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

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

ORDER AWARDING ATTORNEYS' FEES

Before the Court is Class Counsel's Motion for Approval of Attorneys' Fees (Dkt. No. 216) (the "Motion") and Memorandum of Law in Support Thereof (Dkt. No. 217) (the "Memorandum"), wherein Class Counsel seeks entry of an Order approving Class Counsel's request for Attorneys' Fees in the amount of $32,000,000, which represents 14.9% of the Gross Settlement Value—the amount set forth in the Notice. The Court has considered the Motion and Memorandum, all matters and evidence submitted in connection therewith and the proceedings on the Final Fairness Hearing conducted on March 26, 2018. The Court finds the Motion should be granted.

IT IS THEREFORE ORDERED as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement and all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court, for purposes of this Order, incorporates herein its findings of fact and conclusions of law from its Order and Judgment Granting Final Approval of Class Action Settlement as if fully set forth.

3. The Court has jurisdiction to enter this Order and over the subject matter of the Litigation and all parties to the Litigation, including all Settlement Class Members.

4. The Notice stated that Class Counsel would seek attorneys' fees up to $32 million to be paid from the Gross Settlement Fund. Notice of Class Counsel's request for attorneys' fees was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the request for attorneys' fees is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.

5. Class Counsel provided the Court with abundant evidence in support of their request for attorneys' fees, including but not limited to: (1) the Motion and Memorandum; (2) the Declaration of Geoffrey P. Miller in Support of the Settlement Agreement, Certification of the Settlement Class for Settlement Purposes, Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, Class Representative's Request for Case Contribution Award, and Notice Of Proposed Settlement ("Miller Decl.") (Dkt. No. 206); (3) Declaration of Steven S. Gensler in Support of the Stipulation and Agreement of Settlement, Notice of the Proposed Settlement, and Award of Attorney's Fees ("Gensler Decl.") (Dkt. No. 209); (4) Declaration of Bradley E. Beckworth, Patranell Lewis and Rex A. Sharp on Behalf of Class Counsel ("Joint Class Counsel Decl.") (Dkt. No. 218); (5) Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP ("NPR Decl.") (Dkt. No. 216-1); (6) Declaration of Joseph Gunderson and Rex A. Sharp ("G&S Decl.") (Dkt. No. 216-2); (7) Declaration of Lawrence R. Murphy, Jr. ("Murphy Decl.") (Dkt. No. 216-5); (8) Declaration of Robert N. Barnes and Patranell Britten Lewis ("B&L Decl.") (Dkt. No. 216-3); (9) Declaration of Michael Burrage

("WB Decl.") (Dkt. No. 216-4); (10) Declaration of Robert Abernathy President of Chieftain Royalty Company ("Chieftain Decl.") (Dkt. No. 215-1); (11) Declaration of Jennifer M. Keough on Behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement ("JND Decl.") (Dkt. No. 215-4); and (12) Dan Little (Dkt. No. 215-5); Clear Fork Minerals, LLC (Dkt. No. 215-8); Michael P. Starcevich (Dkt. No. 215-6); Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust) (Dkt. No. 215-7); Clear Energy, Ltd. (Dkt. No. 215-9); The Allen Tim Meyer Revocable Trust (Dkt. No. 215-10). This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was objected to or otherwise refuted by any Settlement Class Member.

6. Class Counsel is hereby awarded Attorneys' Fees of $32 million, to be paid from the Gross Settlement Fund. In making this award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of $80,000,000 in cash, Defendant's implementation of new procedures and policies for calculating and paying royalty with respect to production on Class Wells connected to the Ardmore Loop that Class Representative's expert estimates and Defendant does not contest resulted in no less than $60,000,000.00 already being paid to Class Members who own a royalty interest in the Class Wells connected to the Ardmore Loop, Defendant's agreement to continue to implement these procedures and policies with respect to production on Class Wells connected to the Ardmore Loop, which Class Representative's expert estimates has a net present value of at least $74,000,000.00 over the next ten years, and $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. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representative and Class Counsel;

(b) On February 12, 2018, JND caused the Notice of Settlement to be mailed via first-class regular mail using the United States Postal Service to 20,692 unique mailing records identified in the mailing data. *See* JND Decl. at ¶10. Further, JND mailed Notices to an additional 470 records on February 21-22, 2018. *Id.* In addition, on February 26, 2018, JND mailed notices to an additional 1,338 records identified in the mailing data. *Id*. The Notice expressly stated that Class Counsel would seek attorneys' fees up to $32 million;

(c) Class Counsel filed its Motion ten (10) days prior to the deadline for Settlement Class Members to object. No objections were filed regarding Class Counsel's Motion for Approval of Attorneys' Fees;

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

> To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and nationwide application, the Parties agree that this Settlement Agreement shall be governed solely by any federal law as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, case contribution award, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions. For any such matters where there is no federal common law, Oklahoma state law will govern.

Settlement Agreement at ¶11.8;

(e) The Court finds that this choice of law provision complies with Oklahoma choice of law and/or conflicts of laws principles and should be and is hereby enforced. *See Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees (Dkt. No. 124) ("*Reirdon* Fee Order") at ¶¶6(d)-(e); *Leritz v. Farmers Ins. Co.*, 2016 OK 79, ¶1 n.2, 385 P.3d 991, 992 ("Generally, '[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ..'"); *see also* Miller Decl. at ¶41. The Court is aware of the Tenth Circuit's recent holding in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017). The Court is further aware that the plaintiff in that case has filed a request for *en banc* review and that further appeals are possible. The Court finds that the ultimate outcome of the *EnerVest* appeal does not bear on the Court's decision here because the Settlement Agreement in this case specifically includes the choice of law language set forth above and, as such, the Court's analysis is governed by the Tenth Circuit's long line of jurisprudence in common fund class actions under the common fund doctrine. *See Reirdon* Fee Order at ¶6(e); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993). However, as discussed further below, the Court has taken the time to conduct an extensive analysis of the requested fee under Oklahoma law, which is set forth in detail below;

(f) Federal Rule of Civil Procedure 23(h) states "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided.

See Reirdon Fee Order at ¶6(f); *Brown*, 838 F.2d at 453. Such an award will only be reversed for abuse of discretion. *See Reirdon* Fee Order at ¶6(f); *Brown*, 838 F.2d 453; *Gottlieb*, 43 F.3d at 486. Here, the requested fees are specifically authorized by law, federal common law, which is specifically authorized by an express agreement of the parties. Settlement Agreement at ¶¶7.1, 11.8. Under the Parties' chosen law (federal common law), district courts have discretion to apply either the percentage of the fund method or the lodestar method—but, in the Tenth Circuit, the percentage of the fund method is clearly preferred. *See Reirdon* Fee Order at ¶6(f); *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) (Docket No. 52 at 5) (the "*Laredo* Fee Order"). Further, in the Tenth Circuit, in a percentage of the fund recovery case such as this, where federal common law is used to determine the reasonableness of the attorneys' fee under Rule 23(h), neither a lodestar nor a lodestar cross check is required. *See Reirdon* Fee Order at ¶6(f); *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Laredo* Fee Order at 5;

(g) This Court has acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *See Reirdon* Fee Order at ¶6(g); *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A. G. v. Dell, Inc.*, 669

F.3d 632, 644 (5th Cir. 2012)).[1] Other Oklahoma federal district courts agree. *See, e.g.*, *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520 (W.D. Okla. July 31, 2014) ("The Court is not required to conduct a lodestar assessment of the hours versus a reasonable hourly rate. Nonetheless, even if such an assessment were made, the Court would reach the same conclusion that the requested fees are reasonable.") (Docket No. 150 at n.1); *see also Laredo* Fee Order at 5 ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method."); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R, (W.D. Okla. Oct. 5, 2012) (Docket No. 329);

(h) The percentage methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Reirdon* Fee Order at ¶6(h); *Brown*, 838 F.2d at 454. When determining attorneys' fees under this method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Reirdon* Fee Order at ¶6(h); *Brown*, 838 F.2d at 454-55. Not all of the factors apply in every case, and some deserve more weight than others depending on the facts at issue. *See Reirdon* Fee Order at ¶6(h); *Brown*, 838 F.2d at 456. Nevertheless, as discussed more fully below, I have taken the extra step of conducting a lodestar analysis to further verify the reasonableness of the requested fee in this case. Based upon that analysis, the applicable law, and the evidence submitted to the Court, I have concluded that whether these factors are applied as a check on the reasonableness of the percentage awarded (federal common

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

law), or in the lodestar context to determine an appropriate multiplier or enhancement factor (Oklahoma state law), the result is the same—the requested fee of $32 million is reasonable. *See Reirdon* Fee Order at ¶6(h);

(i) The twelve *Johnson* factors are: (l) the time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *See Reirdon* Fee Order at ¶6(i); *Gottlieb*, 43 F.3d at 482 n.4[2];

(j) I find that the eighth *Johnson* factor—the amount involved in the case and the results obtained—weighs heavily in support of the requested fee. *See Reirdon* Fee Order at ¶6(j); *Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."); FED. R. CIV. P. 23(h) adv. comm. note (explaining for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point");

[2] An additional factor under Oklahoma law is the risk of recovery. 12 O.S. §2023(G)(4)(e)(13). I find this factor is easily satisfied for, *inter alia*, the same facts and reasons that support the second (novelty and difficulty of the questions presented by the litigation) and sixth (whether the fee is fixed or contingent) *Johnson* factors analyzed below. *See Reirdon* Fee Order at n.2.

(k) Here, the evidence shows that, under the results obtained factor, the Fee Request is fair and reasonable. *See Reirdon* Fee Order at ¶6(k). There are four critical components of this Settlement: (1) the Gross Settlement Fund of $80 million, which alone represents a significant recovery for the Class; (2) Defendant's implementation of new procedures and policies for calculating and paying royalty with respect to production on Class Wells connected to the Ardmore Loop that Class Representative's expert estimates and Defendant does not contest resulted in no less than $60,000,000.00 already being paid to Class Members who own a royalty interest in the Class Wells connected to the Ardmore Loop; (3) Defendant's agreement to continue to implement these procedures and policies with respect to production on Class Wells connected to the Ardmore Loop, which Class Representative's expert estimates has a net present value of at least $74,000,000.00 over the next ten years; and (4) $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. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Counsel. Thus, the result obtained here through the Settlement bestows a minimum total economic benefit of $214.750 million (the Gross Settlement Value) upon the Class;

(l) In valuing the result obtained for purposes of determining a reasonable fee to award under the Tenth Circuit's percentage of recovery method, it is well-established that the fee award should be based on the total economic benefit bestowed on the class. *See, e.g.*, *Reirdon* Fee Order at ¶6(l); *Fager v. Centurylink Comm'cns*, No. 14-cv-00870 JCH/KK, 2015 U.S. Dist. LEXIS 190795, at *7-8 (D.N.M. June 25, 2015) (collecting cases), *aff'd by* 854 F.3d 1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert*, 444

U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member" obtained through the "entire judgment fund"). Thus, in making this assessment, "the court should take into account the value of any future relief under the settlement." *See Reirdon* Fee Order at ¶6(l); *Feerer v. Amoco Prod. Co.*, No. 95-0012 JC/WWD, 1998 U.S. Dist. LEXIS 22248, at *42-43 (D.N.M. May 28, 1998) (finding fee award of $20,542,665, which represented 41.9% of $49,000,000 cash portion of settlement and "approximately 27.7% to 29.5% of the current value of the settlement" based upon the agreed-upon future changes to royalty payment calculations, which had a present value of $21,000,000 to $25,600,000) (collecting cases)[3];

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

(m) Here, each of the four components of the Settlement represent significant, concrete monetary benefits to the Settlement Class. And, as Professor Gensler has aptly opined, unlike cases in which absent class members' recovery is contingent upon their submission of information or some sort of complicated claims process, here, these benefits are ***guaranteed*** and automatically bestowed upon the Settlement Class as a result of the Settlement:

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

Gensler Decl. at ¶40. Accordingly, the "results obtained" factor strongly supports a fee award of $32 million to be paid from the immediate cash portion of the Settlement that represents no more than 14.9% of the Gross Settlement Value. *See Reirdon* Fee Order at ¶6(m);

(n) I find that the other *Johnson* factors also support and weigh strongly in favor of the Fee Request. *See Reirdon* Fee Order at ¶6(n). First, I find that the evidence of the time and labor involved weighs in favor of the Fee Request. The time and labor Class Counsel and Plaintiff's Counsel have expended in the research, investigation, prosecution and resolution of this Litigation is set forth in detail in the following declarations: (1) NPR Declaration; (2) G&S Declaration; (3) Murphy Declaration; (4) B&L Declaration; (5) WB Declaration; and (6) the Joint Class Counsel Declaration (Final Approval Memorandum, Exhibit 2). These Declarations support the Fee Request. In summary, these Declarations prove that this Litigation has required investigation and mastery of complex factual

circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. To properly perform the legal services this Litigation required, Class Counsel called on their extensive knowledge of gas marketing, engineering, damages modeling and royalty payment practices. The Declarations also demonstrate that this Litigation involved substantial fact discovery, including reviewing millions of pages of documents; taking multiple depositions; and exchanging written discovery. *See* Joint Class Counsel Decl. at ¶10. Plaintiff also engaged in substantial expert discovery, including consulting with and preparing expert witnesses; preparing expert reports; accounting review and analysis; land and lease examination and analysis; and engineering evaluation and analysis. *Id*. In addition, Plaintiff engaged in substantial motion practice including motions to dismiss, to stay proceedings, to consolidate, class certification, and briefing and arguing a Rule 23(f) appeal of the district court's order granting class certification to the Tenth Circuit. *Id*. Overall, Class Counsel and Plaintiff's Counsel dedicated at least 18,794.66 hours of attorney and professional time to this Litigation and reasonably anticipate dedicating an additional 940.5 hours through final approval and distribution;

(o) Second, I find that the evidence regarding the novelty and difficulty of the questions presented in this action weighs in favor of the Fee Request. *See Reirdon* Fee Order at ¶6(o). Class actions are known to be complex and vigorously contested. *Id*. The legal and factual issues litigated in this case involved complex and highly technical issues. *See* Miller Decl. at ¶61. The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. *Id*. The successful prosecution and resolution of the Settlement Class' claims required Class Counsel to work with various experts to analyze complex data to support their legal

theories and evaluate the amount of alleged damages. *Id*. I find the fact that Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case. Joint Class Counsel Decl. at ¶77; Miller Decl. at ¶61; Gensler Decl. at ¶21. Moreover, XTO asserted a number of significant defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Miller Decl. at ¶61; Gensler Decl. at ¶21. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, weighs in favor of the Fee Request. *See, e.g.*, Joint Class Counsel Decl. at ¶45; Miller Decl. at ¶24; Gensler Decl. at ¶¶39-43;

(p) I find that the third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation and ability of the attorneys—supports the Fee Request. *See Reirdon* Fee Order at ¶6(p). I find the Declarations prove that this Litigation called for Class Counsel's considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. *See* Joint Class Counsel Decl. at ¶¶64, 74; Miller Decl. at ¶62; Gensler Decl. at ¶53; *see also* NPR Decl. at ¶¶4, 11-28; G&S Decl. at ¶¶2, 4, 8-13, 18; B&L Decl. at ¶¶2-4, 10-15, 17-19; WB Decl. at ¶¶4-5, 9-10; Murphy Decl. at ¶¶4-5, 9-10. I have presided over this case and others where various members of Plaintiffs' Counsel were actively involved. I am familiar with the work of NPR, WB, G&S, Larry Murphy and B&L and find that these firms possess the type of experience, reputation and ability that supports the Fee Request. The case required investigation and mastery of

highly technical issues regarding royalty payment practices in Oklahoma. *See* Joint Class Counsel Decl. at ¶74. NPR has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. *Id.* at ¶75. NPR also is highly experienced in class action, commercial, *qui tam*, mass tort, securities, and other complex litigation and has successfully prosecuted and settled numerous class actions, including oil and gas royalty underpayment class actions. *Id.* Additionally, NPR has taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the pharmaceutical industry, the opioid industry, and the energy industry. *See, e.g.*, *Reirdon* Fee Order at ¶6(p); NPR Decl. at ¶¶14-15. NPR consists of some of the most experienced complex litigation attorneys in the country. *See Reirdon* Fee Order at ¶6(p). Utilizing creativity and zealous advocacy, these attorneys have achieved huge results for their clients. *See, e.g.*, NPR Decl. at ¶¶14-15, 28; B&L Decl. at ¶¶2-4; G&S Decl. at ¶2; *see, e.g.*, *Reirdon* Fee Order at ¶6(p); *see also CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.) ("It was a hard-fought case, and I think that the legal work on this case has just been absolutely spectacular, and I want to brag on all of you for the work that you put into it.") (Transcript of Motion Hearing Before the Honorable Kimberly E. West, U.S. Magistrate Judge on October 25, 2012) (Final Approval Memo., Ex. 5); *see also* NPR Decl. at ¶14. And the same is true here;

(q) Further, B&L are the preeminent attorneys in oil and gas royalty class actions in Oklahoma. B&L Decl. at ¶¶2-4. Robert Barnes was the first and only attorney to try a royalty underpayment class action in Oklahoma to verdict in *Bridenstine v. Kaiser-Francis*, Case No. CJ-2001-1, District Court of Texas County, OK CIV APP, Case No. 97,117 (unpublished) August 22, 2003; cert. denied June 26, 2006, Okla. Sup. Ct., Case

No. DF-01569. *Id*. at ¶2. Further, NPR and B&L have worked together extensively over the past seven years, obtaining hundreds of millions in recoveries for royalty owners in Oklahoma, including *Reirdon v. XTO, Chieftain v. QEP, Drummond v. Range, Cecil v. Ward, Chieftain v. Laredo* and *Chieftain v. SM Energy, et al*. NPR Decl. at ¶17. And, both firms have provided support in many royalty matters in an effort to help ensure that the rights of their clients are not compromised by other matters. B&L Decl. at ¶14. Further, Gunderson Sharp, LLP (now practicing separately through Gunderson Law, P.C. and Rex A. Sharp. P.A.) (collectively, "GSLLP"), has litigated class actions and complex commercial litigation in the Eastern District of Oklahoma, the Western District of Oklahoma, the state courts of Oklahoma and numerous other state and federal courts around the country for decades. G&S Decl. at ¶2;

(r) I find that the quality of representation by counsel on *both* sides of this Litigation was high. *See* Declaration of Mediator Gary A. Feess at ¶¶7, 17; *see also Reirdon* Fee Order at ¶6(r). XTO is represented by skilled class action defense attorneys who spared no effort in the defense of their client. *See Reirdon* Fee Order at ¶6(r) (citing *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976)). Simply put, without the experience, skill and determination displayed by *all* counsel involved, the Settlement would not have been reached. *See* Miller Decl. at ¶¶62-65; Gensler Decl. at ¶53; Joint Class Counsel Decl. at ¶66; *see also* NPR Decl. at ¶¶7-28; G&S Decl. at ¶¶2-3, 8-13; B&L Decl. at ¶¶2-4, 9-10; WB Decl. at ¶¶2, 4; Murphy Decl. at ¶¶2, 4. I find these factors strongly support the Fee Request;

(s) I find that the evidence regarding the fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the

client or circumstances—weighs in favor of the Fee Request. *Reirdon* Fee Order at ¶6(s). The Declarations prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were precluded from working on other cases and pursuing otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40; Miller Decl. at ¶66. This case was originally filed many years ago, and has required the devotion of substantial time, manpower and resources from Class Counsel over that period. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. Class Counsel has spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. The schedules of the courts, witnesses and clients were accommodated on a regular basis by Class Counsel. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and works a significant hardship on them over the course of multiple years. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. Class Counsel had to forego taking on numerous additional cases because of this Litigation and the burden it placed on their time and resources. *See* Joint Class Counsel Decl. at ¶88; NPR Decl. at ¶40. Indeed, during the period this case has been pending, NPR states it investigated more than a dozen cases that it ultimately was not able to pursue due to the time and resource constraints imposed by NPR's case load in pending oil and gas

litigation, including this case. NPR Decl. at ¶40. Accordingly, I find these factors support the Fee Request;

(t) I find the evidence regarding the fifth *Johnson* factor—the customary fee and awards in similar cases—further weighs in favor of the Fee Request. *Reirdon* Fee Order at ¶6(t). Class Counsel and Chieftain negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* Chieftain Decl. at ¶6; Joint Class Counsel Decl. at ¶62; NPR Decl. at ¶4. I find this fee represents the market rate and is in the range of the "customary fee" in oil and gas class actions in Oklahoma state courts over the past 15 years. *See Reirdon* Fee Order at ¶6(t); Joint Class Counsel Decl. at ¶75; NPR Decl. at ¶¶4, 11; Miller Decl. at ¶¶67-73 (collecting cases); Gensler Decl. at ¶49; *see also, e.g.*, *Fitzgerald Farms LLC v. Chesapeake Operating, L.L.C.*, 2015 WL 5794008, at *3 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (collecting Oklahoma cases to find in "the royalty underpayment class action context, the customary fee is a 40% contingency fee" and awarding 40% fee of $119 million common fund);

(u) Federal and state courts in Oklahoma often approve similar fee awards in similar cases. *See Reirdon* Fee Order at ¶6(u). For example, I recently awarded a fee in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla.) that represented 40% of the cash component of the settlement and less than 20% of the total settlement value. *See Reirdon* Fee Order; *see also* Miller Decl. at ¶73. Further, the Western District of Oklahoma recently approved a 40% fee and a 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); Miller Decl. at ¶76. The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See Reirdon* Fee Order at ¶6(u); Joint Class Counsel Decl. at ¶¶61-63; NPR Decl. at ¶¶4, 11, 26; Miller Decl. at ¶¶67-73 (collecting cases); Gensler Decl. at ¶45. And, comparable awards have been granted in other complex class actions across the country. *See Reirdon* Fee Order at ¶6(u); Miller Decl. at ¶¶67-73. Given the outstanding cash recovery plus the substantial past and future benefits obtained with respect to wells connected to the Ardmore Loop, the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval. *See Reirdon* Fee Order at ¶6(u); Miller Decl. at ¶¶67-73;

(v) Moreover, I find a 40% fee is consistent with the market rate for high quality legal services in royalty class actions like this. *See Reirdon* Fee Order at ¶6(v); *Laredo* Fee Order at 8 ("The market rate for Class Counsel's legal services also informs the determination of a reasonable percentage to be awarded from the common fund as attorneys' fees."); Miller Decl. at ¶¶67-73. I have held a contingency fee negotiated at arms' length at the outset of the litigation "reflect[s] the value the Class Representatives placed on the future success of [the] [a]ction." *See Reirdon* Fee Order at ¶6(v); *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23; *see also Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of this Litigation."); Miller Decl. at ¶¶67-73. Here, Class Representative agreed Class Counsel would represent it on a contingency fee basis, not to

exceed 40%. *See* Chieftain Decl. at ¶6; Miller Decl. at ¶69; Gensler Decl. at ¶¶47-48. And, Chieftain's declaration demonstrates its continued support of the fairness and reasonableness of the Fee Request. Chieftain Decl. at ¶¶15-16. I find this factor supports the Fee Request. *See Reirdon* Fee Order at ¶6(v);

(w) I find the sixth *Johnson* factor—the contingent nature of the fee—also supports the Fee Request. *See Reirdon* Fee Order at ¶6(w). Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Joint Class Counsel Decl. at ¶¶80, 83; NPR Decl. at ¶¶5-7. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See Reirdon* Fee Order at ¶6(w); Miller Decl. at ¶70. As Professor Miller aptly notes, "the risk of no recovery in complex cases of this type is very real and is heightened when plaintiffs' counsel press to achieve the very best results for their clients and the class." *See id.*; *see also* Joint Class Counsel Decl. at ¶83; NPR Decl. at ¶¶5-7. Indeed, Class Counsel expended thousands of hours litigating several similar royalty underpayment actions where the courts denied class certification and, thus, Class Counsel received no remuneration whatsoever despite their diligence and expertise.[4] Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates. *See* NPR Decl. at ¶¶5-7, 10-11, 20-30; Miller Decl. at ¶¶70-71; *Reirdon* Fee Order at ¶6(w);

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

(x) Further, as noted above, Class Representative negotiated and agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Chieftain Decl. at ¶6; Joint Class Counsel Decl. at ¶54; NPR Decl. at ¶4; Miller Decl. at ¶55; Gensler Decl. at ¶45. This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See Reirdon* Fee Order at ¶6(x); *CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25; *Laredo* Fee Order at 8. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶72; NPR Decl. at ¶4; *see also Reirdon* Fee Order at ¶6(x); *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶¶11 & 15-23, 77 P.3d 1042. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in class actions. *See, e.g.*, *Reirdon* Fee Order at ¶6(x); *Adkisson, et al. v. Koch Indus. Inc., et al.*, Case No. 106,452 (Okla. Ct. Civ. App. Aug. 7, 2009) (unpublished), at ¶¶12-22[5]; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294. Moreover, even though federal law, not Oklahoma law, governs this issue here, I note that when the attorneys' compensation is contingent, Oklahoma law recognizes any attorneys' fee award must account for the risks inherent in such engagements by adjusting "upward the basic hourly rate" to allow for a "risk-litigation" premium. *See, e.g.*, *Reirdon* Fee Order at ¶6(x); *Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, ¶14 n.30, 977 P.2d 357 (citing *Brashier v. Farmers Ins. Co.*, 1996 OK 86, ¶11 n.22, 925 P.2d 20); *Oliver's Sports Ctr., Inc. v. Nat'l Std. Ins. Co.*,

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

1980 OK 120, ¶6, 615 P.2d 291. Accordingly, I find this factor strongly supports the Fee Request. *See Reirdon* Fee Order at ¶6(x);

(y) I find the evidence shows that the tenth *Johnson* factor—the undesirability of the case—weighs in favor of the Fee Request. *See Reirdon* Fee Order at ¶6(y). Compared to most civil litigation, this Litigation clearly fits the "undesirable" test and no other firms or plaintiffs have asserted these claims against XTO. *See* Joint Class Counsel Decl. at ¶92; NPR Decl. at ¶26; Miller Decl. at ¶71; *Reirdon* Fee Order at ¶6(y). Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation for multiple years. *See* Joint Class Counsel Dec. at ¶¶54, 80; NPR Decl. at ¶26; *Reirdon* Fee Order at ¶6(y). Further, XTO has proven itself to be a worthy adversary that will fight for years and years in bitter, adversarial litigation.[6] There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. *See* Joint Class Counsel Decl. at ¶83. The investment by Class Counsel of their time, money and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. *See* Joint Class Counsel Decl. at ¶¶54, 80; NPR Decl. at ¶26; *see also, e.g., Reirdon* Fee Order at ¶6(y); *Finnell v. Jebco Seismic*, 2003 OK 35, ¶17 n.36, 67 P.3d 339 (noting this factor also entails consideration of the "risk of non-recovery"). And, this Litigation involved a number of uncertain legal and factual issues. *See* Joint Class Counsel Decl. at

[6] *See, e.g., Roderick v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 12-7047, 2013 U.S. App. LEXIS 13837 (10th Cir. July 9, 2013); *see also In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007), *rev'd by Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); Joint Class Counsel Decl. at ¶80.

¶71; Gensler Decl. at ¶¶48-51. Indeed, in another complex royalty underpayment class action, one Oklahoma state court explained:

> Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels.

Fitzgerald Farms, 2015 WL 5794008, at *8; *see also Reirdon* Fee Order at ¶6(y). I find the same principle holds true here. Indeed, this Litigation has required investigation and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. To properly perform the legal services this Litigation required, Class Counsel called on their extensive knowledge of gas marketing, engineering, damages modeling and royalty payment practices. *See* Joint Class Counsel Decl. at ¶74; Miller Decl. at ¶62; Gensler Decl. at ¶¶50-51; *see also* NPR Decl. at ¶¶20-28; G&S Decl. at ¶¶2-5, 10-13; B&L Decl. at ¶¶3-4, 9-19; WB Decl. at ¶¶2, 4; Murphy Decl. at ¶¶2, 4. The Declarations also demonstrate that this Litigation involved substantial fact discovery, including reviewing millions of pages of documents; taking multiple depositions; and exchanging written discovery. *See* Joint Class Counsel Decl. at ¶10. Plaintiff also engaged in substantial expert discovery, including consulting with and preparing expert witnesses; preparing expert reports; accounting review and analysis; land and lease examination and analysis; and engineering evaluation and analysis. *Id*. In addition, Plaintiff engaged in substantial motion practice including motions to dismiss, to stay proceedings, to consolidate, class certification, and briefing and arguing a Rule 23(f) appeal of the district court's order granting class certification to the Tenth Circuit. *Id*. Class Counsel and Plaintiff's Counsel also advanced $1,659,904.58 in litigation expenses. Joint

Class Counsel Decl. at ¶¶93-95; NPR Decl. at ¶¶42-44; G&S Decl. at ¶¶25-27; B&L Decl. at ¶20; WB Decl. at ¶13. And, Class Counsel and Plaintiff's Counsel expended at least 18,794.66 hours of time over the length of this action. NPR Decl. at ¶¶35-38; G&S Decl. at ¶¶17-20; B&L Decl. at ¶¶16-20; WB Decl. at ¶¶13-15; Murphy Decl. at ¶¶13-15. I find this factor also supports the Fee Request. *See* Joint Class Counsel Decl. at ¶92; Miller Decl. at ¶¶60, 82; *Reirdon* Fee Order at ¶6(y);

(z) I find the eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. *See Reirdon* Fee Order at ¶6(z). Chieftain is a highly educated royalty owner. *See* Chieftain Decl. at ¶¶4-5. Chieftain was and remains very active in this litigation. *Id.* at ¶¶7-11. Further, Class Counsel currently represents Chieftain in other litigation in Oklahoma courts. Joint Class Counsel Decl. at ¶96; Miller Decl. at ¶72. Chieftain negotiated a 40% fee when it agreed to be class representative in this litigation. *See* Chieftain Decl. at ¶6; Joint Class Counsel Decl. at ¶¶62-63; NPR Decl. at ¶4. And, Chieftain supports the Fee Request. Chieftain Decl. at ¶¶16-17. Accordingly, I find this factor supports Class Counsel's fee request. *See Reirdon* Fee Order at ¶6(z)[7];

[7] The foregoing twelve *Johnson* factors are also included in the statutory enhancement factors in Oklahoma and thus, are supported by the same evidence under Oklahoma state law, as discussed in more detail below. *See* 12 O.S. §2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. As discussed above, this Litigation involved complex issues of law and fact that placed the ultimate outcome in doubt. There was no guarantee Plaintiff and the Class would prevail on their legal theories at class certification, summary judgment and/or trial. Indeed, 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. Accordingly, if Oklahoma law were applicable here, I find this factor also weighs in favor of the Fee Request.

(aa) In summary, upon consideration of the evidence, pleadings on file, arguments of the parties, and the applicable law, I find that the *Johnson* factors under federal common law weigh strongly in favor of the Fee Request and that the Fee Request is fair and reasonable and should be and is hereby approved. *See Reirdon* Fee Order at ¶6(aa);

(bb) Courts in the Tenth Circuit have repeatedly held that a lodestar cross check is not required. *See, e.g., See, e.g., Reirdon* Fee Order at ¶6(bb); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1241 (D.N.M. 2016) ("The Tenth Circuit has made it clear that district courts need not calculate a lodestar when applying the percentage method. . . . [T]he Court will award a reasonable percentage of the fund as attorneys' fees without a lodestar analysis or cross check.") (collecting cases); *see also Brown*, 838 F.2d at 456 (holding that "in awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors"); *Uselton*, 9 F.3d at 853 (finding that *Brown* "recognized the propriety of awarding attorneys' fees in [common fund cases] on a percentage of the fund, rather than lodestar basis"); *Gottlieb*, 43 F.3d at 483 (while either the percentage of the fund or lodestar methodology may be permissible, "*Uselton* implies a preference for the percentage of the fund method"). Indeed, the lodestar method and lodestar cross-checks are a wasteful use of resources and are disfavored by the Tenth Circuit. *See, e.g., Reirdon* Fee Order at ¶6(bb); *Jewell*, 167 F.3d at 1242 ("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, namely

'incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar.' . . . The Court has expressly rejected the lodestar method because it is 'difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result.'"); *see also Gottlieb*, 43 F.3d at 487 (holding district court abused its discretion by replacing "the percentage fee method . . . with the lodestar plus multiplier method."); Miller Decl. at ¶52;

(cc) Nevertheless, in an abundance of caution, I have taken the extra step of evaluating the reasonableness of the Fee Request on a lodestar basis. I find that whether analyzed as a lodestar cross-check, or as a lodestar base amount with an enhancement analysis, the lodestar in this case weighs in favor of the reasonableness of the Fee Request. *See Reirdon* Fee Order at ¶6(cc). The aggregate total lodestar amount submitted by Class Counsel and Plaintiffs' Counsel is $12,383,513.32. *See* Miller Decl. at ¶92; NPR Decl. at ¶¶35-38; G&S Decl. at ¶¶17-20; B&L Decl. at ¶¶16-20; WB Decl. at ¶¶13-15; Murphy Decl. at ¶¶13-15. Thus, the requested $32 million fee represents an enhancement lodestar multiplier of 2.58408. *Id.* This multiplier is well within the range of multipliers approved in the Tenth Circuit, and other circuits, when a lodestar cross-check is used. *See, e.g.*, *Reirdon* Fee Order at ¶6(cc); *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."); *Campbell v. C.R. Eng., Inc.*, No. 2:13-cv-00262, 2015 U.S. Dist. LEXIS 134235, at *20 n.5 (D. Utah Sept. 30, 2015) (finding "lodestar crosscheck

calculation here results in multiplier of 2.9, which is within a reasonable range" of approved multipliers within the Tenth Circuit); *see also, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 & n.6 (9th Cir. 2002) (affirming district court's fee award based on 3.65 lodestar multiplier and listing nationwide class action settlements from 1996-2001 approving multipliers ranging up to 8.5); Miller Decl. at ¶92; Gensler Decl.at ¶¶62-63;

(dd) Alternatively, I find that even if the express terms of the Settlement Agreement are disregarded and that Oklahoma state law controls the right to and reasonableness of attorneys' fees, the Fee Request remains reasonable. *See Reirdon* Fee Order at ¶6(dd);

(ee) The Oklahoma Legislature amended 12 OKLA. STAT. §2023 in 2013 to add a new subsection governing the calculation of attorney's fees, 2023(G)(4)(e), which states that courts shall consider thirteen factors "in arriving at a fair and reasonable fee for class counsel," only one of which is the "time and labor required." *See* Gensler Decl. at ¶¶54-63; *Reirdon* Fee Order at ¶6(ee). These factors include all of the *Johnson* factors (plus one) that federal courts consider, as set forth above. *See* Gensler Decl. at ¶¶54-63; *Reirdon* Fee Order at ¶6(ee). As Professor Gensler states, "[t]he best reading of Section 2023(G)(4)(e) is that it supplanted *Burk* for class-action common fund cases, aligning Oklahoma practice with what had been prevailing Tenth Circuit practice." Gensler Decl. at ¶55;

(ff) Following the enactment of Section 2023(G)(4)(e), Oklahoma district courts have applied the rule "as a flexible scheme that is applied differently based on whether the case involves a common fund recovery or statutory fee-shifting." *Id*. at ¶56; *Reirdon* Fee Order at ¶6(ff). For example, in *Fitzgerald Farms,* Judge Parsley applied the Section 2023(G)(4)(e) factors in approving a 40% fee but held that, in common fund cases,

the primary factor is the percentage of recovery. 2015 WL 5794008, at *2 ("[W]here, as here, the legal representation is undertaken on a contingent fee basis and that representation results in a common fund recovery for the benefit of a class, Oklahoma applies a percentage analysis."); Gensler Decl. at ¶56; *Reirdon* Fee Order at ¶6(ff). Even more recently, in *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. Aug. 30, 2017), Judge Kelly explained the lodestar method does not apply in contingent-fee common-fund cases, and approved a 40% award based on all of the Section 2023(G)(4)(e) factors, but primarily the percentage of recovery. *Id.* at 8 ("When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee."); Gensler Decl. at ¶57; *Reirdon* Fee Order at ¶6(ff);

(gg) However, I do not have to decide what role a lodestar calculation should play in the fee analysis here because, as Professor Gensler opines, I find that "the fee award in this case is reasonable whether lodestar plays no role, whether it serves as a type of cross-check, or whether it serves as a baseline subject to a contingency-fee common-fund multiplier." Gensler Decl. at ¶58; *Reirdon* Fee Order at ¶6(gg);

(hh) The first element of a lodestar calculation is the number of hours expended in the pursuit of the litigation. *See* Miller Decl. at ¶81; Gensler Decl. at ¶59. 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. *See Reirdon* Fee Order at ¶6(ii). 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 the "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 v. Tisdale*, 1983 OK 109, ¶¶6-8, 673 P.2d 836 (finding 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 v. Telex Corp.*, 1981 OK 22, ¶¶23-27, 625 P.2d 106 (finding testimony of attorneys based on examination of "litigation file" and "time records" justified fee calculation). Thus, under Oklahoma law, the "proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors which are applicable to each case." *Robert L. Wheeler, Inc. v. Scott*, 1989 OK 106, at ¶21. "Exclusive imposition of an hourly rate ignores the required analysis of the several interacting factors mandated by *Burk*, *Oliver* and *Sneed*." *Unterkircher*, 1985 OK 96 at ¶10[8];

(ii) Consistent with the foregoing Oklahoma precedent, Class Counsel and Plaintiff's Counsel have submitted attorney declarations that include the number of hours

[8] *See also, e.g.*, *Spencer*, 2007 OK 76 at ¶19, n.27 ("The lodestar/compensatory/base fee is an amount reached by multiplying the time spent by the hourly rate charged by the attorney. It is the 'lodestar' to which additional fees are added based upon the factors enumerated in *Burk*[.]"); *Lindy Bros. Builders, Inc. of Phila., et al. v. Am. R&S San. Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) (cited in *Burk*, 1979 OK 115 at ¶6) ("It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.").

worked in this Litigation by each individual and their hourly rates. *See* NPR Decl. at ¶¶35-38; G&S Decl. at ¶¶17-20; B&L Decl. at ¶¶16-20; WB Decl. at ¶¶13-15; Muprhy Decl. at ¶¶13-15; *Reirdon* Fee Order at ¶6(jj). These records demonstrate Class Counsel and Plaintiff's Counsel devoted at least 18,794.66 hours to this Litigation and reasonably anticipate spending an additional 940.5 through final approval and distribution. *Id*.

(jj) The second element of a lodestar calculation is the hourly rate for the work performed. *See* Miller Decl. at ¶83; Gensler Decl. at ¶60. Class Counsel has provided hourly rates for each attorney and staff member for the services performed for different types of legal work. *Id*. These rates are "predicated on the standards within the local legal community." *Burk*, 1979 OK 115 at ¶20, 598 P.2d at 663; *see also Finnell*, 2003 OK 35 at ¶17; *Reirdon* Fee Order at ¶6(jj). I find the legal community in which Class Counsel practices is a national complex litigation firm. *See Reirdon* Fee Order at ¶6(jj); Miller Decl. at ¶83;

(kk) I find the use of an hourly rate in a contingent fee case is an inefficient endeavor in the context of commercial litigation and typically results in the gross understatement of hourly rates. *See Reirdon* Fee Order at ¶6(kk); NPR Decl. at ¶27. This is so because most attorneys do not desire to advance costs and expenses and work by the hour with no guarantee of success without also negotiating a guaranteed multiple of that rate upon being successful. *See Reirdon* Fee Order at ¶6(kk); NPR Decl. at ¶27. Further, as Class Counsel state, "our goal is always to achieve the best result possible for the class under the circumstances at the time, and if possible, resolve all claims as quickly and efficiently as possible." NPR Decl. at ¶8; *Reirdon* Fee Order at ¶6(kk);

(ll) However, because some courts wish to apply a lodestar cross-check to

determine the fairness of a percentage fee in a complex class action case, and in some cases it may be necessary to submit hourly rates to support a request for payment of attorneys' fees in a fee shifting scenario, Class Counsel submitted hourly rates in support of their fee request here. The hourly rates submitted by Class Counsel here are in line with the hourly rates I recently approved in *Reirdon v. XTO Energy, Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla.). There, like here, I relied upon attorney declarations from Class Counsel and found the following hourly rates to be fair and reasonable:

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

Reirdon Fee Order at ¶¶6(ll)-(oo) ("I find the hourly rates submitted by Class Counsel are in line with rates approved by federal courts across the country as well as in Oklahoma courts in complex litigation involving energy companies."); *see also 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 *Sandridge*, Judge Lee R. West relied upon attorney declarations similar to the ones submitted by Class Counsel here, which demonstrated that the lodestar there was comprised of hourly rates rates billed two years ago for partners in national complex litigation firms that ranged from $850/hour (Whitten Burrage (Dkt. No.

328-2)) to $940/hour (Kaplan Fox (Dkt. No. 328-3)) to $1,150/hour (Jackson Walker (Dkt. No. 328-4)). *See id.* at *10-11 & n.10. The Tenth Circuit affirmed this order on November 17, 2017. *See Reirdon* Fee Order at ¶6(mm);

(mm) Moreover, Professor Miller has opined that, 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. Miller Decl. at ¶¶84-85; *see also Reirdon* Fee Order at ¶6(nn). For example, Professor Miller has 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*." Miller Decl. at ¶85; *see also Reirdon* Fee Order at ¶6(nn). Professor Miller's research shows that 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. Miller Decl. at ¶85 (citing partner rates ranging from $580 - $1,140); *see also Reirdon* Fee Order at ¶6(nn). Professor Miller further found that substantial survey data demonstrates a similar pattern. Miller Decl. at ¶86; *see also Reirdon* Fee Order at ¶6(nn). For example, a report published in December 2009 shows the rates for bankruptcy lawyers at firms that regularly represent defendants in complex litigation approached $1,000 per hour over eight years ago. Miller Decl. at ¶86 (citing partner rates ranging from $810 - $980); *see also Reirdon* Fee Order at ¶6(nn). Additional data regarding 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. Miller Decl. at ¶87 (citing partner rates ranging from $475 - $1,445); *see also Reirdon* Fee Order at ¶6(nn). Further, Professor Miller reviewed comparable billing rates for national complex litigation firms on the plaintiffs' side in prior class action settlements in complex matters. Miller Decl. at ¶88; *see also Reirdon* Fee Order at ¶6(nn). Professor Miller's study 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 Professor Miller's previous empirical studies on class action settlements and attorneys' fees found the most class actions consistently were filed—reflects a "reasonable cross-section of market rates for qualified plaintiffs' counsel in complex class actions nationwide over the past decade." Miller Decl. at ¶88 (citing partner rates ranging from $460 - $975); *see also Reirdon* Fee Order at ¶6(nn). A 2014 dataset collected by the *National Law Journal* regarding 2014 billing rates 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* ALM Legal Intelligence, 2014 NLJ Billing Report (2014); Miller Decl. at ¶89; *see also Reirdon* Fee Order at ¶6(nn). Professor Miller further found 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." Miller Decl. at ¶90 (citing a May 2016 study); *see also Reirdon* Fee Order at ¶6(nn). 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. 2017) (unpublished); *see also Reirdon* Fee Order at ¶6(nn).

And, based on Class Counsel's personal experience, the hourly rates submitted here are well below the actual market rate because no firm who works on an hourly basis would agree to work at these rates without also negotiating a guaranteed multiple of that rate upon being successful. NPR Decl. at ¶¶8-27; *see also Reirdon* Fee Order at ¶6(nn);

(nn) In sum, I find the collective empirical data and competent evidence submitted demonstrates the reasonableness of the hourly rates submitted by Class Counsel here. *See Reirdon* Fee Order at ¶6(oo);

(oo) As demonstrated above, when the attorneys' compensation is contingent, Oklahoma law recognizes any attorneys' fee award must account for the risks inherent in such engagements by adjusting "upward the basic hourly rate" to allow for a "risk-litigaiton" premium. *See, e.g., Reirdon* Fee Order at ¶6(x); *Reirdon* Fee Order at ¶6(pp); *Oliver's Sports*, 1980 OK 120 at ¶6.[9] The enhancement factors account for the fact that, especially in cases taken on a contingency-fee basis, an amount of reasonable attorneys' fees cannot appropriately be determined by inserting numbers "mechanically into a universally valid formula." *Reirdon* Fee Order at ¶6(pp); *Robert L. Wheeler*, 1989 OK 106 at ¶21.[10] And, the total enhanced fee "must bear some reasonable relationship to the

[9] *See also, e.g., Morgan*, 1998 OK 130 at ¶14 n.30 ("Where, as here, the lawyer's compensation is contingent, the trial court must adjust upward the basic hourly rate by allowing a risk-litigation premium based on the likelihood of success at the outset of the representation." (citing *Brashier v. Farmers Ins. Co. Inc.*, 1996 OK 86 ¶11, 925 P.2d 20 (same), *overruled in part on other grounds by Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2000 OK 55, 11 P.3d 162)); *Robert L. Wheeler, Inc. v. Scott*, 1989 OK 106, ¶13, 777 P.2d 394.

[10] *See also, e.g., Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754 ("Often contingent fee agreements are the only means possible for litigants to receive legal services – contingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their day in Court."); *Unterkircher*, 1985 OK 96 at ¶10 ("if time is the singular calculation, inexperience, inefficiency, and incompetence may be rewarded ***while skillful and expeditious disposition of litigation is penalized unfairly***" (emphasis added)); *Lindy*, 487 F.2d at 168 ("***No one expects a lawyer whose compensation is contingent***

amount in controversy." *Reirdon* Fee Order at ¶6(pp); *Finnell*, 2003 OK 35 at ¶17. Here, I find every "enhancement" factor supports an "incentive fee" in addition to Class Counsel's base lodestar. *Reirdon* Fee Order at ¶6(pp). The analysis of the *Johnson* factors under federal common law set forth above applies equally under the Oklahoma statutory factors and is hereby incorporated. *Id*.;

(pp) The purpose of the multi-factored analysis is to ensure an award of ***reasonable*** attorneys' fees in circumstances where compensation "cannot fairly be awarded on the basis of time alone." *Reirdon* Fee Order at ¶6(qq); *Oliver's Sports*, 1980 OK 120 at ¶6. Contingency fee agreements allow those "who could not otherwise afford to assert their claims to have their day in Court[,]" *Sneed*, 1984 OK 22 at ¶3, and reward the "skillful and expeditious disposition of litigation[.]" *Unterkircher*, 1985 OK 96 at ¶10; *Reirdon* Fee Order at ¶6(qq). Therefore, in recognition of the risk involved in funding litigation, especially complex litigation, under an agreement that does not guarantee *any* compensation whatsoever, Oklahoma law holds that fair and reasonable compensation in such cases necessarily entails an upward adjustment of any baseline lodestar. *Unterkircher*, 1985 OK 96 at ¶10; *Reirdon* Fee Order at ¶6(qq); *see also, e.g.*, *Robert L. Wheeler*, 1989 OK 106 at ¶¶7, 13. Under these principles, I find the substantial evidence here demonstrates the enhancement of Class Counsel's baseline lodestar by a factor of 2.58408 is both fair and reasonable;

(qq) Whether viewed as an "incentive fee" or as a percentage "multiplier" of the

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upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." (internal citations omitted, emphasis added)).

baseline lodestar, I find this enhancement falls well within the range frequently awarded by Oklahoma state courts in royalty underpayment class actions. For example, in *Fitzgerald Farms*, the Oklahoma District Court of Beaver County awarded a multiplier of 5 and found that, in "a large common fund case such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7." 2015 WL 5794008, at *8 (citing, *inter alia*, *Lobo v. BP* (Beaver Cty. 2005) (8.7 multiplier); *Brumley v. ConocoPhillips* (Texas Cty.) (3.85 multiplier); *Laverty v. Newfield* (Beaver Cty. 2007) (4.2 multiplier); *Bridenstine v. Kaiser Francis* (Texas Cty. 2004) (5.25 multiplier); *Simmons v. Anadarko Petro.* (Caddo Cty. 2008) (4.2 multiplier); *Mitchusson v. EXCO Res.* (Caddo Cty. 2012) (6.3 multiplier)).[11] I have reviewed these well-reasoned opinions of these honorable Oklahoma state court judges and find these cases comparable to the case at bar. *See Reirdon* Fee Order at ¶6(rr). Moreover, federal cases applying a "lodestar multiplier" to cross-check the reasonableness of a percentage-based fee award in common fund cases have found that multipliers of up to 8.5 are reasonable. *See, e.g.*, *Reirdon* Fee Order at ¶6(rr); *Cook*, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6; *see also, e.g.*, *Campbell*, 2015 U.S. Dist. LEXIS 134235, at *20 n.5; *Vizcaino*, 290 F.3d at 1051-52 & n.6 (collecting federal cases awarding multipliers of up to 8.5); Miller Decl. at ¶92; Gensler Decl. at ¶¶61-63;

(rr) Further, I find that after the addition of the enhancement factor, the total amount of the Fee Request bears a "reasonable relationship" to the amount in controversy. *See Reirdon* Fee Order at ¶6(ss); *Arkoma Gas Co. v. Otis Eng'g Corp.*, 1993 OK 27, ¶6,

[11] *See also, e.g., Continental Resources, et al. v. Conoco Inc.*, No. CJ-95-739 (Okla. Dist. Ct. Garfield Cty. Aug. 22, 2005) at ¶13 & n.3 (awarding a "total multiplier of the base hourly fees of approximately 3.6 under a lodestar approach" and stating, in "appropriate cases where Class Counsel have created a large common fund, such as in the present case, multipliers of even 5 to 10 have been awarded").

849 P.2d 392;

(ss) In sum, I find that each of the Oklahoma statutory enhancement factors, individually and as a whole, support an enhancement of 2.58408 of Class Counsel's baseline lodestar. *See Reirdon* Fee Order at ¶6(tt). Further, I find the total Fee Request clearly bears a "reasonable relationship" to the amount in controversy. *Id.* As such, I find the requested enhancement should be granted. *Id.*; and

(tt) For the foregoing reasons, Class Counsel is hereby awarded Attorneys' Fees of $32 million, to be paid out of the Gross Settlement Fund. I find this amount imminently reasonable under both federal common law and Oklahoma state law. *See Reirdon* Fee Order at ¶6(uu).

7. Any appeal or any challenge affecting this Order Awarding Attorneys' Fees shall in no way disturb or affect the finality of the Order and Judgment Granting Final Approval of Class Action Settlement, the Settlement Agreement or the Settlement contained therein.

8. Exclusive jurisdiction is hereby retained over the parties and the Settlement Class Members for all matters relating to this Litigation, including the administration, interpretation, effectuation or enforcement of the Settlement Agreement and this Order.

9. There is no reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 27th day of March, 2018.

KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE