitled to considerable weight." *Childs*, 2011 WL 6016486, at *14 (citation omitted). Class

Counsel believes the terms and conditions of the Settlement are fair, reasonable, and adequate to the Settlement Class, and the Settlement is in the Settlement Class Members' best interests. *See* Joint Counsel Decl. at ¶79.

This last factor fully supports the Court's final approval of the Settlement. Indeed, all four factors considered by courts in the Tenth Circuit support final approval of the Settlement.

C. The Notice Method Used was the Best Practicable Under the Circumstances and Should be Approved.

The Court should approve the Notice given to the Settlement Class. Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice 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). Also, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). In terms of due process, a settlement notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Fager*, 854 F.3d at 1171 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "The Supreme Court has consistently endorsed notice by first-class mail", holding "a fully descriptive notice…sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process." *Id.* at 1173. Here, the Notice campaign carried out by Class Counsel and the Settlement Administrator is substantially comparable to and perhaps exceeds the highly successful notice campaigns completed in other oil and gas royalty cases approved by district courts in Oklahoma, including this Court. *See Chieftain* Order at ¶¶8(a)-(j); *see also* Joint Counsel Decl. at ¶56.

In its Preliminary Approval Order, the Court preliminarily approved the form and manner of the Notice Documents disseminated by the Settlement Administrator, stating the Notice and

Summary Notice are "the best notice practicable under the circumstances, constitute[] due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisf[y] the requirements of applicable laws, including due process and [Rule] 23." *See* Preliminary Approval Order at ¶8. The Court then directed dissemination of the Notice Documents in accordance with the Settlement Agreement and the Preliminary Approval Order. *Id.*

Class Counsel conducted an extensive campaign to distribute the Notice to the Class. *See* Joint Counsel Decl. at ¶¶48-58. This campaign was necessary because there are tens of thousands of Class Members, including some who were paid royalty from companies other than BP that operated some of the Class Wells. *Id.* at ¶49-51. To send Notice to the Settlement Class, the names and addresses of Class Members was researched. *Id.* at ¶50. For the majority of royalty payments at issue, BP was the operator and maintained the royalty payment history data and provided that data to Class Counsel as part of the Settlement Agreement. *See id.*; Settlement Agreement at ¶3.3; JND Decl. at ¶3. Where BP's data did not include sufficient address information, the Settlement Administrator, with Class Counsel's aid, attempted to locate these individuals. Joint Counsel Decl. at ¶¶51-52; JND Decl. at ¶5.

On September 26, 2018, Notice was mailed to 33,002 Class Members. JND Decl. at ¶6. In addition, the Court-approved Summary Notice was published on September 26, 2018, in four (4) papers of local circulation: *The Oklahoman*; *The Tulsa World*; *The Muskogee Phoenix*; and *The McAlester News Capital & Democrat* as directed in the Preliminary Approval Order. *Id.* at ¶8; Preliminary Approval Order at ¶8(b).

Also, the Notice and Summary Notice, along with other documents germane to the Settlement, were posted on the website created for and dedicated to this Litigation, www.cecil-

bp.com, on September 25, 2018. *See* JND Decl. at ¶9. This website is maintained by the Settlement Administrator, where additional information regarding the Settlement can be found. *Id.*

The Notice Documents fully informed Class Members about the Litigation, the Settlement and the facts needed to make informed decisions about their rights. *See* Preliminary Approval Order at ¶¶7-8; *see also Chieftain* Order at ¶8(j); Gensler Decl. at ¶36. The Notice and Summary Notice also provided Class Members with a toll-free number and URL address for the dedicated Settlement website where Class Members could obtain further information regarding the Settlement, as well as their rights and options as they relate to the Settlement. *See* JND Decl. at ¶¶9-10; *see also,* Exhibits A & B to JND Decl., which are the Notice and Summary Notice.

In sum, the form, manner, and content of the Notice and Summary Notice were the best practicable notice, and their contents were reasonably calculated to, and did, apprise Class Members of the pendency and nature of the Settlement and afford them an opportunity to opt out or object. *See* Gensler Decl. at ¶¶33-38. Therefore, the Court should grant final approval of the Notice given to the Settlement Class here.

D. The Plan of Allocation Should be Approved.

The Court should also approve the proposed Initial Plan of Allocation. Like the settlement itself, a plan of allocation must also be approved as fair and reasonable. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d at 1262 (citing *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 462). Where, as here, a plan of allocation is formulated by competent and experienced class counsel, the plan need only have a reasonable, rational basis. *Id.* As a general rule, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable. *Id.*; *see also, e.g.*, Initial Plan of Allocation Order (Dkt. No. 233), *Chieftain Royalty Company v. XTO Energy, Inc.*, No. 11-CV-00029-KEW (E.D. Okla. Mar. 27, 2018).

Class Counsel, together with Plaintiff's expert, have formulated an Initial Plan of Allocation in which Class Members will be reimbursed proportionately in relation to their individual claim for underpaid royalty and their respective royalty decimal interest in a given Class Well. *See* Joint Counsel Decl. at ¶¶71. Importantly, this is not a claims-made settlement, nor is it a settlement where a Class Member must take further action to participate. *Id.* at ¶72; Gensler Decl. at ¶51. Instead, every royalty owner who does not opt out of the Settlement will receive a check for their allocation of the Net Settlement Fund. *Id.*

Specifically, the Net Settlement Fund will be allocated to individual Class Wells proportionately, with due regard for the production marketed by BP on behalf of itself and/or others, the amount and date of claimed royalty underpayment, the time period when the claimed underpayment occurred, and the distribution of small amounts that exceed the cost of the distribution. Settlement Agreement at ¶6.2; Reineke Decl. on Allocation at ¶¶4, 9. Thereafter, Class Representative and Class Counsel, with the aid of the Settlement Administrator, will allocate the Net Settlement Fund for each Class Well proportionately among all Class Members who hold royalty interests in the Well according to their respective royalty decimal interest in such Well using the December 2017 paydeck (or the most current available royalty pay deck). Joint Counsel Decl. at ¶71; *See* Reineke Decl. on Allocation at ¶9.

A check for each Class Member's allocation of the Net Settlement Proceeds will then be mailed to each respective Class Member's last known mailing address, using the payment history data produced under paragraph 3.3 of the Settlement Agreement (or the most current available address information). Initial Plan of Allocation at ¶2; Joint Counsel Decl. at ¶72. Returned or stale-dated Distribution Checks shall be reissued as necessary to ensure delivery to the appropriate Class

Members using commercially reasonable methods subject to review and approval by the Court. Initial Plan of Allocation at ¶4; Joint Counsel Decl. at ¶73.

Because the Initial Plan of Allocation was formulated by competent and experienced Counsel and is based on the type and extent of each Class Member's particular loss, the Court should approve the Initial Plan of Allocation as fair, reasonable, and adequate. *See* Joint Counsel Decl. at ¶70.

V. CONCLUSION

For all of the foregoing reasons, Class Representative and Class Counsel respectfully request that the Court enter the proposed Order Approving Class Action Settlement and Final Judgment, attached to the Final Approval Motion as Exhibit 1. This Order grants: (1) final certification of the Settlement Class; (2) final approval of the Settlement as fair, reasonable, and adequate, and in the best interests of the Settlement Class; and (3) final approval of the Notice to Class Members. Class Representative and Class Counsel also respectfully request that the Court enter the proposed Initial Plan of Allocation Order to govern the allocation and distribution of the Net Settlement Fund to Class Members.

Respectfully submitted,

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THE SETTLEMENT CLASS

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018, 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.

s/ Rex A. Sharp
Rex A. Sharp