

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

DORSEY J. REIRDON,

Plaintiff,

v.

XTO ENERGY INC.,

Defendant.

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Case No. 6:16-cv-00087-KEW

**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**

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 Stipulation and Agreement of Settlement dated October 9, 2017 (“Settlement Agreement”); (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 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

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 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

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).

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 1.

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) an award of \$8 million in attorneys' fees, which represents twenty percent (20%) of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total Settlement Value, is fair and reasonable under both federal common law and Oklahoma state law and should be approved; (c) reimbursement of up to \$300,000 in Litigation Expenses incurred in successfully prosecuting this Litigation is fair and reasonable and should be approved; (d) a Case Contribution Award for Class Representative of up to \$30,000 from the Gross Settlement Fund as compensation for his time and effort is fair and reasonable and should be approved; and (e) 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 2. I also have consulted with Class Counsel and Class Representative, Dorsey Reirdon, 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 Dorsey J. Reirdon (“Class Representative” or “Reirdon”) first brought the claims in this Litigation against XTO Energy Inc. (“XTO”) in Marshall County, Oklahoma on January 29, 2016. On March 4, 2016, 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 his Original Petition, Reirdon alleged XTO ignored its obligation under Oklahoma law to pay statutory interest to owners in Oklahoma entitled to receive oil and gas proceeds through a uniform policy and practice by which it did not pay statutory interest to any owners unless the owner specifically requested XTO do so. Petition at ¶¶1, 6, 7, 31. Based on these allegations, Reirdon brought claims for breach of statutory obligation to pay interest, fraud, accounting and disgorgement, and injunctive relief. *Id.* at ¶¶40-69.

12. Reirdon undertook substantial discovery related to the merits and class certification in this case, including reviewing thousands of pages of documents, taking depositions, and exchanging various written discovery. XTO produced, and Class Counsel reviewed, thousands of pages of written documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications,

internal logs of communications with royalty owners, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Class Counsel also took three critical depositions of XTO's employees. This case also required extensive legal research and expert analysis on liability and damages.

13. The Parties initiated settlement negotiations under the supervision of Gary McGowan, an experienced and respected mediator. *See* Declaration of Mediator Gary McGowan (the "McGowan Declaration"). Mr. McGowan is an experienced mediator and arbitrator doing business as McGowan Arbitration and Dispute Resolution, located in Houston, Texas. *Id.* at ¶4. Over the last 27 years, he has mediated over 2,500 matters. *Id.* Prior to Mr. McGowan's career as a mediator and arbitrator, he litigated commercial cases for 16 years, most notably as a founding partner of Susman, Godfrey & McGowan, a prominent boutique law firm that represents both plaintiffs and defendants in commercial litigation. *Id.* The Parties met with Mr. McGowan for a formal mediation session on June 30, 2017 in Houston, Texas. *See id.* at ¶8. Prior to this session, the Parties submitted extensive mediation briefs to Mr. McGowan outlining their respective positions on liability, damages, and the strengths and weaknesses of their respective cases, including class certification. *Id.* at ¶7. After a full day of mediation with Mr. McGowan, the Parties were able to reach an agreement on the major terms of the settlement. *Id.* at ¶10. On July 6, the Parties jointly notified the Court that the Parties reached a tentative agreement on major terms and were finalizing the terms of a settlement agreement for court approval. *See* Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl.") at ¶17. The Parties then spent almost three months extensively negotiating and drafting the terms of a formal settlement, which are documented in the Settlement Agreement. *Id.* at ¶18.

14. The Settlement offers Class Members several substantial benefits.

15. *\$20 Million Cash Payment.* First, the Settlement provides XTO will pay \$20 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 interest-bearing escrow account and is earning interest for the Class. The \$20 million cash alone is a remarkable recovery for Class Members.

16. *At Least \$20 Million in Binding Changes to XTO's Statutory Interest Payment Practices and Policies in Oklahoma.* Second, XTO will provide additional material benefits to the Class by way of binding changes to its statutory interest payment practices and policies in Oklahoma. Specifically, XTO has agreed that, commencing on the later of (i) December 31, 2017 or (ii) the Effective Date and continuing unless or until there is a change in the law, XTO will implement new procedures and policies for paying statutory interest to royalty interest owners and overriding royalty interest owners in Oklahoma without awaiting a request for such statutory interest. 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 value of these benefits is at least \$20 million. *See* Affidavit of Barbara A. Ley ("Ley Affidavit") at ¶3.

17. *\$750,000 In Administration, Notice and Distribution Costs.* Third, and in addition to the cash payment of \$20 million and the binding changes valued at \$20 million, 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.

18. Based on the foregoing, *I estimate the total present value of the Settlement as at least \$40.750 million.*

The Settlement is Fair, Reasonable and Adequate

19. 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.

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 October 17, 2017. Docket No. 79 at ¶5 (the “Preliminary Approval Order”).

20. *The first factor*—whether the Settlement was fairly and honestly negotiated—supports approval of the Settlement. “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).

21. 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 several months, the Parties, their experienced counsel and consulting experts engaged in serious settlement negotiations during which the Parties met for a formal mediation session, exchanged multiple briefs on their respective legal, factual and damages positions, and communicated frequently by telephone and email. And, Mr. Gary McGowan, a well-qualified and experienced mediator, supervised all settlement negotiations. *See McGowan Declaration*. These facts demonstrate the first factor weighs in favor of approval of the Settlement. *See Preliminary Approval Order* at ¶5.

22. *The second factor*—whether serious questions of law and fact exist, placing the ultimate outcome in doubt—also supports approval of the Settlement. 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 statutory interest 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.

23. *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. As discussed above, the \$20 million cash payment alone provides a significant benefit to the Class. In addition, the Class receives at least \$20 million in guaranteed and significant benefits going forward—binding changes to XTO's statutory interest payment practices and policies in Oklahoma. 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.

24. Finally, *the fourth factor*—the Parties' judgment that the Settlement is fair, reasonable and adequate—supports approval of the Settlement. 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 Plaintiff, Dorsey J. Reirton, 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 Dorsey J. Reirdon. 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 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.

25. In addition, “Counsel’s 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). 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.

26. 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 Fee Request is Fair and Reasonable

27. On October 17, 2017, 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 December 27, 2017. *See* Preliminary Approval Order at ¶18. Class Counsel and Class Representative now request (a) attorneys’ fees of \$8 million, which constitutes twenty percent (20%) of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total Settlement Value, (b) a Case Contribution Award of up to \$30,000 from the Gross Settlement Fund for Class

Representative, and (c) reimbursement of Litigation Expenses up to \$300,000. These requests were set forth in the Notice mailed to Class Members, as discussed in more detail below.

28. 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. Nothing in this record demonstrates that the Parties' contractual choice of law should not be given effect as written. *See* Restat. 2d of Conflict of Laws, § 187 ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied...unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."). 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 \$8 million is supported by their baseline lodestar of \$3,138,887.19, with a multiplier of 2.55, 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

29. 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.

30. The parties' decision to contractually agree that federal common law controls the right to, and reasonableness of, attorneys' fees, should be honored and enforced. "Absent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'" *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)). "These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to

be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.” Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988); *see also Williams v. Shearson Lehman Bros.*, 917 P.2d 998, 1002 (Okla. Ct. App. 1995) (concluding that parties’ contractual choice of law should be given effect because it does not violate Oklahoma’s constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) (“Parties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity.”).

31. 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 \$20 million 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.

32. 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

33. Earlier this 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 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 while the parties here, unlike in *EnerVest*, contractually agreed that federal common law controls the right to, and reasonableness of, attorneys' fees.

Fee Awards in Common Fund Cases

34. 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.

35. 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.

36. 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.

37. 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 Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). *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.

38. 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. 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.*

39. 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.”); *Court-Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246-49 (Oct. 8, 1985) (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).

40. 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. *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.

41. This Court has acknowledged the Tenth Circuit’s preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *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)).

42. 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).

43. 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.

44. 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 v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). 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 O.S. Supp. 2013 §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

45. In my opinion, the fee request here of \$8 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 \$8 million is reasonable. The *Johnson* factors (and 12 of the 13 Oklahoma statutory factors) are: (1) 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.

46. 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 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 \$20 million alone represents a significant recovery for the Class. Second, Class Counsel also obtained substantial and material binding changes to XTO’s statutory interest payment practices and policies in Oklahoma, having a present value of at least \$20 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 20% of the Gross Settlement Fund and Future Benefits. *See, e.g., 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).

47. The other *Johnson* factors also support the fee request. The first *Johnson* factor—the time and labor involved—supports the fee request. While this factor is relevant under both federal common law (*Johnson*) and Oklahoma state law (12 O.S. Supp. 2013 §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.”).³ 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 almost two years, Class Counsel worked diligently

³ 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.

investigating and analyzing the Class' claims against XTO and conducting extensive discovery and document review. Class Counsel, in conjunction with experts, reviewed thousands of pages of written documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications, internal logs of communications with royalty owners, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Class Counsel spent significant time working with accounting, marketing and lease and title analysis experts in the prosecution and evaluation of the Class' claims. Class Counsel engaged in a lengthy and complex mediation process to negotiate this outstanding Settlement, which provided Class Members a substantial cash recovery and binding changes to XTO's statutory interest payment practices and policies in Oklahoma. The process necessary to achieve this excellent Settlement required several months of negotiations, including a formal mediation session, telephone conferences, briefing on substantive factual and legal issues and extensive consultation with experts to evaluate and analyze damages. Overall, Class Counsel dedicated 4,144 of attorney and professional hours to this Litigation and reasonably anticipate dedicating an additional 765 hours through final approval and distribution.

48. The second *Johnson* factor—the novelty and difficulty of the issues involved—also supports the requested fee award. 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.

49. 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. Class Counsel—Nix, Patterson & Roach, LLP (“NPR”) and Ryan Whaley Coldiron Jantzen Peters & Webber PLLC—have 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 energy industry and the defense contracting industry. In my opinion, Class Counsel consists of some of the most experienced complex litigation attorneys in the country. 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. For example, the Honorable Kimberly West of this Court commended Nix, Patterson & Roach LLP for their outstanding work in *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.

50. Further, the law firm of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC is a litigation, energy, and environmental law firm based in Oklahoma City with national, regional, and state clients. The firm has litigated class actions and complex commercial litigations in courts across the country. With more than 48 years of experience in Oklahoma state and federal courts, Pat Ryan is best known for successful high-profile cases including his work as U.S. Attorney in the prosecution and conviction of Oklahoma City Bombing defendants Timothy McVeigh and Terry Nichols in Denver, and just recently securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Dept. of Justice. Mr. Ryan has defended numerous corporations and financial institutions against class actions, including BNY Mellon in the matter *CompSource v. BNY Mellon* in the United States District Court for the Eastern District of Oklahoma. Mr. Ryan has also prosecuted and defended numerous class action suits involving oil and gas, securities, accounting, environmental pollution and other topics and industries. Moreover, Mr. Ryan has prosecuted and defended major MDL cases, involving breast implants, pharmaceutical products, securities, tobacco products and other types of cases assigned by the MDL panel. Mr. Ryan is a Fellow of the American College of Trial Lawyers and a Fellow of the International Academy of Trial lawyers. He is a former President of the Oklahoma Chapter of the American Board of Trial Advocates, a Master Emeritus of all three Inns of Court for the Western District of Oklahoma and former Oklahoma County Bar President. Mr. Ryan has tried more than 200 jury trials as well as countless bench trials.

51. 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 statutory interest 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.

52. 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. 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. For almost two years, 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 20% of the Gross Settlement Fund and Future Benefits.

53. The fifth *Johnson* factor—the customary fee in similar cases—further supports Class Counsel's fee request. As discussed above, this Court and other federal and state courts in Oklahoma often approve similar fee awards in similar cases. For example, 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 and the substantial binding changes to XTO's statutory interest payment practices and policies in Oklahoma, 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* ¶59 *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)).

54. Moreover, a 40% fee is consistent with the market rate for the high quality legal services in royalty underpayment class actions. *See 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 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* ¶59 *infra* (setting forth examples of customary fees awarded in Oklahoma royalty underpayment class actions).

55. 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* Declaration of Dorsey J. Reirdon ("Reirdon Decl.") at ¶7; *see also* *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* Reirdon Decl. at ¶14. And, I spoke with Mr. Reirdon myself and heard first-hand that he strongly supports the Settlement.

56. The sixth *Johnson* factor—the contingent nature of the fee—also supports an award of 20% of the Gross Settlement Fund and Future Benefits. 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. 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. The contingent nature of this Litigation supports a fee award of 20% of the Gross Settlement Fund and Future Benefits.

57. The tenth *Johnson* factor—the undesirability of the case—supports the fee request. Class Counsel filed this Litigation almost two 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.

58. The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the fee request. Class Counsel currently is representing Class Representative in other litigation in Oklahoma courts. Further, as discussed above, Class Representative agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7. And, Mr. Reirdon supports the fee request. *Id.* at ¶¶16-17. Accordingly, this factor supports Class Counsel’s fee request.

59. The twelfth *Johnson* factor—awards in similar cases—supports the request. 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
<i>Rudman v. Texaco</i> Hon. William Hetherington	CJ-97-1E Stephens Co.	2001	\$25,000,000	40%
<i>McIntoush v. Questar</i> Hon. N. Vinson Barefoot	CJ-02-22 Major Co.	2002	\$1,500,000	40%
<i>Robertson/Taylor v. Sanguine</i> Hon. Richard Van Dyck	CJ-02-150 Grady Co.	2003	\$13,250,606	40%
<i>Kouns v. ConocoPhillips</i> Hon. Ray Dean Linder	CJ-98-61 Dewey Co.	2004	\$4,300,000	42%
<i>Mayo v. Kaiser-Francis (WI only)</i> Hon. Richard Van Dyck	CJ-93-348 Grady Co.	2004	\$5,000,000	40%
<i>Continental v. Conoco</i> Hon. Richard Perry	CJ-95-739; 2000-356 Garfield Co.	2005	\$23,000,000	40%
<i>Lobo v. BP (WI only)</i> Hon. Gerald Riffe	CJ-97-72 Beaver Co.	2005	\$150,000,000	40%
<i>Velma-Alma v. Texaco</i> Hon. C. Allen McCall, Jr.	CJ-2002-304 Stephens Co.	2005	\$27,000,000	40%
<i>Laverty v. Newfield</i> Hon. P. Thomas Thorbrugh	CJ-98-06012 Tulsa Co.	2007	\$17,250,000	40%
<i>Simmons v. Anadarko</i> Hon. Wyatt Hill	CJ-2004-57 Caddo Co.	2008	\$155,000,000	40%
<i>Brown v. Citation</i> Hon. Richard G. Van Dyck	CJ-04-217 Caddo Co.	2009	\$5,250,000	40%
<i>Taylor v. ChevronTexaco</i> Hon. Gerald Riffe	CJ-2002-104 Texas Co.	2009	\$12,000,000	40%
<i>Mitchusson v. EXCO</i> Hon. Wyatt Hill	CJ-2010-32 Caddo Co.	2012	\$23,500,000	40%
<i>Drummond v. Range</i> Hon. Richard Van Dyck	CJ-2010-510 Grady Co.	2013	\$87,500,000	40%
<i>Tatum v. Devon Energy Corp.</i> Hon. Carl G. Gibson	CJ-2010-77 Nawata Co.	2013	\$3,800,000	45%
<i>Cecil v. Ward Petro.</i> Hon. Wyatt Hill	CJ-2010-462 Grady Co.	2014	\$10,000,000	40%
<i>Fitzgerald Farms, LLC v. Chesapeake Operating, LLC</i> Hon. Jon K. Parsley	CJ-2010-38 Beaver Co.	2015	\$119,000,000	40%
<i>Bank of America, N.A. v. El Paso Natural Gas Co., et al.</i> Hon. Christopher S. Kelly	CJ-2004-45 Washita Co.	2017	\$127,660,000	40%

As such, the fee request here of \$8 million, which represents 20% of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total Settlement Value, is fair and reasonable and 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).

60. 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 O.S. Supp. 2013 §2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. As discussed above 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.

61. In summary, analysis of the *Johnson* factors and the Oklahoma enhancement factors strongly supports Class Counsel's application for a fee award of \$8 million from the Gross Settlement Fund, which represents 20% of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total 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

62. 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 Michael J. Weeks, Earl Dwayne Sager, and Robert Lovelace. 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 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*").

63. 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

64. 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, my opinion remains that the fee request of \$8 million is reasonable. In *Burk v. Oklahoma City*, 598 P.2d 659 (Okla. 1979), the Oklahoma Supreme Court adopted a two-step procedure for determining reasonable attorney's fees: (1) determine hourly compensation on an hours times rate basis, and (2) to that factor, add an amount determined from

the applicable factors set forth in *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187 (D.C. Cir. 1974). *Burk*, 598 P.2d at 661. The factors set forth in *Evans* are the now well-known “*Johnson* factors,” applied by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Burk*, 598 P.2d at 661. As such, I find these factors are satisfied, as discussed at length above. Thus, the only additional inquiry under Oklahoma state law is the determination of the time compensation factor, *i.e.*, a baseline lodestar.

65. In order to comply with the first step of this procedure, attorneys are advised to “present to the trial court detailed time records showing the work performed and offer evidence as to the reasonable value for the services performed for different types of legal work.” *Id.* at 663. Such time records need not be contemporaneous and may be “reconstructed.” *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76 at ¶14, n.20, 171 P.3d 890, 895 (citing *Burk*, 1979 OK 115 at ¶12); *see also Conti v. Republic Underwriters Ins. Co.*, 1989 OK 128 at ¶23, 782 P.2d 1357 (finding “recapitulation of [attorney’s] hours, based upon notes included in his trial notes” satisfied *Burk*); *Usrey v. Wilson*, 2003 OK CIV APP 25, ¶6, 66 P.3d 1000, 1002 (“[N]othing in *Burk* or *Oliver*’s prevents an attorney fee award based on a reconstruction of the time spent on a case based upon other records which verify the activity in the case, such as the court file or the attorney’s copies of letters, pleadings, or file memoranda.”). Oklahoma courts also have found affidavits submitted by attorneys attesting to the work they performed sufficient to support *Burk*’s time records consideration. *See, e.g., JLEE Co., L.L.C. v. Reneau Seed Co.*, 2014 OK CIV APP 65, ¶¶6-9 332 P.3d 297 (finding five-page affidavit from attorney submitted with the motion for attorney fees, outlining work performed and summarizing billing entries sufficient evidence under *Burk* to support fee award).

66. 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 to meet *Burk*'s guidance. 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 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")⁴; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100,

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

¶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).

67. 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 include the number of hours worked by each individual and their hourly rates. *See* Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP; Declaration of Patrick M. Ryan Filed on Behalf of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC; Declaration of Lawrence R. Murphy, Jr. on Behalf of Richards & Connor, PLLP; Declaration of Robert N. Barnes and Patranell Britten Lewis; and Declaration of Michael Burrage. I have reviewed these declarations. These declarations demonstrate Class Counsel expended a total of 4,144 hours on this Litigation and reasonably anticipate spending an additional 765 through final approval and distribution. Moreover, Class Counsel has provided hourly rates for each attorney and staff member for the services performed for different types of legal work. As required by *Burk*, these rates are “predicated on the standards within the local legal community.” 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)).

68. It is my opinion based on my extensive research and knowledge of attorneys’ fees that the hours and rates submitted by Class Counsel are fair and reasonable and should be approved.

69. The hourly rates submitted by Class Counsel are in line with the fee award approved in 2015 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*.

70. 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
<i>In re Houghton Mifflin Harcourt Publishing Company, et al., Debtors</i> , No. 12-12171 (REG)	Paul, Weiss, Rifkind, Wharton & Garrison LLP	(Bkrcty. S.D.N.Y.) (May 2012) (Dkt. No. 55)	\$895 - \$1,120
<i>In re Lightsquared, Inc., et al., Debtors</i> , No. 12-12080 (SCC)	Milbank, Tweed, Hadley & McClory LLP	(Bkrcty. S.D.N.Y.) (July 2012) (Dkt. No. 206)	\$950 – \$1,140
<i>In re Eastman Kodak Company, et al., Debtors</i> , No. 12-10202 (ALG)	Milbank, Tweed, Hadley & McCloy LLP	(Bkrcty. S.D.N.Y.) (June 2012) (Dkt. No. 1492)	\$825 – \$1,140
<i>In re 785 Partners LLC, Debtor</i> , No. 11-13702 (SMB)	Proskauer Rose LLP	(Bkrcty. S.D.N.Y.) (May 2012) (Dkt. No. 189)	\$779 - \$1,050
<i>In re Dynergy Holdings, LLC, et al., Debtors</i> , No. 11-38111 (CGM)	Sidley Austin LLP	(Bkrcty. S.D.N.Y.) (Apr. 2012) (Dkt. No. 578)	\$625-\$1,050
<i>In re Ambac Financial Group, Inc., Debtor</i> , No. 10-15973 (SCC)	Wachtell, Lipton, Rosen & Katz	(Bkrcty. S.D.N.Y.) (Nov. 2011) (Dkt. No. 701)	\$975
<i>In re The Great Atlantic & Pacific Tea Company, Inc., et al., Debtors</i> , No. 10-24549 (RDD)	Kirkland & Ellis LLP	(Bkrcty. S.D.N.Y.) (May 2011) (Dkt. No. 1566)	\$580 - \$995
<i>In re CIT Group Inc. and CIT Group Funding Co. of Delaware LLC, Debtors</i> , No. 09-16565 (ALG)	Sullivan & Cromwell, LLP	(Bkrcty. S.D.N.Y.) (Jan. 2010) (Dkt. No. 229)	\$850 - \$965

71. Substantial survey data demonstrates a similar pattern. For example, a December 2009 report published in the *American Law Daily*⁵ 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

72. 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

⁵ 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/>.

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

73. 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
<i>In re MGM Mirage Sec. Litig.</i> , 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
<i>In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litig.</i> , No. 08-cv-2793 (RWS)	Berman DeValerio	(S.D.N.Y.) (Aug. 2012) (Dkt. No. 302-4)	\$595 - \$780
<i>In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litig.</i> , No. 08-cv-2793 (RWS)	Labaton Sucharow LLP	(S.D.N.Y.) (Aug. 2012) (Dkt. No. 302-5)	\$725 - \$975

<i>Board of Trustees of the AFTRA Retirement Fund et al. v. JPMorgan Chase Bank, N.A.</i> , 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
<i>In re Wachovia Equity Securities Litigation</i> , No. 08 Civ. 6171 (RJS)	Kirby McInerney LLP	(S.D.N.Y.) (Apr. 2012) (Dkt. No. 106-5)	\$600 - \$800
<i>In re Lehman Brothers Securities and ERISA Litig.</i> , No. 1:08-cv-05523 (LAK) (GWG)	Bernstein, Litowitz & Grossman LLP	(S.D.N.Y.) (Mar. 2012) (Dkt. No. 343-12)	\$650 - \$975
<i>In re Lehman Brothers Securities and ERISA Litig.</i> , No. 1:08-cv-05523 (LAK) (GWG)	Kessler Topaz Meltzer & Check LLP	(S.D.N.Y. Mar. 2012) (Dkt. No. 343-13)	\$600 - \$725
<i>In re Lehman Brothers Securities and ERISA Litigation</i> , No. 1:08-cv-05523 (LAK) (GWG)	Labaton Sucharow LLP	(S.D.N.Y.) (Mar. 2012) (Dkt. No. 343-17)	\$750 - \$975
<i>Rubin v. MF Global, Ltd., et al.</i> , No. 08 Civ. 2233 (VM)	Barrack Rodos & Bacine	(S.D.N.Y.) (Nov. 2011) (Dkt. No. 198)	\$560 - \$740
<i>Rubin v. MF Global, Ltd., et al.</i> , No. 08 Civ. 2233 (VM)	Cohen Milstein Sellers & Toll PLLC	(S.D.N.Y.) (Nov. 2011) (Dkt. No. 198)	\$700 - \$795
<i>In re Wachovia Preferred Sec. and Bond/Notes Litig.</i> , No. 09 Civ. 6351 (RJS)	Bernstein Litowitz Berger & Grossman LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-7)	\$650 - \$975
<i>In re Wachovia Preferred Sec. and Bond/Notes Litig.</i> , No. 09 Civ. 6351 (RJS)	Kessler Topaz Meltzer & Check, LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-8)	\$600 - \$725
<i>In re Wachovia Preferred Sec. and Bond/Notes Litig.</i> , No. 09 Civ. 6351 (RJS)	Robbins Geller Rudman & Dowd LLP	(S.D.N.Y.) (Oct. 2011) (Dkt. No. 148-9)	\$565 - \$775
<i>Cornwell et al. v. Credit Suisse Group et al.</i> , No. 08 Civ. 03758 (VM)	Robbins Geller Rudman & Dowd LLP	(S.D.N.Y.) (July 2011) (Dkt. No. 117)	\$565 - \$795
<i>Lapin v. Goldman Sachs & Co.</i> , No. 04 Civ. 2236 (RJS)	Kirby McInerney LLP	(S.D.N.Y.) (Nov. 2010) (Dkt. No. 129)	\$600 - \$900
<i>Lapin v. Goldman Sachs & Co.</i> , No. 04 Civ. 2236 (RJS)	Glancy Binkow & Goldberg LLP	(S.D.N.Y.) (Nov. 2010) (Dkt. No. 129)	\$625 - \$725

<i>In re MBIA, Inc., Sec. Litig.</i> , No. 08 Civ. 0264 (KMK)	Bernstein Litowitz Berger & Grossman LLP	(S.D.N.Y.) (Dec. 2011) (Dkt. No. 92)	\$700 - \$975
<i>In re Refco, Inc. Secs. Litig.</i> , No. 05 Civ. 08626 (JSR)	Grant & Eisenhofer P.A.	(S.D.N.Y.) (Sept. 2010) (Dkt. No. 738-5)	\$650 - \$845
<i>In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig.</i> , No. 07-cv-09633 (LBS) (AJP) (DFE)	Kaplan Fox & Kilsheimer LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-4)	\$550 - \$775
<i>In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig.</i> , No. 07-cv-09633 (LBS) (AJP) (DFE)	Barrack, Rodos & Bacine	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-5)	\$525 - \$695
<i>In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig.</i> , No. 07-cv-09633 (LBS) (AJP) (DFE)	Berger & Montague, P.C.	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-6)	\$460 - \$725
<i>In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig.</i> , No. 07-cv-09633 (LBS) (AJP) (DFE)	Pomerantz Haudek Grossman & Gross LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-7)	\$525 - \$830
<i>In re Merrill Lynch & Co. Inc., Securities, Derivatives and ERISA Litig.</i> , No. 07-cv-09633 (LBS) (AJP) (DFE)	Murray, Frank Sailer LLP	(S.D.N.Y.) (Jun. 2009) (Dkt. No. 246-8)	\$675 - \$750
<i>In re Telik, Inc. Secs. Litig.</i> , No. 07 Civ. 04819 (CM)	Bernstein Liebhard & Lifshitz, LLP	(S.D.N.Y.) (Aug. 2008) (Dkt. No. 72)	\$700 - \$750

74. 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.

75. 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).

76. 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.

77. 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 \$3,138,887.19. 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 2.55 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

78. Class Representative requests the Court approve a Case Contribution Award to Mr. Reirdon of up to \$30,000 from the Gross Settlement Fund as compensation for the substantial time and resources he devoted to this Litigation that were critical to achieving such a remarkable result for the Class. *See* Reirdon Decl. at ¶18. It is my opinion that the modest Case Contribution Award requested by Mr. Reirdon is fair and reasonable and should be approved.

79. I have spoken with Mr. Reirdon about his active participation in this matter. Based on my discussions with Mr. Reirdon and my review of Mr. Reirdon’s Declaration, it is clear the excellent recovery attained in this case would not have been achieved but for Mr. Reirdon’s willingness to file this lawsuit and contribute his time and resources throughout the case. Mr. Reirdon 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* Reirdon Declaration at ¶¶8-11. Moreover, based on my discussions with Mr. Reirdon, there is no evidence of collusion, conflict of interest, or any promises of recovery by Class Counsel. *Id.* at ¶20. Thus, the significant time and resources Mr. Reirdon devoted to this Litigation over the past two years justifies the Case Contribution Award under the facts and circumstances of this case.

80. 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 1-2% 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

81. Class Counsel seeks reimbursement of Litigation Expenses not to exceed \$300,000 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 hundreds of thousands 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 \$300,000 falls well below the median and mean amounts reimbursed by other courts, as \$300,000 represents only 1.5% of the Gross Settlement Fund, and only 0.74% of the Total Settlement Value. For each of these reasons, it is my opinion that Class Counsel's Litigation Expenses should be reimbursed.⁶

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

82. 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)(1). Such notice must be reasonably calculated, under all of the circumstances,

⁶ Because Class Counsel is continuing to work on this case and I am executing this declaration well in advance of the January 24, 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 \$300,000 stated in the Notice is fair and reasonable under the circumstances of this case.

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).

83. 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. As such, the Parties will distribute settlement proceeds to the third-party operators, who will then distribute their respective settlement allocations to royalty owners in their wells. As a result of the Parties’ efforts, the Settlement Administrator mailed 37,147 Notices on December 1, 2017. *See* Declaration of Jennifer M. Keough on Behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement. The efforts to obtain Class Members’ information are continuing for distribution purposes. Indeed, of 69 royalty owners for whom XTO lacked address information, Class Counsel, along with their retained expert and consultant landmen, located addresses for 53 of them, and JND then sent notice to these addresses. *Id.* Moreover, of the 2,315 Notices originally returned as undeliverable, JND has located updated address information and re-sent Notices to 811. *Id.* As a result of these Notices, Class Members comprising approximately 98.3% of the Gross Settlement Fund received Notice of the Settlement via first-class mail. In

addition, on December 11, 2017, 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.* Finally, the Settlement Administrator created a website dedicated to this Litigation—www.reirdonxtoenergy.com—which went live on the same day the Notices were mailed (December 1, 2017), and which also contains various documents relevant to the Litigation and the Settlement. *Id.* The above steps demonstrate that the Parties expended more than reasonable efforts to distribute Notice to all Class Members.

84. 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.

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

Conclusion

86. 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) Class Counsel's application for attorneys' fees of \$8 million, which constitutes 20% of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total Settlement Value, is fair and reasonable under the circumstances of this litigation; (c) Class Representative's request for a Case Contribution Award of up to

\$30,000 from the Gross Settlement Fund is fair and reasonable under the circumstances of this Litigation; (d) reimbursement of Litigation Expenses not to exceed \$300,000 as stated in the Notice is fair and reasonable under the circumstances of this litigation; and (e) 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
December 22, 2017.