EXHIBIT M

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

CHIEFTAIN ROYALTY COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-11-29-KEW**
	)	
XTO ENERGY INC.,	)	
	)	
Defendant.	)	

DECLARATION OF GEOFFREY P. MILLER IN SUPPORT OF THE SETTLEMENT AGREEMENT, CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES, CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, CLASS REPRESENTATIVE'S REQUEST FOR CASE CONTRIBUTION AWARD, AND NOTICE OF PROPOSED SETTLEMENT

I, Geoffrey P. Miller, declare as follows:

1. I am the Stuyvesant P. Comfort Professor of Law at New York University located in New York, New York. I have been retained to provide an expert opinion as to: (1) the fairness, reasonableness and adequacy of the Settlement Agreement dated November 20, 2017 ("Settlement Agreement") and whether the Settlement Class meets the requirements for class certification under Federal Rule of Civil Procedure 23; (2) the reasonableness of the attorneys' fees and Litigation Expenses requested by Class Counsel and the Case Contribution Award requested by Class Representative; and (3) the adequacy of the Notice of Proposed Settlement.[1] In that capacity, I make the following representations on the basis of my own personal knowledge. If called as a witness, I could and would competently testify to the matters stated herein.

[1] Capitalized terms not defined herein shall have the meanings given to such terms in the Settlement Agreement.

Background and Qualifications

2. For more than twenty years I have been involved in the area of class action litigation as a teacher, scholar, attorney, consultant, and expert witness. I recently testified—both live at the Final Fairness Hearing and by way of declaration—as an expert witness on attorneys' fees in this Court in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla.). In that case, I was offered, and the Court approved me, as a testifying expert witness on issues related to the fairness and reasonableness of class action settlements, notice, attorneys' fees and class representative awards. I also previously testified by way of declaration in this Court in *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.) regarding the propriety of class certification under Federal Rule of Procedure 23(a) and (b)(3). Thereafter, the case settled for $280 million and the Court awarded a fee of $70 million using the percentage method and no lodestar cross-check. *See* Final Order and Judgment, Dkt. No. 468 (October 25, 2012).

3. I have taught a wide range of subjects including law and economics, corporations, compliance and risk management, property, regulation of financial institutions, land development, securities law, the legal profession, and legal theory. I am an author or editor of a dozen books and more than 200 articles in the fields of financial institutions, contract law, corporate and securities law, constitutional law, civil procedure, legal history, jurisprudence, and ancient law. I have written at least a dozen research articles dealing with class action law and practice. State and federal courts across the United States frequently cite my articles on class actions. I also regularly lecture on class actions at academic conferences and continuing legal education seminars.

4. I have acted as counsel in class actions and shareholder derivative litigation.

5. One of my major areas of research has been the subject of class action attorneys' fees and expenses. With Professor Theodore Eisenberg of Cornell University, I am the author of the leading empirical analysis of attorneys' fees and expenses in class action cases, *Attorneys' Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004). This paper has been extensively cited in federal court decisions on class action attorneys' fees, was featured in a story on the first business page of the *New York Times*, and was discussed in Congress during debates on the Class Action Fairness Act. In 2010, Professor Eisenberg and I updated the data set for that study to account for five additional years of attorneys' fees and nearly double the number of cases. *See Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010). Also, Professor Eisenberg, Professor Michael Perino and I published a working paper on securities class action attorneys' fees, *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after Goldberger v. Integrated Resources, Inc.*, 29 WASH. U.J.L. & POL'Y 5 (2009). And, in December 2016, Professor Eisenberg, Professor Roy Germano of New York University Law School, and I updated the data set for our 2004 and 2010 studies to account for five additional years of attorneys' fees in 458 cases. *See* Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Conference: Attorneys' Fees In Class Actions: 2009-2013*, 92 N.Y.U.L. Rev. 937 (2017). My work on attorneys' fees is frequently cited by numerous courts around the country as authority in class action settlements.[2]

[2] *See, e.g.*, *Bd. of Trs. of Aftra Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 U.S. Dist. LEXIS 79418, at *5 n.12 (S.D.N.Y. June 7, 2012); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1336 n.4 (S.D. Fla. 2011); *Braud v. Transp. Serv. Co. of Ill.*, No. 05-1898c/w05-1977, 2010 U.S. Dist. LEXIS 93433 (E.D. La. Aug. 7, 2010); *see also* Appendix 1 (Cases Citing to Geoffrey Miller's Research on Class Action Litigation).

6. I have frequently consulted with attorneys to assist with issues pertaining to class certification, class settlement, and awards of class counsel fees. I have offered testimony in class action cases in state and federal courts across the United States, including cases in the Tenth Circuit and Oklahoma. For example, as discussed above, I recently testified at the Final Fairness Hearing regarding the fairness and reasonableness of the settlement, notice, attorneys' fees, expenses, and case contribution award in this Court before Magistrate Judge Kimberly West in *Reirdon v. XTO*. I also submitted an expert report and testified on the propriety of class certification in this Court before Magistrate Judge Kimberly West in *CompSource*. I also submitted a declaration and testified before the Honorable David Russell, United States District Judge for the Western District of Oklahoma, in support of the settlement, request for attorneys' fees, reimbursement of litigation expenses and case contribution awards in *Chieftain Royalty Co. v. QEP Energy, Co.*, No. CIV-11-212-R (W.D. Okla. 2013) (Docket No. 152; Final Fairness Hearing Transcript), a royalty underpayment class action. I also testified in support of the future benefits obtained by Class Counsel there, which were binding both ways (*i.e.*, Class Members who participated in the Settlement were barred from suing QEP in relation to the future royalty payment methodology). In *QEP*, Judge Russell granted final approval of the settlement (including the future benefits) and awarded a fee of $46.5 million, which represented approximately 39% of the cash portion of a $155 million settlement. *See* Docket No. 182. I also submitted an expert report and testified on class certification in *City of Blackwell v. Freeport-McMoran Copper & Gold*, No. CJ-2009-15-B, Kay County, Oklahoma District Court, in which the court certified the class and the case was later settled.

7. Further information on my background and qualifications is set forth in my resume, attached hereto as Appendix 2.

Summary of Opinion

8. For the reasons stated below, it is my opinion that: (a) the Settlement proposed in this litigation is fair, reasonable, and adequate for all Class Members and should be approved; (b) the Settlement Class should be certified for settlement purposes; (c) an award of $32 million in attorneys' fees, which represents 40% of the Gross Settlement Fund, is fair and reasonable under both federal common law and Oklahoma state law and should be approved; (d) reimbursement of up to $3,250,000 in Litigation Expenses incurred in successfully prosecuting this Litigation is fair and reasonable and should be approved; (e) a Case Contribution Award for Class Representative of up to $225,000 from the Gross Settlement Fund as compensation for its time and effort is fair and reasonable and should be approved; and (f) the manner of distribution and form of the Notice of Proposed Settlement is fair and adequate.

Materials Relied On

9. In preparing this opinion, I have reviewed an extensive compilation of pleadings and other documents in this case, including but not limited to those listed in Appendix 3. I also have consulted with Class Counsel and the President of Class Representative, Robert Abernathy, conducted legal research, and analyzed settlements in other class action cases. And, I have relied on my extensive personal experience as a professor, lawyer and expert witness in this area. In addition, I have relied on the following facts (among others):

The Settlement

10. Plaintiff Chieftain Royalty Company (herein, "Plaintiff," "Class Representative" or "Chieftain") first brought the claims in this Litigation against XTO Energy Inc. ("XTO") in Coal County, Oklahoma on December 17, 2010. On January 21, 2011, XTO removed this action to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1332(d).

11. In the Original Petition, Chieftain alleged XTO used its position as operator and as an oil and gas working interest owner to secretly underpay royalty due Plaintiff and the Class on production of gas and its constituents from the Oklahoma wells at issue. Petition at ¶13. Based on these allegations, Chieftain brought claims for breach of contract, tortious breach of contract, breach of fiduciary or quasi-fiduciary duty, fraud (actual and constructive) and deceit, conversion, conspiracy, accounting, and injunctive relief. *Id.* ¶¶30-59.

12. Chieftain undertook substantial discovery related to the merits and class certification in this case, including reviewing millions of pages of documents, taking multiple depositions, and exchanging various written discovery. This case also required extensive legal research and expert analysis on liability and damages. As such, Chieftain engaged in substantial expert discovery, including consulting with and preparing expert witnesses; preparing expert reports; accounting review and analysis; land and lease examination and analysis; and engineering evaluation and analysis. In addition, Chieftain engaged in substantial motion practice including motions to dismiss, to stay proceedings, to consolidate, class certification, and briefing and arguing a Rule 23(f) appeal of the district court's order granting class certification to the Tenth Circuit.

13. The Parties initiated settlement negotiations under the supervision of Phillips ADR. *See* Declaration of Mediator Gary A. Feess (the "Feess Declaration") (Dkt. No. 205). Judge Feess previously served as a Los Angeles County Superior Court Judge and a United States District Judge for the Central District of California for more than 15 years, presiding over 200 trials and more than 6,000 civil lawsuits. *Id.* at ¶4. Having mediated approximately 65 matters and arbitrated 3 disputes, Judge Feess provided invaluable assistance and experience to the parties. *Id.* The Parties first formally met under the supervision of former federal judge, Layn Phillips, an experienced and highly respected mediator at Phillips ADR, for a formal mediation session on September 1, 2016

in Dallas, Texas. *See id*. at ¶7. Judge Phillips previously served as a District Judge in the Western District of Oklahoma, where he presided over at least 140 trials. *Id*. After a full day of mediation and discussions with Judge Phillips, the Parties were unable to reach an agreement. *Id.* However, in the months following the initial mediation session, the Parties continued to discuss settlement negotiations through Judge Phillips and to have settlement discussions and informal meetings with their experts. *Id.* On June 22, 2017, the Parties engaged in a second full day mediation conducted by former federal judge and experienced mediator, and colleague of Judge Phillips, Gary Feess. *Id*. at ¶8. Prior to this session, the Parties provided to Judge Feess and exchanged with each other, extensive, confidential legal briefing regarding class certification and merits issues, supported by evidence and expert opinions. *Id.* After this second formal mediation (which lasted approximately 9 hours), the parties continued settlement negotiations, and ultimately reached an agreement in principle on July 4, 2017. *Id.* at ¶11. The Parties then spent the next four months extensively negotiating and drafting the terms of a formal settlement, which are documented in the Settlement Agreement. *See* Joint Class Counsel Declaration at ¶¶10, 24, 56.

14. The Settlement offers the Class several substantial benefits.

15. *$80 Million Cash Payment*. First, the Settlement provides XTO will pay $80 million in cash, which will be allocated and distributed to Class Members in accordance with a Court-approved Plan of Allocation. This cash already has been deposited into an escrow account. The $80 million cash alone is a remarkable recovery for Class Members.

16. *At Least $60 Million as a Result of XTO's Implementation of New Procedures and Policies for Calculating and Paying Royalty on the Ardmore Loop*. Second, as a result of this Litigation, XTO implemented new procedures and policies for calculating and paying royalty with respect to production of natural gas (and its constituents) on Class Wells connected to the

Ardmore Loop in July 2012. Settlement Agreement at ¶2.4. I have been provided and rely on analysis performed by Class Representative's oil and gas accounting expert concluding that the present ecomonic value of these benefits is at least $60 million. *See* Affidavit of Barbara A. Ley ("Ley Affidavit") at ¶7.

17. *At Least $74 Million in Binding Future Benefits to Class Members Who Own Interests in Wells Connected to the Ardmore Loop.* Third, XTO has agreed to continue to implement its procedures and policies for calculating and paying royalty with respect to production of natural gas (and its constituents) on Class Wells connected to the Ardmore Loop. Settlement Agreement at ¶2.4. I have been provided and rely on analysis performed by Class Representative's oil and gas accounting expert concluding that the present economic value of these benefits is at least $74 million. *See* Ley Affidavit at ¶7.

18. *$750,000 In Administration, Notice and Distribution Costs*. Fourth, XTO has agreed to bear up to $750,000 in administration, notice and distribution costs, which is a significant benefit to the Settlement Class as such funds would otherwise be paid from the Gross Settlement Fund.

19. Based on the foregoing, *I estimate the total present value of the Settlement as at least $214.750 million*.

The Settlement is Fair, Reasonable and Adequate

20. The court has broad discretion to determine whether to grant final approval of a class action settlement. When determining whether to approve a class action settlement, the Tenth Circuit identifies four factors that must be considered:

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

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

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

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

See Reirdon v. XTO Energy, Inc., Case No. 6:16-cv-00087-KEW (E.D. Okla. 2018) (Docket No. 122 at ¶7) ("*Reirdo*n Final Approval Order"); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *see also, e.g.*, *Fager v. CenturyLink Commns., LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016). As discussed below, in my opinion, each of these factors supports final approval of the Settlement. Furthermore, the Court already found these factors were preliminarily satisfied when it 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 on January 18, 2018. Docket No. 204 at ¶5 (the "Preliminary Approval Order").

21. *The first factor*—whether the Settlement was fairly and honestly negotiated—supports approval of the Settlement. *See Reirdon* Final Approval Order at ¶7. "The Court may presume the settlement to be fair, adequate, and reasonable" when the settlement results from "arm's length negotiations between experienced counsel after significant discovery [] occurred." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). In addition, courts in the Tenth Circuit recognize that a thorough mediation process with an experienced mediator supports a finding that a settlement has been fairly and honestly negotiated. *See, e.g., Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 285 (D. Colo. 1997); *see also Ashley v. Reg'l Transp. Dist.*, No. 05-cv-01567-WYD-BNB, 2008 U.S. Dist. LEXIS 13069, at *15-22 (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).

22. Based on my review of materials related to the Settlement, the Parties' negotiation of the Settlement, and the pleadings and other relevant documents in this case, it is my opinion that the Settlement is the result of intensive arm's-length negotiations between the Parties and experienced counsel after the Parties conducted extensive fact discovery and consulted with several experts on a variety of issues to support their respective factual and legal theories of the case. This substantial fact discovery and expert analysis allowed the Parties to thoroughly and intelligently brief and present the strengths and weaknesses of their claims and defenses during settlement negotiations as well as comprehensively evaluate liability and damages. Over the course of several months, the Parties, their experienced counsel and consulting experts engaged in serious settlement negotiations during which the Parties met for two formal mediation sessions with two well-respected mediators, exchanged multiple briefs on their respective legal, factual and damages positions, and communicated frequently by telephone and email. And, Judge Phillips and Judge Feess, both well-qualified and experienced mediators, supervised the two formal settlement negotiations. *See* Feess Declaration at ¶¶7-8. These facts demonstrate the first factor weighs in favor of approval of the Settlement. *See* Preliminary Approval Order at ¶5.

23. *The second factor*—whether serious questions of law and fact exist, placing the ultimate outcome in doubt—also supports approval of the Settlement. *See Reirdon* Final Approval Order at ¶7. Based on my review of the various pleadings in this matter, it is clear that throughout the Litigation and settlement negotiations, the Parties held contrary legal and factual positions on a number of complex and highly technical issues of Oklahoma oil and gas law. XTO asserted numerous defenses to the Class' claims. And, XTO denies all allegations of wrongdoing or liability

with respect to the claims and allegations in the Litigation and denies that the Litigation could have been properly maintained as a class action. *See* Settlement Agreement at ¶11.1. XTO has always maintained its royalty payment policies—which form the basis of Plaintiff's and the Settlement Class' claims—comply with Oklahoma law. XTO entered into this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *See id.* 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, I find the second factor supports approval of the Settlement. *See* Preliminary Approval Order at ¶5.

24. *The third factor*—whether the value of an immediate recovery outweighs the mere possibility of future relief—weighs heavily in favor of approval of the Settlement. *See Reirdon* Final Approval Order at ¶7. As discussed above, the $80 million cash payment and $750,000 administration, notice and distribution costs alone provides a significant benefit to Class Members. In addition, Class Wells connected to the Ardmore Loop have received at least $60 million in past benefits as a result of XTO's implementation of new procedures and policies for calculating and paying royalty on production of natural gas (and its constituents) on the Ardmore Loop in July 2012. Those same Class Wells will also receive at least $74 million in future benefits, as XTO has agreed to continue to implement its procedures and policies for calculating and paying royalty on production of natural gas (and its constituents) on the Ardmore Loop. Moreover, although Plaintiff is confident in its ability to obtain class certification (as discussed in more detail below), the fact remained that the first class certification order in this case was appealed and reversed by the Tenth Circuit, and if Plaintiff had moved again for certification, XTO undoubtedly would have vehemently opposed such motion and appealed a second time, if necessary. Balancing the outstanding Settlement against the substantial risk and expense of continuing to litigate complex

legal and factual issues at summary judgment and trial, I believe the third factor weighs strongly in favor of approval of the Settlement.

25. Finally, *the fourth factor*—the Parties' judgment that the Settlement is fair, reasonable and adequate—supports approval of the Settlement. *See Reirdon* Final Approval Order at ¶7. It is clear the Parties believe the substantial and immediate benefits achieved for the Class in the Settlement significantly outweigh the risk, uncertainty and expense of further litigation. Based on my discussions with Rob Abernathy, President of Chieftain Royalty Company, it is apparent that he was heavily involved in the litigation, fully supports the Settlement, and has no conflicts of interest with Class Counsel or any class member. *See also* Declaration of Robert Abernathy President of Chieftain Royalty Company ("Chieftain Decl.") at ¶7. Further, as of the time I executed this declaration, several absent Class Members had signed affidavits and/or declarations supporting the Settlement. *See* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starcevich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust.

26. In addition, "Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Childs v. United Life Ins. Co.*, No. 10-CV-23-PJC, 2011 U.S. Dist. LEXIS 138818, at *37 (N.D. Okla. Dec. 2, 2011) (citation omitted); *see also Reirdon* Final Approval Order at ¶7. Based on my discussions with Class Counsel, it is apparent Class Counsel believes the Settlement is fair, reasonable and adequate. Class Counsel reached this outstanding Settlement only after vigorous advocacy on behalf of Plaintiff and the Class and serious arm's-length settlement negotiations. Thus, the fourth factor supports final approval of the Settlement. *See* Preliminary Approval Order at ¶5.

27. Based upon my experience, expertise and analysis of the Settlement and these additional facts, it is my opinion that the proposed Settlement is fair, reasonable and adequate and should be approved.

The Settlement Class Should be Certified for Settlement Purposes

28. In the Preliminary Approval Order, the Court found the Settlement Class "should be certified for the purposes of this Settlement" and that the Settlement Class "meets all certification requirements of Federal Rule of Civil Procedure 23 for a settlement class." Preliminary Approval Order at ¶2. The Court further found the Settlement Class satisfies all prerequisites of Rule 23(a) (*id*. at ¶3) and Rule 23(b)(3) (*id*. at ¶4). I agree with these findings and believe the Settlement Class should be finally certified for settlement purposes.

29. In reviewing a proposed settlement before the putative class has been certified, the Court must determine whether the action may be maintained as a class action under Rule 23. *See, e.g., Tennille v. Western Union Co.*, 785 F.3d 422, 430 (10th Cir. 2015); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 278 (D. Kan. 2010). Trial courts have "considerable discretion" in making class certification decisions. *DG v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010). Indeed, the Tenth Circuit just recently held that a district court abuses its discretion only "when it misapplies the Rule 23 factors—either through a clearly erroneous finding of fact or an erroneous conclusion of law—in deciding whether class certification is appropriate." *Menocal v. GEO Grp., Inc.*, No. 17-1125, 2018 U.S. App. LEXIS 3131, *10 (10th Cir. Feb. 9, 2018). "In the end, as long as the district court applies the proper Rule 23 standard, [the Tenth Circuit] will defer to its class certification ruling provided that decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand." *Id*. at *10-11 (citing *Soseeah v. Sentry Ins.*, 808 F.3d 800, 808 (10th Cir. 2015)). However, in the settlement

context, courts need not inquire into trial manageability under Rule 23(b)(3)(D). *Motor Fuel*, 271 F.R.D. at 269.

30. Here, Plaintiff and Defendant have stipulated to: (i) the certification, for settlement purposes only, of the Settlement Class pursuant to Rules 23(a) and (b)(3); (ii) the appointment of Plaintiff as class representative; and (iii) the appointment of Nix, Patterson & Roach, LLP, Barnes & Lewis, LLP and Gunderson Sharp, LLP (n/k/a Rex A. Sharp, P.A. and Gunderson Law, P.C.) as Class Counsel, and Whitten Burrage and Richards & Connor, PLLP as liaison local counsel. *See* Settlement Agreement at ¶¶1.42 & 3.1.

31. It is my opinion that certification of the Settlement Class for settlement purposes will further the interests of Settlement Class Members and XTO by allowing this Litigation to be settled on a class-wide basis. It is also my opinion that the relevant requirements of Rule 23 are satisfied, as demonstrated below.

32. Rule 23(a)(1) requires "the class [be] so numerous that joinder of all members is impracticable." *See Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 275 (10th Cir. 1977) (holding a class as small as 46 sufficient). Here, the Class consists of thousands of royalty owners dispersed throughout Oklahoma and other states, making joinder of all Class Members impracticable. Accordingly, numerosity is met.

33. Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." A "common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). "'Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist.'" *Beer v. XTO Energy, Inc.*, No. CIV-07-798-L, 2009 U.S. Dist. LEXIS 23096, at *10

(W.D. Okla. Mar. 20, 2009); *Heartland Commc'ns, Inc. v. Sprint Corp.*, 161 F.R.D. 111, 116 (D. Kan. 1995). Plaintiff need only show a *single* issue common to all members of the class. *See Menocal*, 2018 U.S. App. LEXIS 3131, at *13; *DG*, 594 F.3d at 1195; 1 Herbert B. Newberg et al., NEWBERG ON CLASS ACTIONS § 3:10, at 272-73 (5th ed. 2011).

34. Many Oklahoma federal courts, including this Court, have certified royalty underpayment class actions, finding common issues existed. *See Reirdon* (certifying settlement class for settlement purposes).[3] Similarly, here, many questions of law and fact exist that could be answered uniformly for the Settlement Class using common evidence. Importantly, each Class Member's claims and causes of action asserted in this Litigation are exclusively governed by Oklahoma law. The Class Wells at issue are property located in the State of Oklahoma, and the royalty payments at issue here are required to be paid in accordance with and exclusively governed by Oklahoma law. Thus, there are no other states' laws implicated by this Litigation, nor any other choice of law issues that could affect the Court's commonality analysis. And, even if the Court engaged in any choice of law analysis, it would result in the exclusive application of Oklahoma statutory and common law to all Class Members' claims here. Indeed, all of the common issues in this case stem from a *single* underlying tenet of Oklahoma law: the implied duty to market under which lessees bear all costs of transforming raw gas into a marketable product unless "spelled-out" otherwise in the lease. *Wood v. TXO Prod. Corp.*, 854 P.2d 880, 882-83 (Okla. 1992). The

[3] *See also, e.g., Chieftain Royalty Co. v. SM Energy Co., et al.*, No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015), Dkt. No. 154 (certifying settlement class); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, 2015 U.S. Dist. LEXIS 62450 (W.D. Okla. 2015); *Chieftain Royalty Co. v. QEP Energy Co.*, 281 F.R.D. 499 (W.D. Okla. 2012); *Fankhouser v. XTO Energy, Inc.*, 2010 U.S. Dist. LEXIS 133345 (W.D. Okla. 2010); *Hill v. Kaiser-Francis Oil Co.*, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. 2010); *Hill v. Marathon Oil Co.*, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. 2010); *Naylor Farms v. Anadarko OGC Co.*, 2009 U.S. Dist. LEXIS 127516 (W.D. Okla. 2009); *see also Hershey v. ExxonMobil Oil Corp.*, No. 6:07-cv-01300 (D. Kan. Oct. 26, 2012).

scope of the implied duty to market presents a common question of law, and whether XTO complied with this duty presents many common questions of fact, including, among others: (1) whether the raw gas stream produced from the Class Wells required the expenditure of costs and expenses to make it marketable; (2) whether XTO routinely deducted any costs and expenses from Class Members' royalty payments that were incurred before the gas became marketable; and (3) whether XTO can prove, under *Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203, 1208 (Okla. 1998), that such deductions were reasonable, were associated with an already marketable product, and increased royalty in proportion to the fee charged.

35. Moreover, under Oklahoma oil and gas royalty law, the royalty attributable to all royalty owners in a particular well is "communitized" before payments are disbursed, a concept often referred to as the "royalty pot." *See* 52 OKLA. STAT. § 570.4. Under the royalty pot system, royalty owners are then paid out of the common "pot" of royalty proceeds according to each royalty owner's interest in the well. Thus, if the amount of royalty attributable to one royalty owner is improperly reduced prior to communitization, all royalty owners in the pot will receive less royalty. As Judge Russell recognized in certifying the class in *Chieftain Royalty Co. v. QEP Energy Co.*, "shorting the pot shorts everyone who shares the proceeds of the royalty pot." 281 F.R.D. 499, 506 (W.D. Okla. 2012). Accordingly, differences in lease language do not affect the common question of whether all Class Members received less royalty than they were entitled to under the law. Were this Litigation to proceed to trial, these questions of law and fact could be determined "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). Because there are questions of law and fact common to members of the Settlement Class, the commonality requirement is satisfied.

36. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are

typical of the claims or defenses of the class." However, "'[e]very member of the class need not be in a situation identical to that of the named plaintiff'" to meet the typicality requirement. *DG*, 594 F.3d at 1195. "[D]iffering fact situations of class members do not defeat typicality . . . so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Menocal*, 2018 U.S. App. LEXIS 3131, at *13. Here, Plaintiff's claims are typical of the Settlement Class' because XTO treated all royalty owners the same for purposes of paying royalties, regardless of lease language. That is, the same legal theories and fact issues underlie the Settlment Class' claims because XTO engaged in a common course of conduct to deprive the Settlement Class of royalties and misrepresent the true value of gas production to benefit XTO. As a result, all Class Members suffered the same injury arising out of the same facts, and the same evidence could be used to establish XTO's liability. Moreover, XTO has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement at ¶¶1.42 & 3.1. Thus, Plaintiff's claims are typical.

37. Rule 23(a)(4) requires plaintiffs to show they "will fairly and adequately protect the interests of the class." In the Tenth Circuit, the adequacy requirement is satisfied when (i) neither plaintiff nor its counsel has interests that conflict with the interests of other class members and (ii) plaintiff will prosecute the action vigorously through qualified counsel. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188-89 (10th Cir. 2002). To defeat certification, a conflict must be fundamental and go to specific issues in controversy; minor conflicts will not suffice. *See Tennille*, 785 F.3d at 430-31; *see also Fankhouser*, 2010 U.S. Dist. LEXIS 133345, at *14-15. First, there are no conflicts—minor or otherwise—between Plaintiff and other members of the Settlement Class. To the contrary, Plaintiff, who suffered the same injury as other Class Members, has had every incentive to vigorously prosecute this Litigation on behalf of the Settlement Class.

Second, Plaintiff has prosecuted this Litigation vigorously through qualified counsel. Plaintiff has demonstrated its dedication to this matter through participation in all aspects of the Litigation, including responding to extensive discovery, reviewing numerous pleadings and other case-related information, working closely with Plaintiff's experts, and attending full day mediations. Such dedicated conduct demonstrates that Plaintiff understands its duties and obligations to the Settlement Class and accepts them willingly. Further, there is no dispute that Plaintiff's Counsel is adequate and has successfully prosecuted numerous class actions and other complicated litigation in federal courts throughout the country including other royalty underpayment class actions.[4] Indeed, less than a month ago, this Court approved the adequate representation of another class of royalty owners by many of the law firms that comprise Plaintiff's Counsel here. *See generally* Reirdon Final Approval Order. The Court can take judicial notice that Counsel is qualified and experienced to conduct this Litigation. Accordingly, adequacy is met.

38. Rule 23(b)(3) requires "questions of law or fact common to class members predominate over any questions affecting only individual members." "'The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation'" by asking "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045; *see also, e.g.*, *Menocal*, 2018 U.S. App. LEXIS 3131, at *13; *CGC Holding Co., LLC v. Hutchens*, 773 F.3d 1076, 1087 (10th Cir. 2014) (same); *In re Urethane Antitrust Litig.*, 768

[4] *See, e.g.*, *SM Energy Co., et al.* (W.D. Okla. Dec. 23, 2015); *Fitzgerald Farms, Inc. v. Chesapeake Operating Co.*, No. CJ-10-38 (Dist. Ct. Beaver County, Okla. 2015); *Laredo Petroleum, Inc.*, No. CIV-12-1319-D, 2015 (W.D. Okla. May 13, 2015); *Drummond et al. v, Range Resources Corp., et al.*, No. CJ-2010-510 (Dist. Ct. Grady County, Okla. Sept. 9, 2013); *Eatinger v. BP Am. Prod. Co.*, No. 07-1266-EFM (D. Kan. Sept. 17, 2012); *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV (D. Kan. Dec. 16, 2012); *Hershey v. ExxonMobil Oil Co.*, No. 07-1300-JTM (D. Kan. Oct. 26, 2012); *QEP Energy Co.*, No. CIV-11-212-R (W.D. Okla. Mar. 12, 2012).

F.3d 1245, 1255 (10th Cir. 2014) ("Class-wide proof is not required for all issues. Instead, Rule 23(b)(3) simply requires a showing that the questions common to the class predominate over individualized questions."). Thus, when "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045; *see also In re Syngenta AG Mir 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, at *1369-70 (D. Kan. Sept. 26, 2016) (same). XTO engaged in a common course of conduct to deprive Class Members of royalties by improperly charging costs, and concealing those costs, to make the raw gas a marketable product. This common conduct gave rise to each Class Member's claims, resulting in a sufficiently cohesive Class to warrant adjudication by representation. As with the commonality and typicality prerequisites, differences in lease language do not preclude a finding of predominance because XTO ignored any language differences and treated all leases the same. Moreover, common issues also predominate because, under OKLA. STAT. tit. 52, § 570.4, all royalties in a drilling and spacing unit are pooled or "communitized" so that all royalty owners receive a proportionate share of all royalty revenue from all gas sold from the well. Each royalty payment goes into a common royalty pool comprised of all proceeds from all of the gas sales in the well. 52 OKLA. STAT. § 570.4(A). Once pooled, the revenue in the royalty pool is then distributed proportionately among *all* royalty owners in the drilling and spacing unit. *Id.* The ultimate result of § 570.4 is that royalty owners do not receive royalty based on the terms of their individual leases, but rather their proportionate share of all royalties from the common royalty pool. *See QEP*, 281 F.R.D. at 506. As such, when XTO underpays royalty, thereby short-changing the royalty pool in a given drilling and spacing unit, all

royalty owners in that unit are also shorted their royalty. *Id*. Thus, as Judge Russell held, "regardless of lease language, at this juncture Plaintiff has established that common issues predominate." *Id*. Moreover, XTO has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement at ¶¶1.42 & 3.1. Accordingly, predominance is met.

39. Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The factors pertinent to a finding of superiority are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3). "In deciding whether to certify a settlement class, the Court need not inquire whether the case, if tried, would present difficult management problems under Rule 23(b)(3)(D)." *Motor Fuel*, 271 F.R.D. at 269; *Lucas*, 2006 U.S. Dist. LEXIS 21521, at *15. "Courts and commentators have observed that the Rule 23(b)(3) class action is superior when it allows for the 'vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'… For this reason, 'the class action device is especially pertinent to vulnerable populations.'" *Menocal*, 2018 U.S. App. LEXIS 3131, at *15 (internal citations omitted). The superiority requirement is easily met here. First, every Class Member has an interest in proving XTO's common course of wrongful conduct. It would be enormously inefficient for both the courts and the parties to engage in multiple trials in individual actions on the same issues. Second, no Class Member has filed an individual action. Third, because this case has been litigated in this Court for many years, concentrating the Litigation in this forum

is desirable. Fourth, there are no anticipated difficulties in managing this case as a class action for settlement purposes only. And, the class action device is especially pertinent in the royalty underpayment context, for royalty owners lack both the technical sophistication and access to the information necessary to independently analyze whether their royalties are being paid appropriately under Oklahoma law—two facts demonstrating the vulnerability of royalty owners to oil and gas companies' royalty underpayment schemes like the one at issue here. *See, e.g.*, *Menocal*, 2018 U.S. App. LEXIS 3131, at *15. Moreover, XTO has agreed the Settlement Class should be certified for settlement purposes. *See* ¶¶1.42 & 3.1, Exhibit 1. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

In sum, I find the Settlement Class should be finally certified for settlement purposes and that each Rule 23(a) and (b)(3) element is satisfied.

The Fee Request is Fair and Reasonable

40. On January 18, 2018, the Court entered the Preliminary Approval Order. Therein, the Court ordered Class Representative and Class Counsel to file any requests for approval of attorneys' fees, reimbursement of Litigation Expenses, and a Case Contribution Award no later than February 26, 2018. *See* Preliminary Approval Order at ¶17. Class Counsel and Class Representative now request (a) attorneys' fees of $32,000,000, which represents 40% of the Gross Settlement Fund, (b) a Case Contribution Award of $225,000 for Class Representative, and (c) reimbursement of Litigation Expenses up to $3,250,000. These requests were set forth in the Notice mailed to Class Members, as discussed in more detail below.

41. As explained in detail below, it is my opinion that the fee request here is fair and reasonable under either the percentage of the fund method or the lodestar method. To promote certainty, predictability, the full enforceability of the Settlement Agreement as written, and

nationwide application, the Parties here expressly and contractually agreed that the right to and reasonableness of attorneys' fees (among other things) shall be governed solely by federal common law regarding federal equitable common fund class actions. Settlement Agreement at ¶¶7.1, 11.8. Under Oklahoma choice of law principles, this choice of law should be enforced. *See Leritz v. Farmers Ins. Co.*, 2016 OK 79, ¶1, 385 P.3d 991, 992 ("Generally,'[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ..'"). Here, the contractually chosen law is the well-developed and consistent body of federal common law that applies to common fund class action settlements where no fee shifting occurs. *See, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939); 7B Wright & Miller § 1803 (n.4 omitted) ("The court's authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."). Under federal common law, the Tenth Circuit has expressed a preference for the percentage of the fund method, the reasonableness of which is determined through application of the *Johnson* factors. *Gottlieb*, 43 F.3d at 483. I find the fee request here is imminently fair and reasonable under the percentage of the fund method. Alternatively, should the Court determine that the express terms of the Settlement Agreement should be disregarded and that Oklahoma state law should control the right to and reasonableness of attorneys' fees, the Fee Request is still reasonable. I find that Class Counsel's fee request of $32 million is supported by their baseline lodestar of $12,383,513.32, with a multiplier of 2.58408, and thus, the fee request is imminently fair and reasonable under Oklahoma state law.

The Parties Here Have Contractually Agreed Federal Common Law Controls the Right to, And Reasonableness Of, Attorneys' Fees

42. Under Federal Rule of Civil Procedure 23(h), the Court must determine whether any request for attorneys' fees and costs is reasonable. FED. R. CIV. P. 23(h). The Court may grant

such a request if the requested award is authorized by law or by the parties' agreement. *Id*. Here, the requested fees are authorized by an express agreement of the parties. Indeed, pursuant to the express terms of the Settlement Agreement, federal common law controls here with respect to both the right to, and reasonableness of, attorneys' fees. Settlement Agreement at ¶¶7.1, 11.8.

43. The parties' decision to contractually agree that federal common law controls the right to, and reasonableness of, attorneys' fees, should be honored and enforced. *See Leritz*, 2016 OK 79 at ¶1 ("Generally,'[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . .'"); *see also Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees (Dkt. No. 124) ("*Reirdon* Fee Order") at ¶¶6(d)-(e).

44. The Settlement Agreement recognizes that any fees will come from a common fund and that XTO is not paying any fees on top of the $80 million cash it contributed to the Settlement Fund. The express language of the Settlement Agreement makes it clear that the Parties wished to apply federal common law to remove any doubt about the correct application of choice of law rules to the issues surrounding certification, notice and overall evaluation of the fairness and reasonableness of the Settlement and associated requests for fees and expenses. Settlement Agreement at ¶11.8 ("To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and nationwide application, the Parties agree that this Settlement Agreement shall be governed solely by any federal law…"). Such an agreement is in direct keeping with the principles of the Class Action Fairness Act ("CAFA"). Indeed, Congress passed CAFA with an intent to provide certainty, uniformity and confidence in the application of the class device to cases involving interstate commerce. *See* 28 U.S.C. §1711(a)-(b). Pursuant to the express language of Rule 23(h), the Court must determine whether the fees authorized by the Settlement Agreement

are reasonable. Here, that determination must be made by applying federal common law. Settlement Agreement at ¶¶7.1, 11.8.

45. As discussed below, when federal common law applies to class action settlements in the Tenth Circuit, there is a strong preference for the percentage of the fund method.

Because the Parties Have Contractually Agreed That Federal Common Law Controls the Right to, And Reasonableness of, Attorneys' Fees, the Tenth Circuit's Opinion in EnerVest is Inapplicable Here

46. Last year, the Tenth Circuit issued an opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that awarded attorney fees to class counsel and an incentive award to the class representative to be paid out of the common fund, holding that the district court failed to compute attorney fees under the lodestar method, as purportedly required by Oklahoma law in that diversity case. The plaintiff-appellee in *EnerVest* has filed a Petition for Rehearing *En Banc*, which remains pending as of the date this declaration was executed. The Petition for Rehearing *En Banc* was overwhelmingly supported by seven *amici* briefs filed by: (1) The Chickasaw Nation and the Choctaw Nation; (2) Arthur R. Miller, co-author of the leading treatise, Wright & Miller, and my colleague at NYU Law School; (3) Oklahoma Law Enforcement Retirement System; (4) Provident Energy, Ltd.; (5) the Honorable Richard G. Van Dyck and Drew Edmondson; (6) absent class members Kelsie Wagner, trustee of the Kelsie Wagner Trust; Patrick Cowan, owner of CSW 2003 Exploration Limited Partnership and Trustee of the Asa R. Maley Revocable Living Trust; Roger Brown, owner of Omega Royalty Company, LLC; and (7) Charles Silver, University of Texas Law Professor. Regardless of the ultimate outcome in *EnerVest*, the opinion is wholly inapplicable here because that case dealt with the application of state law choice of law principles in the absence of an agreement on choice of law, while the parties here, unlike in

EnerVest, contractually agreed that federal common law controls the right to, and reasonableness of, attorneys' fees. *See, e.g.*, *Reirdon* Fee Order at ¶¶6(d)-(e).

Fee Awards in Common Fund Cases

47. Courts have recognized the importance of distinguishing attorneys' fee awards in common fund cases (like this one) versus statutory fee cases due to the different rationales behind the two types of cases. This distinction was brought to the forefront when the widely-cited Third Circuit Task Force wrote, "a distinction must be drawn between fund-in-court cases and statutory fee cases since the policies behind the two categories differ greatly." *Court-Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 250 (3d Cir. 1985). Expressly relying on that Report, the Tenth Circuit explained:

> [C]ommon fund fees are neither intrinsically punitive nor designed to further any statutory public policy. Conversely, statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights. [citing Third Circuit Task Force Report, 108 FRD 237] ... Thus, unlike statutory fees, which result in a shifting of the fee burden to the losing party, common fund fees result in a sharing of the fees among those benefited by the litigation.

Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (emphasis original) ("[t]he award of attorneys' fees is based on substantially different underlying purposes in a common fund case than in a statutory fee case."). Because the distinction is an important one in determining what constitutes a reasonable attorney fee, I will address the rationale behind each.

48. The common fund doctrine "is part of the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939). The doctrine embodies the courts' equitable "power to award counsel fees out of a fund created or preserved through someone's efforts." 10 Wright & Miller §2675 (citing *Trustees v. Greenough*, 105 U.S. 527 (1882); *Central R.R. Banking Co. v. Pettus*, 113 U.S. 116 (1885)). Therefore, it is the court's jurisdiction

"over the fund involved in the litigation" that invokes the court's equitable power to assess "attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Brown*, 838 F.2d at 454 ("common fund fees result in a *sharing* of the fees among those benefited by the litigation" because "normally a large number of people or entities benefit from a common fund case."); *Third Circuit Task Force*, 108 F.R.D. at 250 (fees are taken from the fund based on equitable concerns that those who benefit from the fund should not be unjustly enriched without sharing in the expenses incurred by the successful litigant). That is, in common fund cases, the authority to award attorneys' fees is entirely unrelated to fee-shifting and arises in equity when the fund is created. *See Boeing*, 444 U.S. at 478.

49. In contrast, in fee shifting cases, fees are assessed against the unsuccessful litigant and awarded to the prevailing party to encourage private enforcement of statutory substantive rights. *Third Circuit Task Force*, 108 F.R.D. at 250. That is, attorneys' fees are obtained from the losing party and thus "result in a *shifting* of the fee burden to the losing party." *See Brown*, 838 F.2d at 454.

50. Thus, it is well-settled that class counsel who obtain a "common fund" or a "common benefit" settlement for a class, as Class Counsel did here, are entitled to reasonable attorneys' fees and reimbursement of expenses. *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). Such is based on the theory that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Id.* (citing *Boeing*, 444 U.S. at 478). *Boeing* explained, "[t]he common-fund doctrine reflects the traditional practice in courts of *equity*," 444 U.S. at 478 (emphasis added), and that a court's "[j]urisdiction over the fund involved in the litigation allows a court to prevent [] inequity by assessing attorney's

fees against the entire fund[.]" *Id*. at 478. "The court's authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Wright & Miller § 1803 (n.4 omitted). Without reasonable awards of attorneys' fees and reimbursement of expenses, there is no incentive for competent attorneys to take on the extremely risky, time-consuming and difficult task of pursuing class actions.

51. The majority of courts in the United States award fees in class action cases on a percentage of the fund basis in common fund cases. *See, e.g.*, *Reirdon* Fee Order at ¶6(g). Indeed, my recent study shows that the vast majority of fee awards during the 2009-2013 period were decided using the percentage method or the percentage method with a lodestar check. Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Conference: Attorneys' Fees In Class Actions: 2009-2013*, 92 N.Y.U.L. Rev. 937, 945 & Table 1 (2017). Specifically, the percentage method was used in 53.61% of cases studied and used in combination with a lodestar check in an additional 38.23% of cases studied. *Id*. A decreasing minority of courts utilize the "lodestar" methodology, which calculates a fee based on the number of hours reasonably incurred by counsel multiplied by counsel's reasonable hourly fee and adjusted by a "multiplier" that accounts for other factors, most importantly, the risk assumed by counsel in the litigation. The use of the pure lodestar method was used in only 6.29% of cases during the 2009-2013 period. *Id*. This is down from its use in 13.6% of cases during the 1993-2002 period, and 9.6% of cases during the 2003-2008 period. *Id*.

52. Many courts have criticized the use of the lodestar approach in common fund cases, including imposing the lodestar approach "through the back door via a 'cross check.'" *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011). For example, in *In re Checking Account*, the court refused to consider lodestar in determining the reasonableness

of class counsel's attorneys' fee, finding "[l]odestar creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *Id*. (citation omitted); *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-69 (D.C. Cir. 1993) (adopting the percentage of the fund method in common fund cases finding the lodestar approach encourages attorneys to spend as many hours as possible and discourages early settlement); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1241-42 (D.N.M. 2016) ("The Tenth Circuit has made it clear that district courts need not calculate a lodestar when applying the percentage method. . . . The lodestar analysis, even when used as a cross check to determine a reasonable percentage award, has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage. . ."); Federal Judicial Center, *Moore's Federal Practice: Manual for Complex Litigation*, §14.121 (4th ed. 2004) ("In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended."); *Third Circuit Task Force*, 108 F.R.D. at 246-49 (finding the lodestar method is insufficiently objective, creates a sense of mathematical precision that does not mirror the realities of the practice of law, encourages excessive hours and duplicative work, and creates disincentives for the early settlement of cases, among other deficiencies). Due to the numerous deficiencies in applying the lodestar method in the common fund context, the Third Circuit Task Force recommended the percentage of the fund method be utilized in common fund cases. *Third Circuit Task Force*, 108 F.R.D. at 255; *see also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation."); *Camden I*

Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 773-74 (11th Cir. 1991) (considering the distinct rationales behind attorneys' fees awarded in fee-shifting versus common fund cases and finding the percentage of the fund method the better reasoned approach in common fund cases).

53. In the Tenth Circuit, when federal common law applies, district courts have discretion to apply either the percentage of the fund method or the lodestar method. However, the strong preference is for application of the percentage fund method. *See Reirdon* Fee Order at ¶6(g); *see also Gottlieb*, 43 F.3d at 483. In *Brown*, the Court did not mandate one method over the other, but simply instructed courts to utilize the factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). 838 F.2d at 454. However, "rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation." *Id.* In *Uselton v. Commercial Lovelace Motor Freight, Inc.*, the Court rejected an invitation to adopt a "less deferential review standard" or to "attempt to improve upon the approach carefully set out in *Brown*." 9 F.3d 849, 853 (10th Cir. 1993). And, in *Gottlieb*, the Court reaffirmed that: "[i]n our circuit, following *Brown* and *Uselton*, either method is permissible in common fund cases…." 43 F.3d at 483. The only *requirement* is consideration of the applicable *Johnson* factors. *Id*. Under this methodology, the fee is calculated as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454.

54. 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 Reirdon* Fee Order at ¶6; *see also 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)).

55. Other Oklahoma federal district courts also have acknowledged they are not required to conduct a lodestar assessment where federal common law applies in a common fund case. *See 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.") (Docket No. 150 at n.1); *see also Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method.") (Docket No. 52 at 5) (the "*Laredo* Fee Order"); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R (W.D. Okla. Oct. 5, 2012) (Docket No. 329).

56. Not only is the percentage approach preferred in the Tenth Circuit, it is superior, in my opinion, to the lodestar method for calculating fees in common fund class actions such as this. The percentage approach offers the following important advantages:

a. The percentage approach aligns the interests of class counsel with the interests of the class by giving counsel a strong incentive to maximize the size of the class recovery;

b. The percentage approach does not give class counsel a perverse incentive to "run up the hours" by needlessly protracting litigation;

c. The percentage approach reduces the burden on judges who would otherwise be required to audit the reasonableness of counsel's hours and hourly rates; and

d. The percentage approach emulates the fee methodology chosen by the private market, which in contingency fee cases, nearly always calculates counsel fees based on the size of the recovery obtained for the client.

Brown, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Laredo* Fee Order at 5.

57. When determining attorneys' fees under the percentage of the fund method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson*, 488 F.2d 714. *See Brown*, 838 F.2d at 454-55. Similarly, Oklahoma state courts analyze thirteen "enhancement factors," which "are essentially the same as the *Johnson* factors" and are codified in a state statute. *See, e.g.*, 12 OKLA. STAT. §2023(G)(4)(e)). Not all of the *Johnson* factors will apply in a given case and, similarly, some factors may be given more weight than others depending on the specific facts at issue. *See Brown*, 838 F.2d at 456. Here, I find that all of the applicable factors support the fee request under either the percentage method or the lodestar method. I also find that an attorneys' fee of 40% is in line with awards in both federal and state courts in the Tenth Circuit and Oklahoma.

Class Counsel's Fee Request Is Reasonable Under Federal Common Law

58. In my opinion, the fee request here of $32 million is fully supported by federal common law, which looks to the twelve *Johnson* factors. Whether these factors are applied in the percentage of the fund context as a cross-check on the reasonableness of the percentage awarded, or in the lodestar context to determine an appropriate multiplier or enhancement factor, the result is the same—the requested fee of $32 million is reasonable. *See, e.g.*, *Reirdon* Fee Order at ¶6(h). The *Johnson* factors (and 12 of the 13 Oklahoma statutory factors) are: (l) the time and labor required, (2) the novelty and difficulty of the questions presented by the case, (3) the skill required to perform the legal service properly, (4) the preclusion of other employment by the attorneys due

to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Gottlieb*, 43 F.3d at 483 n.4. The additional enhancement factor under Oklahoma law is the risk of recovery in the litigation. To avoid redundancy and because these factors largely overlap, I will only address them once.

59. In my opinion, the *Johnson* factor that should be entitled to the most weight in this case is the amount involved in the case and the results obtained (factor number 8). *See Reirdon* Fee Order at ¶6(j); *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."); *see also, e.g.*, FED. R. CIV. P. 23(h), adv. comm. notes (2003) ("For a percentage approach to fee measurement, results achieved is the basic starting point."). Here, the results obtained are remarkable in several respects. First, as discussed above, the Gross Settlement Fund of $80 million alone represents a significant recovery for the Class. Second, Class Counsel also obtained substantial and material past and future binding changes to XTO's payment practices and policies in the Ardmore Loop, having a combined present value of at least $134 million ($60 million plus $74 million). Third, XTO has agreed to bear up to $750,000 in administration, notice and distribution costs, which is a significant benefit to the Settlement Class as such funds would otherwise be paid from the Gross Settlement Fund. Therefore, this factor justifies a fee award of $32,000,000 (40% of the Gross Settlement Fund or 14.496% of the Gross Settlement Value). *See, e.g.*, *Reirdon* Fee Order at ¶¶6(l)-(m); *Principles of the Law of Aggregate Litigation*, §3.13(b) (American Law Institute, 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."); *Camden I Condominium Ass'n*, 946 F.2d at 775 (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).

60. The other *Johnson* factors also support the fee request. The first *Johnson* factor—the time and labor involved—supports the fee request. *See Reirdon* Fee Order at ¶6(n). While this factor is relevant under both federal common law (*Johnson*) and Oklahoma state law (12 OKLA. STAT. §2023(G)(4)(e)), the Oklahoma Supreme Court has cautioned that "[f]ees cannot fairly be awarded on the basis of time alone" and time and labor must be considered in conjunction with the other factors. *Oliver's Sports Center, Inc. vs. Nat'l Std. Ins. Co.*, 615 P.2d 291 (Okla. 1980); *Robert L. Wheeler, Inc. v. Scott*, 1989 OK 106, ¶¶6-8, 777 P.2d 394 (time and labor "is not the only relevant factor, and it must be considered in conjunction with the other enumerated criteria....In short, a reasonable attorney's fee in a given case does not necessarily result from simple multiplication of the hours spent times a fixed hourly rate.").[5] Through my discussions with Class Counsel and my review of relevant documents, it is evident Class Counsel expended significant time and labor to prosecute this Litigation to a favorable conclusion. For years, Class

[5] *See also, e.g., Arkoma Gas Co. v. Otis Eng'g Corp.*, 1993 OK 27, ¶¶6-7, 849 P.2d 392 (Oklahoma Supreme Court precedent "makes clear that the trial court may consider factors other than reasonable hours multiplied by a reasonable rate in determining a reasonable attorney fee under" prevailing-party statutes); *Southwestern Bell Tel. Co. v. Parker Pest Control, Inc.*, 1987 OK 16, ¶¶13-17, 737 P.2d 1186 (same); *Sneed v. Sneed*, 1984 OK 22, 681 ¶¶3-5, 681 P.2d 754 (finding exclusive focus on hours worked in contingency-fee case "ignores the required analysis of several interacting factors mandated by prior decisions of this Court"); *Hamilton v. Telex Corp.*, 1981 OK 22, ¶¶25-27, 625 P.2d 106 ("time is a factor to be considered in connection with other criteria"); *Peters v. Am. Income Life Ins. Co.*, 2003 OK CIV APP 62, ¶71, 77 P.3d 1090; *Pursley v. Mack Energy Co.*, 1995 OK CIV APP 129, 908 P.2d 289, 291.

Counsel worked diligently investigating, analyzing, and litigating the Class' claims against XTO. Class Counsel took substantial fact discovery in this case, including reviewing millions of pages of documents; taking multiple depositions; and exchanging written discovery. Class Counsel also engaged in substantial expert discovery, including consulting with and preparing expert witnesses; preparing expert reports; accounting review and analysis; land and lease examination and analysis; and engineering evaluation and analysis. In addition, Class Counsel engaged in substantial motion practice including motions to dismiss, to stay proceedings, to consolidate, class certification, and briefing and arguing a Rule 23(f) appeal of the district court's order granting class certification to the Tenth Circuit. This hard-fought litigation led to multiple formal mediation sessions over the course of several months; settlement negotiations; damages modeling; and ultimately, the Settlement. Overall, Class Counsel dedicated 18,794.66 of attorney and professional hours to this Litigation and reasonably anticipate dedicating an additional 940.5 hours through final approval and distribution.

61. The second *Johnson* factor—the novelty and difficulty of the issues involved—also supports the requested fee award. *See Reirdon* Fee Order at ¶6(o). 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 Class' claims required Class Counsel to work with various experts to analyze complex data to support Plaintiff's legal theories and evaluate the amount of alleged damages. 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 Class further supports the fee request in this case.

62. 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 requested fee award. *See Reirdon* Fee Order at ¶6(p). Class Counsel—Nix, Patterson & Roach, LLP ("NPR"), Barnes & Lewis, LLP ("B&L"), and Gunderson Sharp, LLP ("GS") (n/k/a Rex A. Sharp, P.A. and Gunderson Law, P.C.)—have years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. As Judge West recently noted, "NPR 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*. Additionally, NPR has taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the energy industry and the defense contracting industry. *Id*. In my opinion, and Judge West's, Class Counsel "consists of some of the most experienced complex litigation attorneys in the country." *Id*. I have worked with NPR, and Jeff Angelovich and Brad Beckworth specifically, for well over a decade on many different cases, tackling a variety of novel and complex factual and legal issues in courts across the country. Utilizing tremendous creativity and zealous advocacy, these attorneys have achieved huge results for their clients. *Id*. For example, the Honorable Kimberly West of this Court recently commended Nix, Patterson & Roach LLP for their outstanding work in *Reirdon v. XTO*, where she held:

> NPR has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. NPR 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. Additionally, NPR 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….NPR 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. I witnessed this advocacy first-hand

> and commended NPR for their work in *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.)[.]

Id. (internal citations omitted); *see also 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.") (Transcript of Motion Hearing Before the Honorable Kimberly E. West, U.S. Magistrate Judge on October 25, 2012).

63. Further, B&L are the preeminent attorneys in oil and gas royalty class actions in Oklahoma. Robert Barnes was the first and only attorney to try a royalty underpayment class action in Oklahoma to verdict in *Bridenstine v. Kaiser-Francis*, Case No. CJ-2001-1, District Court of Texas County, OK CIV APP, Case No. 97,117 (unpublished) August 22, 2003; cert. denied June 26, 2006, Okla. Sup. Ct., Case No. DF-01569. Further, NPR and B&L have worked together extensively over the past seven years, obtaining hundreds of millions in recoveries for royalty owners in Oklahoma, including *Reirdon v. XTO*, *Chieftain v. QEP*, *Drummond v. Range*, *Cecil v. Ward*, *Chieftain v. Laredo* and *Chieftain v. SM Energy, et al.* Class Counsel's hard work and experience has paved the way for other attorneys in this area. In fact, class counsel in similar royalty underpayment cases have called upon B&L to help try their cases, for example, in *Hill v. Kaiser Francis Oil Co.*, No. 09-CV-07-R (W.D. Okla.). And, I understand that both firms have provided support in many royalty matters in an effort to help ensure that the rights of their clients are not compromised by other matters.

64. Further, Gunderson Sharp, LLP (now practicing separately through Gunderson Law, P.C. and Rex A. Sharp. P.A.) (collectively, "GSLLP"), has litigated class actions and complex commercial litigation in the Eastern District of Oklahoma, the Western District of

Oklahoma, the state courts of Oklahoma and numerous other state and federal courts around the country for decades.

65. This action clearly required Class Counsel's considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion. The case required investigation and mastery of complex and highly technical issues regarding royalty payment practices and policies in Oklahoma. In addition, XTO is represented by prominent and well-respected counsel, which should be considered because it further demonstrates the challenges faced by Class Counsel. Class Counsel's skill, knowledge and experience significantly contributed to the remarkable Settlement attained in this Litigation and therefore, is another factor supporting Class Counsel's fee request.

66. The fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and any time limitations imposed by the client or circumstances—supports the requested fee award. *See Reirdon* Fee Order at ¶6(s). The size of Class Counsel's law firms is relatively small. Thus, when Class Counsel undertakes major litigation, such as this Litigation against XTO, it necessarily limits Class Counsel's ability to undertake other complex litigation. Class Counsel have informed me that they have had to refuse to take on several new cases due to their ongoing case load, including this case. Throughout this case, Class Counsel devoted significant manpower and resources to the Litigation. Therefore, Class Counsel's willingness to prosecute this Litigation on a contingent fee basis and willingness to advance costs necessarily diverted attorney time and resources from other cases. Accordingly, this factor supports an attorneys' fee award of 14.496% of the Gross Settlement Value.

67. The fifth *Johnson* factor—the customary fee in similar cases—further supports Class Counsel's fee request. *See Reirdon* Fee Order at ¶¶6(t)-(v). As discussed above, this Court

and other federal and state courts in Oklahoma often approve similar fee awards in similar cases. For example, this Court recently awarded a fee in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla.) that represented 40% of the cash component of the settlement (and less than 20% of the total settlement value). *See Reirdon* Fee Order. Further, the Western District of Oklahoma recently approved a 40% fee and an approximately 39% fee in similar royalty underpayment class cases. *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). Importantly, the typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. Given Class Counsel's outstanding recovery, the past benefit conferred to Class Members owning interests in Ardmore Loop class wells due to XTO's implementation of new royalty payment practices on the Ardmore Loop and the future benefits they will receive as a result of XTO's agreement to continue these practices going forward, the fact that Class Counsel's fee request is in line with the typical fee award granted in similar royalty class action cases supports approval of the fee request. *See also* ¶73 *infra* (setting forth examples of customary fees awarded in Oklahoma royalty underpayment class actions); *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *3 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding that, under Oklahoma law, "[i]n the royalty underpayment class action context, the customary fee is a 40% contingency fee." (collecting cases)).

68. Moreover, a 40% fee is consistent with the market rate for the high quality legal services in royalty underpayment class actions. *See Reirdon* Fee Order at ¶6(v); *see also 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."). This Court has held a contingency agreement negotiated at the outset of the litigation when the risk of loss is uncertain is a useful measure. *See Reirdon* Fee Order at ¶¶6(v), (x); *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23 (finding the 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."); *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."). *See also* ¶73 *infra* (setting forth examples of customary fees awarded in Oklahoma royalty underpayment class actions).

69. After arm's-length negotiations with Class Counsel, Plaintiff agreed Class Counsel would represent Plaintiff on a contingency fee basis, not to exceed 40%. *See* Chieftain Decl. at ¶6; *see also Reirdon* Fee Order at ¶6(v); *Laredo* Fee Order at 8. Plaintiff also executed a declaration demonstrating his continued support of the fairness and reasonableness of Class Counsel's fee request. *See* Chieftain Decl. at ¶15. And, I spoke with Mr. Abernathy myself and heard first-hand that he strongly supports the Settlement.

70. The sixth *Johnson* factor—the contingent nature of the fee—also supports the fee requested. *See Reirdon* Fee Order at ¶¶6(w)-(x). 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. Courts consistently have recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *Id*. Indeed, 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 result for those they represent. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. In fact, Class Counsel received no reimbursement for their significant efforts and resources devoted to litigating several similar royalty underpayment actions in federal court where the courts denied class certification. *See, e.g.*, *Foster v. Apache*, No. CIV-10-0573-HE, 2012 U.S. Dist. LEXIS 116915 (W.D. Okla. Aug. 20, 2012); *Foster v. Merit Energy Co.*, No. CIV-10-758-F, 2012 U.S. Dist. LEXIS 76574 (W.D. Okla. May 14, 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). 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 Reirdon* Fee Order at ¶¶6(w)-(x). The contingent nature of this Litigation supports a fee award of $32,000,000.

71. The tenth *Johnson* factor—the undesirability of the case—supports the fee request. *See Reirdon* Fee Order at ¶6(y). Class Counsel filed this Litigation many years ago, understanding it would be protracted and expensive with Class Counsel advancing all costs. Class Counsel undertook substantial risk in devoting significant time and resources representing Plaintiff on a contingency basis in this complex class action when recovery and payment of fees and expenses remained uncertain. Indeed, as explained above, class counsel in similar cases—including in some instances the attorneys involved here—have expended significant time and resources litigating cases where the courts denied class certification.

72. The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the fee request. *See Reirdon* Fee Order at ¶6(z). Class Counsel and

Chieftain's President, Robert Abernathy, have a long-standing professional relationship lasting many years. Class Counsel has in the past and currently is representing Chieftain in several royalty underpayment actions in Oklahoma state and federal court. Further, as discussed above, Class Representative agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Chieftain Decl. at ¶6. And, Chieftain supports the fee request. *Id.* at ¶¶15-16. Accordingly, this factor supports Class Counsel's fee request.

73. The twelfth *Johnson* factor—awards in similar cases—supports the request. *See Reirdon* Fee Order at ¶¶6(t)-(u). The typical percentage for fees in royalty class actions in Oklahoma federal and state courts is 40%. *See, e.g., Laredo* Fee Order at 7 ("An award of forty percent (40%) of the settlement value is…within the range of acceptable fee awards in common fund cases."). As the below chart demonstrates, the overwhelming trend in Oklahoma state courts—where oil and gas is a major part of the state's economy and state courts have adjudicated many royalty underpayment cases—is to award fees of 40% of the common fund:

Case Name & Judge	Case No. & Court	Year Awarded	Common Fund	Attorney Fee
Rudman v. Texaco Hon. William Hetherington	CJ-97-1E Stephens Co.	2001	$25,000,000	40%
McIntoush v. Questar Hon. N. Vinson Barefoot	CJ-02-22 Major Co.	2002	$1,500,000	40%
Robertson/Taylor v. Sanguine Hon. Richard Van Dyck	CJ-02-150 Grady Co.	2003	$13,250,606	40%
Kouns v. ConocoPhillips Hon. Ray Dean Linder	CJ-98-61 Dewey Co.	2004	$4,300,000	42%
Mayo v. Kaiser-Francis (WI only) Hon. Richard Van Dyck	CJ-93-348 Grady Co.	2004	$5,000,000	40%
Continental v. Conoco Hon. Richard Perry	CJ-95-739; 2000-356 Garfield Co.	2005	$23,000,000	40%
Lobo v. BP (WI only) Hon. Gerald Riffe	CJ-97-72 Beaver Co.	2005	$150,000,000	40%
Velma-Alma v. Texaco Hon. C. Allen McCall, Jr.	CJ-2002-304 Stephens Co.	2005	$27,000,000	40%

Laverty v. Newfield Hon. P. Thomas Thorbrugh	CJ-98-06012 Tulsa Co.	2007	$17,250,000	40%
Simmons v. Anadarko Hon. Wyatt Hill	CJ-2004-57 Caddo Co.	2008	$155,000,000	40%
Brown v. Citation Hon. Richard G. Van Dyck	CJ-04-217 Caddo Co.	2009	$5,250,000	40%
Taylor v. ChevronTexaco Hon. Gerald Riffe	CJ-2002-104 Texas Co.	2009	$12,000,000	40%
Mitchusson v. EXCO Hon. Wyatt Hill	CJ-2010-32 Caddo Co.	2012	$23,500,000	40%
Drummond v. Range Hon. Richard Van Dyck	CJ-2010-510 Grady Co.	2013	$87,500,000	40%
Tatum v. Devon Energy Corp. Hon. Carl G. Gibson	CJ-2010-77 Nawata Co.	2013	$3,800,000	45%
Cecil v. Ward Petro. Hon. Wyatt Hill	CJ-2010-462 Grady Co.	2014	$10,000,000	40%
Fitzgerald Farms, LLC v. Chesapeake Operating, LLC Hon. Jon K. Parsley	CJ-2010-38 Beaver Co.	2015	$119,000,000	40%
Bank of America, N.A. v. El Paso Natural Gas Co., et al. Hon. Christopher S. Kelly	CJ-2004-45 Washita Co.	2017	$127,660,000	40%

As such, the fee request here of $32 million is fair and reasonable and entirely in accord with the attorneys' fees awarded in similar cases. *See, e.g.*, *Fitzgerald Farms*, 2015 WL 5794008, at *3-4 (explaining that Oklahoma state courts have demonstrated a "long history of awarding a 40% fee" in oil and gas royalty underpayment class actions).

74. The foregoing twelve *Johnson* factors are also included in the statutory enhancement factors in Oklahoma and thus, are supported by the same evidence under either federal common law or Oklahoma state law. *See* 12 OKLA. STAT. §2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. *See Reirdon* Fee Order at ¶6(z), n.8. As discussed above and based on my review of the various pleadings in this matter, it is clear that 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, XTO 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. And, as discussed further above, by accepting this representation on a contingent basis and advancing all litigation expenses, Class Counsel took on the monumental risk of no payment whatsoever for their services if a successful recovery was not obtained. Accordingly, I find this factor supports the fee request.

75. In summary, analysis of the *Johnson* factors and the Oklahoma enhancement factors strongly supports Class Counsel's application for a fee award of $32 million from the Gross Settlement Fund (which represents 40% of the Gross Settlement Fund and 14.496% of the Gross Settlement Value). The fifth *Johnson* factor—the customary fee in similar cases—together with other *Johnson* factors, such as the outstanding recovery achieved, Class Counsel's knowledge, skill and experience, the risks involved, and the complexity of the issues, further support the fee request.

Substantial, Additional Evidence Demonstrates the Reasonableness of the Fee Request

76. In addition to the specific factors discussed above, substantial additional evidence submitted in this action supports my conclusion that the fee request here is fair and reasonable. For example, further supporting Class Counsel's fee request, several absent Class Members filed affidavits endorsing the fee request as fair and reasonable. *See* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starcevich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust. And, University

of Oklahoma law professor Steven Gensler is submitting a declaration in support of Class Counsel's fee request. Professor Gensler submitted a declaration and testified at the fairness hearing in support of Class Counsel's request for attorneys' fees in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla. 2018) (Docket No. 124), and also submitted a declaration in support of Class Counsel's request for attorneys' fees in *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R (W.D. Okla. 2013) (Docket No. 182) (awarding a fee of $46.5 million, which represented approximately 39% of the cash portion of a $155 million settlement) ("*QEP* Fee Order").

77. In sum, I find that Class Counsel's fee request is fair and reasonable under both the *Johnson* factors and the Oklahoma factors and, therefore, should be approved.

Class Counsel's Fee Request Is Reasonable Under Oklahoma State Law

78. As discussed above, because the Parties contractually agreed that federal common law governs any fee and expense request here, the Court should apply the common fund approach. However, in the event that the Court declines to enforce the Parties' agreement, and instead chooses to apply Oklahoma state law *and* concludes that Oklahoma fee law requires a lodestar calculation, my opinion remains that the fee request of $32,000,000 is reasonable. *See Reirdon* Fee Order at ¶6(dd)-(tt).

79. Under Oklahoma law, Section 2023 controls the award of attorney's fees. *See* 12 OKLA. STAT. §2023(G). This statute was amended in 2013 to add a new subsection governing the calculation of attorney's fees, which includes the 12 *Johnson* factors discussed above, plus one additional factor. Notably, Section 2023 does *not* say that the court must perform a lodestar calculation first, and then adjust the fee based on the other factors. As such, it is my opinion that the amendments to Section 2023 were intended to supplant *State ex rel. Burk v. City of Oklahoma*

City, 598 P.2d 659, 661-62 (Okla. 1979), an opinion predating the amendments by almost 35 years, and to align Oklahoma practice with prevailing Tenth Circuit practice.[6] In applying Section 2023, Oklahoma district courts have held that in common fund cases, the primary factor is the percentage of recovery. *See Fitzgerald Farms*, 2015 WL 5794008, at *2 ("Oklahoma courts have long preferred the percentage method for awarding fees in Oklahoma oil and gas class actions[.]"); *see also Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45, at 8 (Okla. Dist. Ct. Washita Cty. Aug. 30, 2017) ("When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee.").

80. Regardlesss of what role this Court determines a lodestar calculation should play in the fee analysis (none, cross-check or a baseline subject to a multiplier), it is my opinion that the fee award in this case is reasonable.

81. The first element of a lodestar calculation is the number of hours expended in the pursuit of the litigation. In contingency-fee cases (like this one), where hourly billing invoices are not submitted to a paying client, Oklahoma courts often have found testimony based on the review of pertinent case files sufficient. For example, the Oklahoma Supreme Court rejected the argument that a fee award was excessive because an attorney "did not submit detailed time records as appellant maintains were required by" *Burk* and *Oliver's Sports*, holding instead that "testimony of the expert witnesses" that the contingency agreement was "reasonable for this case" sufficiently supported the trial court's fee award. *See Root v. Kamo Elec. Co-op*, 1985 OK 8, ¶¶46-47, 699

[6] For these reasons, I respectfully disagree with the Tenth Circuit's conclusion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P, et al.*, 861 F.3d 1182 (10th Cir. 2017) that federal judges must look to state law on attorney's fees in diversity class actions, and that common fund fee awards in Oklahoma are governed by *Burk*, 598 P.2d 659, 661-62.

P.2d 1083; *see also Unterkircher v. Adams*, 1985 OK 96, ¶¶3, 10-11, 714 P.2d 193 (finding attorneys' and expert witnesses' testimony that the contingency contract was reasonable in light of the *Burk* and ORPC 1.5(a) factors "ample evidence" to support the trial court's fee award); *Abel*, 1983 OK 109 at ¶¶6-8 (finding, after *Burk*, that "testimony of several practicing attorneys" supported time and labor factor under ORPC 1.5(a) and established reasonableness of one-third contingency-fee agreement); *Hamilton*, 1981 OK 22 at ¶¶23-27 (finding testimony of attorneys based on examination of "litigation file" and "time records" justified base hourly fee calculation). Following *Burk*, Oklahoma trial and appellate courts also have found that testimony in class action cases taken pursuant to a contingent fee agreement can support "the trial court's decision to award an incentive or bonus fee by extending the contingent fee agreement to the Class." *Adkisson, et al. v. Koch Indus. Inc., et al.*, Case No. 106,452 (Okla. Ct. Civ. App. Aug. 7, 2009) (unpublished), at ¶¶12-22 (upholding Oklahoma trial court's attorneys' fee award in class action settlement and finding the "Oklahoma Supreme Court's directive in *Burk* is consistent with federal cases allowing the extension of contingent fee agreements to the class")[7]; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294 ("once a class is certified and a decision on the merits is had, the trial court may decide whether to approve the contingent fee agreement, and whether to extend the contingent arrangement to all class members"); *Fitzgerald Farms*, 2015 WL 5794008, at *7-8 (finding counsel's declaration supplied a summary of class counsel's and hourly fees to support time and labor factor or lodestar analysis).

82. Consistent with the foregoing Oklahoma precedent, Class Counsel is submitting declarations regarding the time they spent litigating this case in support of their fee request that

[7] The Oklahoma Supreme Court issued an Order denying *certiorari* in *Adkisson v. Koch Industries, Inc.*, No. 106,452, on February 4, 2010.

include the number of hours worked by each individual. *See* Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP; Declaration of Robert N. Barnes and Patranell Britten Lewis; Declaration of Rex A. Sharp and Joe Gunderson; Declaration of Lawrence R. Murphy, Jr.; and Declaration of Michael Burrage. I have reviewed these declarations. These declarations demonstrate Class Counsel expended a total of 18,794.66 hours on this Litigation and reasonably anticipate spending an additional 940.5 through final approval and distribution.

83. The second element of a lodestar calculation is the hourly rate for the work performed. Class Counsel has provided hourly rates for each attorney and staff member for the services performed for different types of legal work. These rates are "predicated on the standards within the local legal community." *Burk*, 598 P.2d at 663; *see also Finnell v. Seismic*, 2003 OK 35, ¶17, 67 P.3d 339, 346 ("An attorney seeking an award must submit to the trial court detailed time records and must offer evidence of the reasonable value of the services performed based on the standards of the legal community in which the attorney practices."). The legal community in which Class Counsel practices is a national complex litigation firm. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (explaining that, in the lodestar context, courts generally look to the current billing rates of the attorneys in "the relevant marketplace, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" (quoting *Blum*, 465 U.S. at 896 n.11)). It is my opinion based on my extensive research and knowledge of attorneys' fees that the rates submitted by Class Counsel are fair and reasonable and should be approved.

84. The hourly rates submitted by Class Counsel are in line with the fee award recently approved by this Court in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla.). There, Judge West relied upon attorney declarations from Class Counsel similar to those

submitted here and found the hourly rates to be fair and reasonable. *See Reirdon* Fee Order at ¶6(mm) ("I find the hourly rates submitted by Class Counsel are in line with rates approved by federal courts across the country as well as in Oklahoma courts in complex litigation involving energy companies."). The hourly rates submitted here were recently approved by Judge West in *Reirdon*:

Title	Hourly Billing Rate
Senior Partner Robert Barnes	$900.00
Senior Partner Bradley Beckworth, Jeffrey Angelovich, Patranell Lewis, Michael Burrage and Larry Murphy	$875.00
Partner	$700.00
Associates– 6-plus years	$500.00
Associates– 4-6 years	$450.00
Associates– 2-4 years	$400.00
Associates– 1st year	$350.00
Project Associate (Manager)	$300.00
Project Associate	$275.00
Senior Paralegal	$275.00
Paralegal	$250.00
Legal Assistant	$200.00

Reirdon Fee Order at ¶¶6(ll)-(oo). These rates also align with the rates approved by the Honorable Lee R. West of the U.S. District Court for the Western District of Oklahoma in a complex shareholder derivative action, *In re Sandridge Energy, Inc. S'holder Derivative Litig.*, No. CIV-13-102-W, 2015 U.S. Dist. LEXIS 180740 (W.D. Okla. Dec. 22, 2015). In that decision, Judge West relied upon attorney declarations similar to the ones submitted by Class Counsel here to assess the time and labor expended by the lead counsel in the action. *See id.* at *10-11 & n.10 (citing counsel's declarations for amount of time expended in litigation). And, those declarations (Dkt. Nos. 328 & 328-2 through 328-4) demonstrate that the lodestar submitted in the *Sandridge* matter was comprised of hourly rates billed two years ago for partners in national complex litigation firms, like Class Counsel here, that ranged from $850 per hour (Whitten Burrage (Dkt.

No. 328-2)) to $940 per hour (Kaplan Fox (Dkt. No. 328-3)) to $1,150 per hour (Jackson Walker (Dkt. No. 328-4)). The Tenth Circuit affirmed this order on November 17, 2017, over four months *after* the Tenth Circuit's opinion in *EnerVest*.

85. From an empirical standpoint, numerous different data sources can be evaluated to compare the rates submitted by Class Counsel to those regularly charged for comparable representation in the national complex litigation legal community. For example, in previous research in this field, I have found that public filings in sophisticated federal bankruptcy litigation—an area of law in which many national complex litigation firms practice—often reveal the hourly rates that such firms charge for representation by their partners in complex bankruptcy matters, *where there is no risk of nonpayment of fees*. As the table below demonstrates, the standard hourly rate approved for partners from prominent complex litigation firms on the defense-side in high-stakes matters in one bankruptcy court between 2010 and 2012 (five to seven years ago) significantly exceeds the rates submitted by Class Counsel here:

Bankruptcy Fees Awarded to Complex Litigation Firms in the SDNY (2010-2012)			
Case Name	**Firm**	**Citation**	**Partner Rates**
In re Houghton Mifflin Harcourt Publishing Company, et al., Debtors, No. 12-12171 (REG)	Paul, Weiss, Rifkind, Wharton & Garrison LLP	(Bkrtcy. S.D.N.Y.) (May 2012) (Dkt. No. 55)	$895 - $1,120
In re Lightsquared, Inc., et al., Debtors, No. 12-12080 (SCC)	Milbank, Tweed, Hadley & McClory LLP	(Bkrtcy. S.D.N.Y.) (July 2012) (Dkt. No. 206)	$950 – $1,140
In re Eastman Kodak Company, et al., Debtors, No. 12-10202 (ALG)	Milbank, Tweed, Hadley & McCloy LLP	(Bkrtcy. S.D.N.Y.) (June 2012) (Dkt. No. 1492)	$825 – $1,140
In re 785 Partners LLC, Debtor, No. 11-13702 (SMB)	Proskauer Rose LLP	(Bkrtcy. S.D.N.Y.) (May 2012) (Dkt. No. 189)	$779 - $1,050
In re Dynergy Holdings, LLC, et al., Debtors, No. 11-38111 (CGM)	Sidley Austin LLP	(Bkrtcy. S.D.N.Y.) (Apr. 2012) (Dkt. No. 578)	$625-$1,050

In re Ambac Financial Group, Inc., Debtor, No. 10-15973 (SCC)	Wachtell, Lipton, Rosen & Katz	(Bkrtcy. S.D.N.Y.) (Nov. 2011) (Dkt. No. 701)	$975
In re The Great Atlantic & Pacific Tea Company, Inc., et al., Debtors, No. 10-24549 (RDD)	Kirkland & Ellis LLP	(Bkrtcy. S.D.N.Y.) (May 2011) (Dkt. No. 1566)	$580 - $995
In re CIT Group Inc. and CIT Group Funding Co. of Delaware LLC, Debtors, No. 09-16565 (ALG)	Sullivan & Cromwell, LLP	(Bkrtcy. S.D.N.Y.) (Jan. 2010) (Dkt. No. 229)	$850 - $965

86. Substantial survey data demonstrates a similar pattern. For example, a December 2009 report published in the *American Law Daily*[8] shows that the rates for bankruptcy lawyers at firms that regularly represent defendants in complex litigation exceeded $1,000 per hour over eight years ago:

Bankruptcy Fee Survey Data		
Firm	**Median Partner Rate**	**# of Partners Filing Billing Entries**
Simpson Thacher	$980	30
Cleary Gottlieb	$960	47
Shearman & Sterling	$950	17
Davis Polk	$948	14
Skadden Arps	$945	38
Paul Weiss	$925	24
Cadwalader	$900	29
Milbank	$900	55
Weil Gotshal	$843	142
Gibson Dunn	$840	29
Latham & Watkins	$830	57
White & Case	$825	21
Paul Hastings	$810	46

[8] Amy Kolz, *Bankruptcy Rates Top $1,000 Mark In 2008-09*, THE AM. LAW DAILY (Dec. 16, 2009), *available at* https://www.law.com/americanlawyer/almID/1202436371636/.

87. Additional data with respect to bankruptcy filings specifically involving energy companies with a place of business in Oklahoma demonstrates a similar pattern of hourly rates and supports the rates requested by Class Counsel here:

Bankruptcy Fee Data Specifically Involving Energy Companies With a Place of Business in Oklahoma		
Case Name	**Firm**	**Partner Rates Ranges**
Seventy Seven Energy, Inc.	Baker Botts	$800 - $1,300
Samson Resources Corporation	Kirkland Ellis	$665 - $1,375
Parallel Energy LP	Thompson Knight	$515 - $945
New Gulf Resources, LLC	Baker Botts	$800 - $1,300
Chaparral Energy, Inc.	Latham & Watkins	$925 - $1,350
Sandridge Energy, Inc.	Kirkland Ellis	$875 - $1,445
Sandridge Energy, Inc.	Akin Gump	$800 - $1,425
Midstates Petroleum Company, Inc.	Kirkland Ellis	$875 - $1,445
Midstates Petroleum Company, Inc.	Kirkland Ellis	$825 - $1,375
Midstates Petroleum Company, Inc.	Squire Patton Boggs	$805 - $1,150
Postrock Energy Corporation	Lowenstein, Sandler	$550 - $1,100
GMX Resources	Andrews Kurth	$475 - $1,090

88. Comparable billing rates for national complex litigation firms on the plaintiffs' side can be gleaned from a review of prior class action settlements in complex matters. The following table presents a summary of hourly rates approved from 2008 through 2012 in class action settlements in the U.S. District Court for the Southern District of New York—the court in which my previous empirical studies on class action settlements and attorneys' fees found the most class actions consistently were filed. Although these data are not all-inclusive, based on my experience and scholarly research, I believe they reflect a reasonable cross-section of market rates for qualified plaintiffs' counsel in complex class actions nationwide over the past decade:

National Class Action Plaintiff Firms' Billing Rates			
Case Name/Number	**Plaintiff Firm**	**Citation**	**Partners' Fee Range**
In re MGM Mirage Sec. Litig., No. 2:09-cv-01558-GMN-VCF	NPR, Kessler Topaz Meltzer & Check LLP and Robbins Geller Rudman & Dowd LLP	(D. Nev.) (Nov. 2015) (Dkt. Nos. 366-1, 367-1, 368-1)	$625 - $925
In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litig., No. 08-cv-2793 (RWS)	Berman DeValerio	(S.D.N.Y.) (Aug. 2012) (Dkt. No. 302-4)	$595 - $780
In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litig., No. 08-cv-2793 (RWS)	Labaton Sucharow LLP	(S.D.N.Y.) (Aug. 2012) (Dkt. No. 302-5)	$725 – $975
Board of Trustees of the AFTRA Retirement Fund et al. v. JPMorgan Chase Bank, N.A., No. 1:09-cv-00686 (SAS) (DCF)	NPR and Kessler Topaz Meltzer & Check LLP	(S.D.N.Y.) (May 2012) (Dkt. No. 187-1)	$625 - $735
In re Wachovia Equity Securities Litigation, No. 08 Civ. 6171 (RJS)	Kirby McInerney LLP	(S.D.N.Y.) (Apr. 2012) (Dkt. No. 106-5)	$600 - $800
In re Lehman Brothers Securities and ERISA Litig., No. 1:08-cv-05523 (LAK) (GWG)	Bernstein, Litowitz & Grossman LLP	(S.D.N.Y.) (Mar. 2012) (Dkt. No. 343-12)	$650 - $975
In re Lehman Brothers Securities and ERISA Litig., No. 1:08-cv-05523 (LAK) (GWG)	Kessler Topaz Meltzer & Check LLP	(S.D.N.Y. Mar. 2012) (Dkt. No. 343-13)	$600 - $725
In re Lehman Brothers Securities and ERISA Litigation, No. 1:08-cv-05523 (LAK) (GWG)	Labaton Sucharow LLP	(S.D.N.Y.) (Mar. 2012) (Dkt. No. 343-17)	$750 - $975
Rubin v. MF Global, Ltd., et al., No. 08 Civ. 2233 (VM)	Barrack Rodos & Bacine	(S.D.N.Y.) (Nov. 2011) (Dkt. No. 198)	$560 - $740
Rubin v. MF Global, Ltd., et al., No. 08 Civ. 2233 (VM)	Cohen Milstein Sellers & Toll PLLC	(S.D.N.Y.) (Nov. 2011) (Dkt. No. 198)	$700 - $795
In re Wachovia Preferred Sec. and Bond/Notes Litig., No. 09 Civ. 6351 (RJS)	Bernstein Litowitz Berger & Grossman LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-7)	$650 - $975

In re Wachovia Preferred Sec. and Bond/Notes Litig., No. 09 Civ. 6351 (RJS)	Kessler Topaz Meltzer & Check, LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-8)	$600 - $725
In re Wachovia Preferred Sec. and Bond/Notes Litig., No. 09 Civ. 6351 (RJS)	Robbins Geller Rudman & Dowd LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-9)	$565 - $775
Cornwell et al. v. Credit Suisse Group et al., No. 08 Civ. 03758 (VM)	Robbins Geller Rudman & Dowd LLP	(S.D.N.Y.) (July 2011) (Dkt. No. 117)	$565 - $795
Lapin v. Goldman Sachs & Co., No. 04 Civ. 2236 (RJS)	Kirby McInerney LLP	(S.D.N.Y.) (Nov. 2010) (Dkt. No. 129)	$600 - $900
Lapin v. Goldman Sachs & Co., No. 04 Civ. 2236 (RJS)	Glancy Binkow & Goldberg LLP	(S.D.N.Y.) (Nov. 2010) (Dkt. No. 129)	$625 - $725
In re MBIA, Inc., Sec. Litig., No. 08 Civ. 0264 (KMK)	Bernstein Litowitz Berger & Grossman LLP	(S.D.N.Y.) (Dec. 2011) (Dkt. No. 92)	$700 - $975
In re Refco, Inc. Secs. Litig., No. 05 Civ. 08626 (JSR)	Grant & Eisenhofer P.A.	(S.D.N.Y.) (Sept. 2010) (Dkt. No. 738-5)	$650 - $845
In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig., No. 07-cv-09633 (LBS) (AJP) (DFE)	Kaplan Fox & Kilsheimer LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-4)	$550 - $775
In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig., No. 07-cv-09633 (LBS) (AJP) (DFE)	Barrack, Rodos & Bacine	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-5)	$525 - $695
In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig., No. 07-cv-09633 (LBS) (AJP) (DFE)	Berger & Montague, P.C.	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-6)	$460 - $725
In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig., No. 07-cv-09633 (LBS) (AJP) (DFE)	Pomerantz Haudek Grossman & Gross LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-7)	$525 - $830
In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig., No. 07-cv-09633 (LBS) (AJP) (DFE)	Murray, Frank Sailer LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-8)	$675 - $750

In re Telik, Inc. Secs. Litig., No. 07 Civ. 04819 (CM)	Bernstein Liebhard & Lifshitz, LLP	(S.D.N.Y.) (Aug. 2008) (Dkt. No. 72)	$700 - $750

89. A more recent dataset was collected by the *National Law Journal* as a result of a survey of billing rates for 2014. *See* ALM Legal Intelligence, 2014 NLJ Billing Report (2014). This 2014 survey reported national *average* partner rates that ranged from $345 to $1,055 per hour and *average* associate rates that ranged from $135 to $678 per hour. *See id.* Thus, the data available related to the hourly rates charged by national complex litigation firms over the past decade supports and demonstrates the reasonableness of the rates submitted by Class Counsel here.

90. The reasonableness of Class Counsel's rates is further demonstrated by the fact that "59% of corporate counsel at large companies now pay at least one law firm $1,000 per hour" and many corporations pay hourly rates of up to $2,000 per hour. *See* Aebra Coe, LAW360.COM, *What Do the Highest-Paid Lawyers Make an Hour?* (May 11, 2016). Moreover, other courts have approved Class Counsel's rates of $850/hour and higher. *See, e.g.*, *In re MGM Mirage Sec. Litig.*, No. 2:09-cv-01558-GMN-VCF (D. Nev. Mar. 1, 2016) (Order Awarding Attorneys' Fees and Expenses (Dkt. No. 396)), *affirmed by* No. 16-15534 (9th Cir. Sept. 15, 2017) (unpublished).

91. In summary, based on my experience and extensive review of ample data related to the hourly rates charged by comparable, national complex litigation firms over the past decade, including the data set forth above, I conclude that the hourly rates submitted by Class Counsel in this action are reasonable and fit well within the customary rates charged by comparable firms in complex matters.

92. The third element of a lodestar calculation is to apply a multiplier to reflect the fact that plaintiffs' lawyers in common fund cases only get paid if they win. When their reasonable hourly rates are multiplied by the number of hours expended in this litigation and reasonably anticipated in the future, Class Counsel's base lodestar is equal to $12,383,513.32. Whether

analyzed through the lens of the "enhancement factors" as described by the Oklahoma Supreme Court in *Burk* or the "lodestar multiplier" sometimes applied by federal courts primarily outside the Tenth Circuit, the result in my opinion is the same: the total fee award requested by Class Counsel is reasonable and appropriate. To be sure, the total fee award requested by Class Counsel is 2.58408 times their reasonable base lodestar. In my opinion, this "enhancement factor" or "lodestar multiplier" is imminently reasonable and justified based on the facts and circumstances of this case and under the *Johnson*/Oklahoma enhancement factors. And, my opinion is supported by numerous federal and Oklahoma state court cases that have approved of similar or greater "enhancement factors" or "multipliers" in class action cases litigated pursuant to a contingency fee agreement. *See, e.g.*, *Fitzgerald Farms*, 2015 WL 5794008, at *8 (holding that, in "large common fund case[s] such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7" and, thus, concluding that "a multiplier of around 5 supports the 40% fee request and is well-within the parameters of Oklahoma case law" (citing similar class action fee awards in Oklahoma state court royalty underpayment common fund settlements)); *see also, e.g.*, *Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181-JLK, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6 (D. Colo. April 28, 2017) (finding that "[t]ypical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds" and collecting federal cases to support conclusion that "multiplier of 2.41 is within the range of those frequently awarded in common fund cases.").

Case Contribution Award

93. Class Representative requests the Court approve a Case Contribution Award to Class Representative of up to $225,000 from the Gross Settlement Fund as compensation for the substantial time and resources it devoted to this Litigation that were critical to achieving such a

remarkable result for the Class. *See* Chieftain Decl. at ¶17. It is my opinion that the modest Case Contribution Award requested by Class Representative is fair and reasonable and should be approved.

94. I have spoken with the President of Chieftain Royalty Company, Robert Abernathy, about his active participation in this matter. Based on my discussions with Mr. Abernathy and my review of Chieftain's Declaration, it is clear the excellent recovery attained in this case would not have been achieved but for Class Representative's willingness to file this lawsuit and contribute its time and resources throughout the case. Class Representative has worked with Class Counsel since the inception of this Litigation, reviewing pleadings, motions and other court filings, communicating regularly with Class Counsel, responding to document requests and interrogatories, searching for and producing documents, and making himself available for mediation sessions, meetings and hearings. *See* Chieftain Decl. at ¶¶8-12, 18-19. Moreover, based on my discussions with Mr. Abernathy, there is no evidence of collusion, conflict of interest, or any promises of recovery by Class Counsel. *Id.* at ¶20. There is no *quid pro quo* arrangement. Thus, the significant time and resources Class Representative devoted to this Litigation over the past ten years justifies the Case Contribution Award under the facts and circumstances of this case.

95. Significantly higher case contribution awards have been granted in similar cases. *See, e.g.*, *Laredo* Fee Order at 10 (awarding a 1% case contribution award); *Cecil v. Ward Petroleum Corp.*, CJ-2010-462, District Court of Grady County, OK (Judge Hill awarding 1% case contribution award); *Drummond v. Range Res.*, CJ-2010-510, District Court of Grady County, OK (Judge Van Dyck awarding 1% case contribution award); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Grady County, Oklahoma (July 11, 2003) (awarding 1% class representative fee); *Velma-Alama Indep. Sch. Dist. No. 15 v. Texaco Inc.*, No. CJ- 2002-304, District Court of

Stephens County, Oklahoma (Dec. 22, 2005) (awarding l-2% of total settlement amounts); *Continental Resources, Inc. v. Conoco Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (Aug. 22, 2005) at 11 ("Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.").

Litigation Expenses

96. Class Counsel seeks reimbursement of Litigation Expenses not to exceed $3,250,000 incurred in the prosecution of this case on behalf of Plaintiff and the Class. District courts in the Tenth Circuit allow reimbursement of expenses and costs incurred in litigating a class action. To date, Class Counsel has advanced millions of dollars to prosecute this Action on behalf of Class Representative and the Class with the risk of non-recovery and non-repayment, and will incur additional expenses in the future. Successfully prosecuting large class actions like this often requires the expenditure of millions of dollars. This is especially true in litigation against prominent and well-funded corporate defendants. Based on my discussions with Class Counsel regarding the Litigation and the expenses incurred, it is my opinion that these expenses were reasonable and necessary to achieve this outstanding Settlement. In the vast majority of class action settlements reported from 2009 through 2013 in my recent study, litigation expenses were reimbursed by courts. Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Conference: Attorneys' Fees In Class Actions: 2009-2013*, 92 N.Y.U.L. Rev. 937, 963 (2017). The median amount of expenses reimbursed in such cases was 1.71% of the total recovery and the mean amount of expenses reimbursed in such cases was 3.93% of the total recovery. *Id*. Here, the request for reimbursement of Litigation Expenses not to exceed $3,250,000 falls well below the median and mean amounts reimbursed by other courts, as $3,250,000 represents only 1.51% of the Gross

Settlement Value. For each of these reasons, it is my opinion that Class Counsel's Litigation Expenses should be reimbursed.[9]

The Form and Manner of Distribution of the Notice of Proposed Settlement is Adequate

97. The Federal Rules of Civil Procedure require the parties distribute the "best notice that is practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B). Courts are instructed to "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(l). Such notice must be reasonably calculated, under all of the circumstances, to apprise the class members of the proposed settlement and provide them an opportunity to object. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

98. Here, it is apparent the Parties utilized their best efforts to distribute Notice of the Proposed Settlement ("Notice") in a reasonable manner. Indeed, the Parties expended significant time and resources to effectuate distribution of the Notice to the Class. JND Legal Administration, the court appointed Settlement Administrator, distributed Notice via first class mail to the last known mailing address of each Class Member who the Parties were able to identify at that time with reasonable effort. XTO provided the necessary information to identify and disseminate Notice to the royalty owners in wells operated by XTO. However, XTO did not have the necessary information to distribute the Notice to royalty owners in wells in which XTO was not the operator. The contact information for the royalty owners in these non-operated wells is maintained by the respective third-party operators of such wells. In an effort to identify and effectuate Notice to

[9] Because Class Counsel is continuing to work on this case and I am executing this declaration well in advance of the March 26, 2018 Final Fairness Hearing, it is my understanding that Class Counsel's expenses will continue to accumulate, but will not exceed the amount stated in the Notice. It is my opinion that any amount up to the $3,250,000 stated in the Notice is fair and reasonable under the circumstances of this case.

royalty owners in non-operated wells, representatives of the Parties attempted to contact by telephone the third-party operators that distributed or distribute royalty on the Settling Parties' behalf during the Class Period. The Parties also served subpoenas on those operators who refused to provide the necessary royalty owner information or with whom counsel was unsuccessful at making contact, requesting the operators produce the information necessary to effectuate distribution of Notice. As a result of the Parties' efforts, the Settlement Administrator mailed Notices to 20,692 unique mailing records identified in the mailing data on February 12, 2018. *See* Declaration of Jennifer M. Keough on Behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement at ¶10. Further, the Settlement Administrator mailed Notices to an additional 470 records on February 21-22, 2018. *Id.* As a result of these Notices, Class Members comprising in excess of 99% of the Gross Settlement Fund received Notice of the Settlement via first-class mail. In addition, on February 7-8, 2018, the Settlement Administrator published the Notice in six newspapers in Oklahoma: (1) *The Oklahoman*, a paper of general circulation in Oklahoma; (2) *The Tulsa World*, a paper of general circulation in Oklahoma; (3) *The Daily Armoreite*, a paper of local circulation; (4) *The Fairview Republican*, a paper of local circulation; (5) *The McAlester News Capital & Democrat*, a paper of local circulation; and (6) the *Holdenville Tribune*, a paper of local circulation. *Id.* at ¶13. Finally, on February 6, 2018, the Settlement Administrator established a website dedicated to this Litigation—www.chieftain-xto.com—which contains various documents relevant to the Litigation and the Settlement. *Id.* at ¶14. The above steps demonstrate that the Parties expended more than reasonable efforts to distribute Notice to all Class Members.

99. Further, I find the form of the Notice meets all of the requirements under Federal Rule of Civil Procedure 23(c)(2)(B). The Notice clearly informs the Class about the nature of the

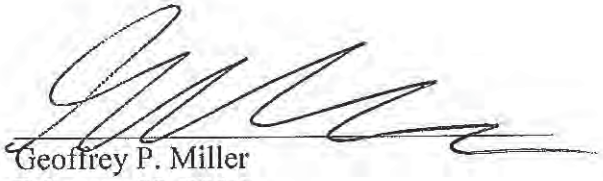
Litigation and the proposed Settlement, directs Class Members to the location of additional information, which is easily accessible, and provides instructions for Class Members to object or opt out.

100. Based on the foregoing facts, it is my opinion that the Notice provided here is adequate under the circumstances of this case.

Conclusion

101. In conclusion, I am of the opinion that (a) the Settlement proposed in this Litigation is fair, reasonable, and adequate for all Class Members; (b) the Settlement Class should be certified for settlement purposes; (c) Class Counsel's application for attorneys' fees of $32 million is fair and reasonable under the circumstances of this litigation; (d) Class Representative's request for a Case Contribution Award of up to $225,000 from the Gross Settlement Fund is fair and reasonable under the circumstances of this Litigation; (e) reimbursement of Litigation Expenses not to exceed $3,250,000 as stated in the Notice is fair and reasonable under the circumstances of this litigation; and (f) the manner of distribution and form of the Notice of Proposed Settlement is adequate under the circumstances.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Geoffrey P. Miller
February 23, 2018.