EXHIBIT L

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

DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 6:16-cv-00087-KEW**
	)	
XTO ENERGY INC.,	)	
	)	
Defendant.	)	

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

I, Steven S. Gensler, declare as follows:

1. I am the W. DeVier Pierson Professor of Law at the University of Oklahoma College of Law, where I teach Civil Procedure and related classes. I am the author of Federal Rules of Civil Procedure: Rules and Commentary (West) and a wide range of articles on federal practice and procedure. My curriculum vitae is attached as Exhibit 1.

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

3. In forming these opinions, I have reviewed, among other things: (1) pleadings, filings, and orders in this case; (2) the Settlement Agreement; (3) the Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, Class Representative's Request for Case Contribution Award, and Notice Of Proposed Settlement ("Miller Decl."); (4) the Declaration of Mediator Gary McGowan; (5) the Declaration of Jennifer M. Keough on Behalf of Settlement

Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement ("JND Decl."); (6) the Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl."); (7) the Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP ("NPR Decl."); (8) the Declaration of Patrick M. Ryan Filed on Behalf of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC ("RW Decl."); (9) the Declaration of Lawrence R. Murphy, Jr. on Behalf of Richards & Connor, PLLP ("R&C Decl."); (10) the Declaration of Robert N. Barnes and Patranell Britten Lewis ("B&L Decl."); (11) the Declaration of Michael Burrage ("WB Decl."); (12) the Declaration of Dorsey J. Reirdon ("Reirdon Decl."); (13) the Affidavit of Barbara Ley ("Ley Affidavit"); and (14) the Affidavits of Absent Class Members, Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust), Earl Dwayne Sager, and Robert Lovelace.

Summary of Opinions

4. It is my opinion that (a) the Settlement Agreement submitted for approval is fair, reasonable, and adequate; (b) the manner of distribution and form of the Notice of Proposed Settlement is fair and adequate; and (c) the fee award requested in this case—representing an estimated 20% of the total net value of the settlement, and 40% of the immediate cash payment from the defendant to the Class Members—is fair and reasonable compensation for the services provided to the Class Members and the benefits bestowed upon the Class Members by the terms of the settlement.

The Settlement

5. Plaintiff Dorsey J. Reirdon ("Reirdon") initiated this lawsuit against Defendant XTO Energy, Inc. ("XTO") in Marshall County, Oklahoma on January 29, 2016. XTO removed

the case to federal court pursuant to 28 U.S.C. § 1332(d), the class-action jurisdictional provisions enacted by the Class Action Fairness Act of 2005 ("CAFA").

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

7. Class Counsel investigated, analyzed, and litigated the claims against XTO for almost two years. This work included extensive discovery, reviewing thousands of pages of written materials and gigabytes of electronic records. The documents obtained and reviewed included XTO's communications with royalty owners and XTO's internal records showing how interest payments were made and when, and how they were not made and when. In pursuing and evaluating the Class' claims, Class Counsel also worked extensively with experts on subjects including accounting, marketing, and lease and title analysis.

8. During the first several months of 2017, Reirdon and Class Counsel expended considerable time and resources responding to XTO's effort to derail this class action by filing an early Motion to Strike Plaintiff's Class Allegations. These efforts included discovery taken to rebut XTO's assertion that the case could not proceed on a classwide basis.

9. The parties initiated settlement discussions in the late spring and early summer of 2017. They ultimately agreed to participate in formal mediation before Gary McGowan. A former founding, named partner in what is now the Susman & Godfrey law firm (formerly, Susman, Godfrey & McGowan), Mr. McGowan has been serving as a mediator of high-stakes disputes for over 27 years and has mediated over 2,500 matters. *See* Declaration of Mediator Gary McGowan at ¶4. In preparation for the mediation session, the parties submitted extensive mediation briefs outlining their respective positions on class certification, liability, and damages. *Id.* at ¶7. The formal mediation session took place on June 30, 2017, in Houston. *Id.* at ¶8. After approximately 10 hours of mediation, the parties reached agreement on the major terms of a settlement. *Id.* at ¶10. A week later, on July 6, 2017, the parties jointly notified the Court that they had reached agreement on the major terms and were working to finalize a settlement to present to the Court for approval. Joint Class Counsel Decl. at ¶17. The parties continued their negotiations regarding specific terms for an additional three months, culminating in the Settlement Agreement presently before the Court for approval. *Id.* at ¶18.

10. The Settlement Agreement provides the Class Members with several substantial benefits, including: (1) an immediate economic benefit of $20 million in cash; (2) an agreement by XTO to change its interest-payment practices going forward, yielding an estimated $20 million in future economic benefits; and (3) XTO's agreement to provide up to an additional $750,000 to pay for the cost of providing notice, administering the settlement, and distributing the settlement funds.

11. In sum, the total present value conferred on the Class Members by the Settlement Agreement is estimated to be at least $40,750,000. Ley Affidavit at ¶3.

The Settlement is Fair, Reasonable, and Adequate

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

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

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

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

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

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

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

14. The four-factor test set forth in *Rutter* represents the Tenth Circuit's way of focusing attention on the cues a judge has available to determine whether a proposed compromise is "fair." As the Advisory Committee on Civil Rules recently explained,[1] there are two ways for a judge to approach the question of fairness. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at C-71). One way is to examine the terms of the deal. The other way is to examine the process that led to the deal.

[1] After a five-year study period, the Advisory Committee on Civil Rules has proposed a package of amendments to Rule 23. The package has been approved by the U.S. Judicial Conference and forwarded to the U.S. Supreme Court. If approved by the Supreme Court and then not rejected by Congress, the amendments will take effect on December 1, 2018. The amendment package includes amendments to Rule 23(e), with accompanying Committee Notes. Both the changes and the Committee Notes are consistent with current Tenth Circuit practice. Some of the Committee Notes provide valuable insight into what really matters—and what judges meaningfully and usefully can do—when judges are asked to approve a proposed settlement.

15. The most important consideration in whether a settlement is fair, reasonable, and adequate is whether the benefits provided by the settlement are commensurate with the present, uncertain value of the claims, taking into account the cost, delay, and risk of litigating to judgment. *See* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 585 (West 2017 edition) ("In most cases, the key question is whether the value of the relief provided by the settlement is commensurate with the value of the claims to be released."). Making this type of forecast is not something that can be done "with arithmetic accuracy." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at C-71). That is why the Advisory Committee couches it in terms of "the likely *range* of possible classwide recoveries and the likelihood of success in obtaining such results." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at C-71). In other words, deciding whether the terms of the deal are fair involves, in part, deciding on a range of what the claims might be worth, based on the apparent strength of the claims and defenses. The settlement posture, of course, adds to the uncertainty and underscores the need to guard against second-guessing whether the class could have held out for more. Defendants do not volunteer information about how high they would go to settle. Of course, neither does the class volunteer information about what would be the lowest offer it would accept. To the contrary, both sides have every incentive to conceal that information from the other. In this environment of strategic misinformation, lawyers and clients do the best they can with the information available.

16. On top of forecasting a likely range of claim values, the fairness question also takes into account the cost and delay of litigating to judgment and the value of certainty. When parties settle, they trade the chance of total victory later for a known and certain result today. Plaintiffs take less than they would hope for; defendants pay more than they would like to. But in the

process, they avoid the risk of a worse outcome later. As the Tenth Circuit itself put it in the class-action approval setting, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015).

17. The other lens through which judges can try to assess the fairness of a settlement is to examine the process that led to it. Does it appear to be the product of vigorous advocacy? Did class counsel take the steps one would expect of a vigorous advocate to gather the information needed to assess the strengths and weaknesses of the claims and defenses, and to gain the leverage needed to press for the best result possible in settlement negotiations? "Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at C-71).

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

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

20. *The first factor: "whether the proposed settlement was fairly and honestly negotiated*." By any account, the Settlement was the result of a vigorous, intensive, arms-length, adversarial process. XTO moved aggressively to start with its motion to strike the class allegations. Class Counsel vigorously opposed that motion and undertook significant discovery, both to fend off the motion to strike and to build its case. Class Counsel also began developing

the expert resources customarily needed in this type of high-stakes class-action litigation. These efforts, together with Class Counsel's considerable experience litigating oil-and-gas royalty class actions, allowed Class Counsel to evaluate the strengths and weaknesses of the claims and defenses and thoroughly and skillfully advocate for the Class during settlement negotiations. The parties then conducted mediation before an experienced and highly-regarded mediator. The mediation successfully brought the parties to an agreement on the major terms of the settlement, and the parties then spent the next three months working out the remaining terms and drafting the final Settlement Agreement.

21. *The second factor: "whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt."* During the course of this case, XTO steadfastly denied that it violated its interest-payment obligations under the PRSA. In the Settlement Agreement, XTO continues that denial and disclaims any future duty under the PRSA to pay statutory interest automatically. XTO asserted numerous affirmative defenses, including that the class claims are barred in whole, or in part, by the applicable statute of limitations.[2] Whether XTO violated its interest-payment obligations under the PRSA, what damages would result, and how far back damages could run were all vigorously contested questions placing the ultimate outcome of the litigation in doubt. Moreover, XTO aggressively opposed certification for litigation purposes, going so far as filing a preemptive motion to strike the class allegations. In a class action, uncertainty about whether a case will be certified for litigation (as opposed to settlement) is another factor placing the ultimate outcome of the litigation in doubt. *See, e.g.*, *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015) (listing obstacles to proceeding as a class action among

[2] The class definition in the Original Petition contained no temporal limitation. As proposed, the Settlement Class extends back eight years, encompassing non-excluded persons who received royalty payments from XTO (or its designee) between January 1, 2009 and October 31, 2017.

those that placed the outcome of future litigation in doubt); *see also* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at C-71) ("If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.").

22. *The third factor: "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation."* Despite XTO's continuing assertion that the PRSA did not and does not require automatic interest on late royalty payments, and despite the aggressive posture it has taken to contest class certification for litigation purposes, XTO has agreed to pay $20 million in back damages and to change its payment practices to conform to the Class's view of what is required under the PRSA. Both elements of recovery represent a substantial victory for the Class Members. XTO's agreement to pay statutory interest going forward amounts to a *de facto* full recovery for future damages. Is it possible that the Class might have succeeded in obtaining litigation certification and then prevailed entirely on the merits, securing a greater recovery? It is possible but irrelevant, because it is also possible for class-action plaintiffs to lose on the merits, get only a fraction of the damages sought, or never even get to proceed as a litigation class because certification is denied. Is it possible that the Class could have held out for more? Again, it is possible but irrelevant because the question is not whether the settlement is perfect but whether it is a fair, reasonable, and adequate one, taking into account the uncertainties and adversarial dynamics of settlement negotiations. As the Tenth Circuit emphasized when affirming a settlement approval over an objector's speculation that some better terms might have been attained, it was not unreasonable for the class to accept the terms of the settlement "instead of deciding to undertake expensive litigation, with an uncertain outcome, in

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

23. *The fourth factor: "the judgment of the parties that the settlement is fair and reasonable."* Finally, it is evident that the parties believe that the settlement they reached, after contested litigation and arms-length negotiation, is fair and reasonable. Mr. Reirdon, as named plaintiff, explains his full support for the settlement in his declaration. *See* Reirdon Decl. Class Counsel also describe their full support for the settlement in their declaration. *See* Joint Class Counsel Decl. Further, as of the time I executed this declaration, several absent Class Members had signed affidavits supporting the Settlement. *See* Affidavits of Michael J. Weeks, Earl Dwayne Sager, and Robert Lovelace.

The Form and Manner of Notice

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

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

26. The parties retained JND Legal Administration to administer the settlement. JND is an established class-action claims administrator with extensive experience and expertise in handling class-action settlement administration. *See* JND Decl. at ¶¶1-5. In accordance with the Preliminary Approval Order, and at the direction of the parties, on December 1, 2017, JND mailed

the Notice of Proposed Settlement, Motion for Attorneys' Fees, and Fairness Hearing via first-class mail to the last known mailing address (verified and updated for changes of address through the U.S. Postal Service's database) of each class member who could be identified from the payment history data provided by XTO pursuant to the Settlement Agreement. *Id.* at ¶¶8-11. For notices returned as undeliverable, JND will conduct follow-up investigation to try to get an updated address for re-mailing. 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. As such, the Parties will distribute the settlement proceeds to the third-party operators, who will then distribute their respective settlement allocations to royalty owners in their wells. On December 6, 2017, JND arranged for the Summary Notice to be published in *The Oklahoman* and *The Tulsa World*, the two largest general circulation papers in Oklahoma, and in four papers of local circulation: *The Daily Armoreite*, *The McAlester News Capital & Democrat*, and *The Holdenville Tribune*. *Id.* at ¶12. On December 7, 2017, JND arranged for the Summary Notice to be published in *The Fairview Republican*. *Id.* Finally, on December 1, 2017, the settlement notices were posted on the website dedicated to this litigation. *Id.* at ¶13.

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

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

The practices employed in this case and carried out by JND are industry standard and are routinely approved as part of administering oil-and-gas royalty class action settlements.

The Fee Request

29. In this common-fund class action, the Court is authorized to make a fee award to Class Counsel to recognize the work done on behalf of, and the benefit conferred upon, all Class Members. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 591 (West 2017 edition).

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

31. In this case, the parties have agreed to use federal-law standards to measure reasonableness. Settlement Agreement, ¶¶7.1, 11.8.[3]

[3] The choice-of-law clause avoids the current uncertainty in the Tenth Circuit about what law governs the determination of class counsel fees when the settlement agreement does not specify the law to be applied. In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P., et al.*, 861 F.3d 1182 (10th Cir. 2017), a panel of the Tenth Circuit held that, in diversity class-action cases, the federal court should look to state law for determining the reasonableness of class counsel's fee award. A petition for rehearing is pending. That decision, if left in place, would change how fee awards have been calculated in the Tenth Circuit for over 30 years and would place the Tenth Circuit in conflict with the fee-award practices of every other circuit. Amicus briefs in support of the petition for rehearing have been filed by leading procedure professors, including Arthur Miller of the NYU School of Law, who was the Reporter for the Civil Rules Advisory Committee in 1966 when the modern version of Rule 23 was adopted. The choice-of-

32. Under the federal-law standards followed in the Tenth Circuit, the preferred method for determining the reasonableness of a fee award in a common fund case is the percentage of recovery method. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (Dkt. No. 52) ("*Laredo* Fee Order"); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010) (endorsing the percentage of recovery method for common fund cases).

33. Since 1988, the Tenth Circuit has instructed district courts to analyze the reasonableness of fee awards under the factors developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. The *Johnson* factors are (1) the time and labor required, (2) the novelty and difficulty of the questions presented by the case, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Id.*

34. Because the *Johnson* factors were developed in the context of statutory fee-shifting, the Tenth Circuit held that the scheme should be modified when applied in a common fund case to better fit the setting. *See Brown*, 838 F.2d at 453. Not all of the factors will apply in every case. *Id.* at 456; *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998) (trial

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law clause here, adopting federal standards for determining reasonableness, avoids the current uncertainty in the Tenth Circuit and restores the method of determining reasonableness to that which has been used in the Tenth Circuit for decades.

courts need not specifically address each factor in every case). And the weight to be given each factor varies when the court is awarding fees from a common fund. *Brown*, 838 F.2d at 456.

35. The most important difference in the application of the *Johnson* factors in common fund cases is the emphasis placed on the eighth factor—the result obtained by Class Counsel. In a common fund case, the result obtained is the most important factor and deserves the greatest weight. *Brown*, 838 F.2d at 456. As the Advisory Committee later put it when adopting the 2003 amendments to Rule 23, "[f]or a percentage fee approach to fee measurement, results achieved is the basic starting point." FED. R. CIV. P. 23(h) advisory committee's note (2003).

36. The other important difference is the diminished role of the first *Johnson* factor—the time and labor involved. In *Brown* itself, the Tenth Circuit recognized that the differences between common fund cases and statutory fee cases cautioned against importing a formal lodestar requirement—the usual starting point in statutory fee-shifting cases—into common fund cases. Accordingly, the Tenth Circuit recast the nature of the "time and labor" inquiry in common fund cases. While "time and labor" is a factor to be considered, the court need not conduct a lodestar analysis to assess it. *Brown*, 838 F.2d at 456 & n.3; *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013) (lodestar analysis is not required); *CompSource Okla. v. BNY Mellon, N.A.*, 2012 WL 6864701, *8 (E.D. Okla. 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions."); *Childs v. Unified Life Ins. Co.*, 2011 WL 6016486, *15 n.10 (N.D. Okla. 2011) ("Because the other *Johnson* factors, combined, warrant approval of the common fund fee sought by class counsel, the Court need not engage in a detailed, lodestar-type analysis of the 'time and labor required' factor."). Rather, the court may make a general finding regarding the

expenditure of time and labor based on the record as a whole. *See, e.g., Laredo* Fee Order; *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520, Dkt. No. 150 (W.D. Okla. July 31, 2014).

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

38. In my opinion, the result achieved supports the request for a fee award of $8,000,000, an amount that represents 40% of the up-front cash payment of $20,000,000, but which is less than 20% when calculated as a percentage of the estimated total benefit of $40,750,000 conferred on the Class Members.

39. First, the $20 million in cash that XTO has agreed to pay represents approximately 72% of the principal underpaid and unpaid statutory interest claimed by the Settlement Class. Ley Affidavit at ¶3. That is an excellent result in light of the cost, delay, and risk associated with future litigation. Even when a party has strong claims, it is reasonable to accept the immediate and certain benefit of partial payment rather than face the risks already known—or expose itself to future unexpected setbacks—that come with future litigation. As the Tenth Circuit appreciates, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015). In this case, the Class Members have strong claims. But there are no sure things in high-stakes class-action litigation. The case would still need to be certified for litigation, something XTO has strenuously opposed. The Class Members would need to prevail on their theory of liability, something XTO has vigorously contested. Uncertainties exist as to the measure of damages and the time period for which they are available. Even for strong claims, getting a defendant like

XTO—who surely wished to pay less up-front cash to settle—to pay 72% of the principal underpaid and unpaid statutory interest claimed by the Settlement Class for the entire Class Period (including two years XTO contends are outside the applicable limitations period) is a strong result.

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

41. The Settlement also provides a very substantial future benefit to Class Members. During the course of this litigation, XTO has asserted that it does not need to pay statutory interest until an individual royalty owner specifically makes a demand for it in writing. In the Settlement Agreement, XTO continues to take that position. As history has shown, few royalty owners have been experienced or savvy enough to make the demand that XTO says is required to trigger statutory interest payments. As part of the Settlement, however, XTO has agreed to change its practices and automatically pay statutory interest to all, without the need for a specific demand. To put it plainly, XTO has agreed to implement the very thing that the Class Members asked for by way of injunctive relief. Class Counsel's conservative estimate is that the statutory interest XTO will automatically pay to Class Members in the years to come will exceed $20 million dollars in net present value.

42. It is well established that the value of future benefits should be included when determining the size of the recovery obtained for the class. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010); *see also Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013)

(awarding $46.5 million in attorneys' fees on a $155 million gross settlement fund, $40 million of which constituted future benefits). Thus, even though Class Counsel is not asking the Court to award a fee from the future benefit, the existence of the future benefit is still relevant to the fee request because it is a part of the Class' recovery and therefore speaks to the overall quality of the result.

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

44. Four of the *Johnson* factors examine, in different ways, whether the fee request is consistent with the market for legal representation of this type.[4] This makes sense in that absent Class Members do not have an express, pre-existing attorney-client relationship with Class Counsel. In determining how much Class Counsel should be paid for the work done on absent Class Members' behalf, it is appropriate to consider what clients agree to pay their lawyers when a direct attorney-client relationship exists.

45. Here, after arm's-length negotiations with Class Counsel, Plaintiff agreed Class Counsel would represent Plaintiff on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7. At the time this agreement was reached, Plaintiff understood a 40% contingency fee was at or below the market rate. *Id*. It is also my understanding that 40% is a typical contingent

[4] These factors are: (5) the customary fee; (6) whether the fee is fixed or contingent; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

fee agreement in oil and gas royalty class action litigation in Oklahoma. *See* Declaration of Geoffrey P. Miller at ¶59 (listing numerous Oklahoma state court cases awarding 40% attorneys' fees from common fund); *see also 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)).

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

47. Another way of comparing the fee request to the market for comparable legal services is to consider awards in similar cases (*Johnson* factor #12). The 40% fee request in this case is consistent with what many federal and state courts[5] in Oklahoma have awarded in other royalty class actions, as is more fully set out in the Declaration of Geoffrey P. Miller.

48. Seven of the *Johnson* factors examine, in different ways, Class Counsel's dedication of its time, effort, and skill, and commitment to the case.[6] As noted above, these factors

[5] Oklahoma state court awards provide an appropriate point of comparison because Oklahoma law considers the same factors. *See* 12 O.S. 2023(G)(4)(e) (listing thirteen factors, the first twelve of which are the *Johnson* factors); *Burk v. Oklahoma City*, 1979 OK 115 ¶8 (adopting *Johnson* factors as part of two-step process).

[6] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (7) any time limitations imposed by the client or the circumstances; (9) the experience, reputation and ability of the attorneys; and (10) the undesirability of the case.

are less important in a common fund case (rather than a fee-shifting case) because the most important determinant of the lawyer's contribution—and therefore the most important factor in setting the fee—is the outcome the lawyer was able to achieve. *See Brown*, 838 F.2d at 456. However, a few of these factors deserve specific attention.

49. Having reviewed the history of this case and the docket, and having reviewed selected critical pleadings, filings, and orders, I find that the time and labor factor of the *Johnson* test supports approval of Class Counsel's fee request. Class Counsel invested significant time and money over nearly two years of litigation with no guarantee of reimbursement or recovery. As experienced oil-and-gas royalty-payment class action litigators, Class Counsel knew exactly what needed to be done and what tasks were best calculated to advance the likelihood of certification and to marshal the proof needed to prevail in court or in a favorable settlement. That said, the Court knows as well as anyone the challenges and complexity of cases like this and the risk Class Counsel undertook in representing the Class.

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

51. Though I suspect the Court does not need me to attest to the skill and reputation of Class Counsel, it is nonetheless true that the firms of Nix, Patterson, and Roach, LLP and Ryan Whaley Coldiron Jantzen Peters & Webber PLLC are leaders in the field of class action royalty

litigation. Having worked with Nix, Patterson, and Roach, LLP on multiple occasions, and based on my knowledge of their work in those cases, and having served as a consultant or expert in many other class actions, it is my opinion that they are excellent lawyers well-deserving of their reputation as being among the very best in the field.

52. A lodestar calculation—either as a discretionary cross-check under federal fee law, or should the court conclude that Oklahoma law controls *and* that Oklahoma fee law requires a lodestar basis for the calculation of the reasonable fee award—confirms that the fee award requested in this case is reasonable.

53. Before turning to the lodestar calculation in this case, it bears repeating that it is far from clear that one is required. A lodestar calculation clearly is not required under the Tenth Circuit's case law. And it is questionable whether one is required even under Oklahoma law. In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P, et al.*, 861 F.3d 1182 (10th Cir. 2017), after concluding (I believe erroneously) that federal judges must look to state fee law in diversity class actions, the panel then concluded that common fund fee awards in Oklahoma are governed by *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 661-62 (Okla. 1979). However, the Oklahoma Legislature amended 12 O.S. 2023 in 2013—nearly 35 years after *Burk*. In doing so, it added a new subsection governing the calculation of attorney's fees. That section, 2023(G)(4)(e), states that courts should consider 13 factors, only one of which is the "time and labor required." The statute does not say that the court must base fees on a lodestar calculation first, subject to adjustment based on the other factors. Compare the preceding section, 2023(G)(4)(d), which explicitly says that if the court appoints a lawyer to represent the class in a challenge to class counsel's fee request, the fee-challenge lawyer "shall be awarded reasonable fees by the court on an hourly basis." The best reading of Section 2023(G)(4)(e) is that it

supplanted *Burk* for class-action common fund cases, aligning Oklahoma practice with what had been prevailing Tenth Circuit practice. Such a reform ought to come as no surprise. The Oklahoma Supreme Court adopted the *Burk* factors almost 40 years ago, in the era when lodestar methodology was at its height, and before courts came to understand how inapt it is in the common fund setting. *Burk* itself relies on three cases from federal circuits that have all since disavowed the necessity of lodestar calculations and instead emphasize calculating fee awards in common fund cases as a percentage of the result.[7] Indeed, one of those circuits, the Third Circuit, led the charge in moving away from lodestar methodology as a result of its well-known and influential Task Force Report on Court Awarded Attorney Fees. Through Section 2023(G)(4)(e), the Oklahoma Legislature seems to have brought Oklahoma fee-award methodology into the modern era.

54. In the years after Section 2023(G)(4)(e) was enacted, Oklahoma district courts have understood it as a flexible scheme that is applied differently based on whether the case involves a common fund recovery or statutory fee-shifting. In *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008 (Okla. Dist. Ct. Beaver Cty. July 2, 2015), for example, Judge Parsley applied all of the Section 2023(G)(4)(e) factors but held that, in common fund cases, the primary factor is the percentage of recovery. Judge Parsley discussed at length the need to distinguish between common fund and statutory fee-shifting cases, stating: "[W]here, as here, the legal representation is undertaken on a contingent fee basis and that

[7] *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1270 (D.C. Cir. 1993) ("[W]e join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); Union Asset Management Holding A.G. v. Dell, Inc., 669 F.3d 632, 644 (5th Cir. 2012) (rejecting argument that the *Johnson* factors require a lodestar analysis, acknowledging the benefits of the percentage method in common fund cases, and holding that trial courts may use the percentage method in common fund cases).

representation results in a common fund recovery for the benefit of a class, Oklahoma applies a percentage analysis." *Fitzgerald* Fee Order, 2015 WL 5794008, at *2. In contrast, while the time-and-labor "factor is the most important in a fee shifting case, its relevance in the contingent fee common fund class actions such as this one is to show that the case was not a lay-down winner where little time was invested and little risk actually assumed." *Id.* at *6. Judge Parsley went on to explain that "Oklahoma courts have long preferred the percentage method for awarding fees in Oklahoma oil and gas class actions," noting that it rewards good results, promotes efficiency, and aligns the interests of class counsel with the class members. *Id.* Later in the opinion, Judge Parsley rejected the assertion, made by objectors, that the Oklahoma Supreme Court's 2014 opinion in *Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.2d 662, requires a lodestar calculation, pointing out that *Hess* was a statutory fee-shifting case, not a common fund case. *Id.* at *12. Ultimately, Judge Parsley approved a 40% fee based on a settlement that obtained approximately 41% of the damages claimed.

55. A very recent example is *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. August 30, 2017). At first, *Bank of America* might appear to be lodestar-based because the order begins by saying what the lodestar calculation would be. But in his analysis, Judge Kelly made clear that he was in fact applying the percentage method—and not the lodestar method—because the case involved a contingent fee and a common fund. In discussing the sixth factor listed in Section 2023(G)(4)(e)—whether the fee is fixed or contingent—Judge Kelly explained that, while the lodestar method applies in fixed-fee and statutory-fee cases, it does not apply in contingent-fee common-fund cases, stating: "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." *Id.* at 8. The fee order ultimately approves a 40% award based on all of the Section 2023(G)(4)(e) factors, but primarily the percentage of recovery, which the court found to also represent a reasonable multiplier of 3 to 3.6 applied to the lodestar. *Id.* at 5.

56. This court does not have to decide exactly what role a lodestar calculation should play in the fee analysis, however, because the fee award in this case is reasonable whether lodestar plays no role, whether it serves as a type of cross-check, or whether it serves as a baseline subject to a contingency-fee common-fund multiplier.

57. The first element of a lodestar calculation is the number of hours expended in the pursuit of the litigation. Class Counsel and Plaintiff's Counsel have submitted evidence that it dedicated 4,144 of attorney and professional hours to this Litigation and reasonably anticipate dedicating an additional 765 hours through final approval and distribution. *See* NPR Decl. at ¶¶32-34; RW Decl. at ¶¶13-15; B&L Decl. at ¶15; WB Decl. at ¶13; R&C Decl. at ¶13.

58. The second element of a lodestar calculation is the hourly rate for the work performed. The hourly rate is that which clients would customarily pay for the type of work involved in the relevant legal market. The relevant legal market in this case is high-stakes class-action oil-and-gas royalty litigation against wealthy oil and gas companies. *See* NPR Decl. at ¶¶13, 25. This legal market is no place for dabblers or dilettantes. Lawyers who take on big oil and gas companies seeking tens of millions of dollars in damages must be prepared for a long and expensive battle. *Id.* at ¶25. They must also have the expertise and acumen needed to get the case certified as a class action despite the inevitable and often extraordinary efforts the defendant will make to keep that from happening. *Id.* at ¶5. Moreover, the oil and gas defendant must know and appreciate that class counsel is sufficiently expert and resourced to not just survive but thrive in that environment. Any hint of weakness on the part of class counsel will embolden the defendant's

procedural resistance and undermine settlement. To get top dollar in a settlement, class counsel has to be—and be seen to be—as well-funded and as legally formidable as the oil and gas companies and the "big law" firms they retain. *Id.* at ¶5.

59. Because high-stakes class-action royalty litigation is almost exclusively done on a contingency-percentage/common fund basis, finding the market rate for class counsel is not as simple as it would be for the defense counsel, who typically bill by the hour. *See id*. Class Counsel and Plaintiff's Counsel believes that effective, equivalent market rates for what it does ranges from $400.00 to $875.00 per hour for attorneys. *See* NPR Decl. at ¶¶32-35; RW Decl. at ¶¶13-16; B&L Decl. at ¶¶15-16; WB Decl. at ¶¶13-16; R&C Decl. at ¶¶13-16. On information and belief, these rates are in line with the rates of national complex litigation firms and are lower than the billing rates charged by the large law firms hired to defend multi-million-dollar oil-and-gas class actions. *See* Miller Decl. at ¶¶67-76 (concluding 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"); *see also* Joint Class Counsel Decl. at ¶58; NPR Decl. at ¶¶23-29.

60. Taking the 4,144 hours and the 765 reasonably anticipated future hours and multiplying that by the market rates set forth in the Declarations, the lodestar base comes to $3,138,887.19. *See* NPR Decl. at ¶¶32-35; RW Decl. at ¶¶13-16; B&L Decl. at ¶¶15-16; WB Decl. at ¶¶13-16; R&C Decl. at ¶¶13-16.

61. The third element of a lodestar calculation is to apply a multiplier to reflect the fact that lawyers in common fund cases only get paid if they win. *See* NPR Decl. at ¶5. It is an adjustment to account for the risk that contingency/common fund lawyers take. (If a top lawyer can earn a guaranteed hourly rate representing a defendant, why would that lawyer represent plaintiffs if the hourly rate was the same but they only got paid if they win?) The lodestar accounts

for that factor with adjustments for the risk associated with contingency/common fund work, and also for the complexity of the work in question and the quality of the work performed. *See 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."); *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 661-62 (Okla. 1979) (applying multiplier under Oklahoma's lodestar method). Here, Class Counsel's multiplier of 2.55 is well within the range of multipliers that federal and Oklahoma state courts have found to be reasonable. *See* Miller Decl. at ¶77 (concluding that the 2.55 multiplier here is "imminently reasonable and justified based on the facts and circumstances of this case and under the *Johnson*/Oklahoma enhancement factors").

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

Steven S. Gensler
December 22 2017