

**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.)

**MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL’S MOTION FOR
APPROVAL OF REIMBURSEMENT OF LITIGATION EXPENSES**

I. SUMMARY OF THE ARGUMENT

In connection with approval of the Settlement¹ in the above-captioned Litigation, Class Counsel respectfully move the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation not to exceed \$3,250,000, plus interest (the “Expense Request”)—the amount set forth in the Notice.² This request is fair and reasonable, and, therefore, Class Counsel respectfully request that it be approved.

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of \$80 million (the “Gross Settlement Fund”) to compensate the Settlement Class for past damages; (2) 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; (3) 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 Plaintiff estimates and Defendant does not contest resulted in no less than

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Settlement Agreement dated November 20, 2017 (the “Settlement Agreement”), a copy of which was attached as Exhibit A to Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion to Certify the Settlement Class, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (“Preliminary Approval Memorandum”) (Dkt. No. 197).

² To date, Class Counsel has incurred out-of-pocket expenses of \$1,579,455.43. Class Counsel may incur additional expenses between now and the Final Approval Hearing on March 26, 2018. As such, at the March 26, 2018 hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$3,250,000. Likewise, Class Counsel likely will incur future expenses after the Final Approval Hearing, and may seek reimbursement for such future expenses, up to a total of \$3,250,000. Class Counsel’s Expense Request does not include the Administration, Notice and Distribution Costs associated with effectuating the Settlement, as XTO has agreed to pay up to \$750,000 of such Costs. *See* Settlement Agreement at ¶1.1.

\$60,000,000.00 already being paid to Class Members who own a royalty interest in the Class Wells connected to the Ardmore Loop; (4) Defendant's agreement to continue to implement these procedures and policies with respect to production on Class Wells connected to the Ardmore Loop, which Plaintiff estimates has a net present value of at least \$74,000,000.00 over the next ten years; and (5) royalty owners' claims outside of the Ardmore Loop are preserved in the future to seek the same future benefits received by Ardmore Loop royalty owners and the evidence developed in this case greatly benefits these claims. This brings the total value of the Settlement to at least \$214.750 million.³ The \$80 million cash Gross Settlement Fund alone is an outstanding recovery for Class Members.⁴

In order to achieve this remarkable recovery for the Class, Class Counsel was required to expend a significant amount of out-of-pocket expenses that were necessary and reasonable for the prosecution of this action. Class Counsel now seeks reimbursement of those reasonable expenses, in an amount not to exceed \$3,250,000, plus interest—the amount set forth in the Notice.⁵ To date, Class Counsel have advanced \$1,579,455.43 in prosecuting and resolving this case. *See* Joint Class Counsel Declaration at ¶¶93-95; Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP (“NPR Decl.”) at ¶¶42-44; Declaration of Joseph Gunderson and Rex A. Sharp (“G&S Decl.”) at ¶¶25-27; Declaration of Robert N. Barnes and Patranell Britten Lewis

³ *See* Affidavit of Barbara A. Ley (“Ley Affidavit”), attached as Exhibit 3 to Class Representative's Memorandum of Law in Support of Class Representative's Motion for Final Approval (“Final Approval Memorandum”), at ¶6.

⁴ *See* Declaration of Bradley E. Beckworth, Patranell Lewis and Rex A. Sharp on Behalf of Class Counsel (“Joint Class Counsel Declaration”), attached as Exhibit 2 to Final Approval Memorandum, at ¶¶45-49, 55-60.

⁵ A copy of the Notice is attached as Exhibit A to the Declaration of Jennifer M. Keough on behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement (“JND Decl.”), attached as Exhibit 4 to Final Approval Memorandum.

(“B&L Decl.”) at ¶20; Declaration of Michael Burrage (“WB Decl.”) at ¶13; 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.”) (Docket No. 206) at ¶96. In addition to these expenses, Class Counsel may incur additional expenses between now and the Final Approval Hearing on March 26, 2018. *See id.* As such, at the hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$3,250,000. *Id.* In addition, Class Counsel reserve their right to make additional expense requests following the Final Approval Hearing; however, in no event will Class Counsel’s cumulative expense requests exceed the \$3,250,000 stated in the Notice. Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted. *See* Miller Decl. at ¶96.

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of brevity, Class Counsel will not recite the factual and procedural background of this Litigation again herein. Instead, Class Counsel respectfully refers the Court to the Preliminary Approval Memorandum, the Final Approval Memorandum, the Joint Class Counsel Declaration, the pleadings and motions on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein.

III. ARGUMENT

A. The Parties Have Agreed Federal Common Law Controls the Reasonableness of Any Requests for Expenses

The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the reasonableness of attorneys' requests for 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 (emphasis added).

The Parties' decision to contractually agree that federal common law controls the reasonableness of attorneys' expenses complies with Oklahoma conflicts of laws and/or choice of law principles and should be enforced. *See Reirdon v. XTO Energy Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Reimbursement of Litigation Expenses (Dkt. No. 125) ("*Reirdon* Litigation Expenses Order") at ¶6(e); *see also Leritz v. Farmers Ins. Co.*, 2016 OK 79, ¶1, 385 P.3d 991, 992 ("Generally, '[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied"); Miller Decl. at ¶¶41-45.

B. The Request for Reimbursement of Expenses Is Reasonable Under Federal Common Law or Oklahoma State Law

Applying the Parties' chosen law—federal common law—Rule 23(h) allows courts to reimburse counsel for "non-taxable costs that are authorized by law." FED. R. CIV. P. 23(h). "As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney

fee percentage.” *Reirdon* Litigation Expenses Order at ¶6(f) (quoting *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000)). Similarly, should the Court choose to disregard the Parties’ choice of law and instead apply Oklahoma state law, the Oklahoma class action statute provides “the court may award...nontaxable costs that are authorized by law or by the parties’ agreement.” 12 O.S. §2023(G)(1); *Reirdon* Litigation Expenses Order at ¶6(f).

Class Counsel respectfully request reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Litigation. *See* Joint Class Counsel Decl. at ¶¶93-95; NPR Decl. at ¶42; G&S Decl. at ¶25; B&L Decl. at ¶20; WB Decl. at ¶13. Class Counsel set forth in the Notice that they would seek up to \$3,250,000 in reimbursement of expenses. JND Decl., Ex. A. To date, Class Counsel’s out-of-pocket expenses are \$1,579,455.43.⁶ All of these expenses were reasonably and necessarily incurred by Class Counsel, and are directly related to their prosecution and resolution of this Litigation. *See* Joint Class Counsel Decl. at ¶¶93-95; NPR Decl. at ¶¶42-44; G&S Decl. at ¶25; B&L Decl. at ¶20; WB Decl. at ¶13. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, document production and review, and mediation, which are typical of large, complex class

⁶ Because additional expenses will continue to be incurred through and after the Final Approval Hearing on March 26, 2018, Class Counsel specifically request reimbursement of \$1,579,455.43 *plus* the ability to recover additional expenses up to \$3,250,000—the noticed amount—to the extent such expenses are actually incurred. At the Final Approval Hearing, Class Counsel will provide the Court with updated charts of Class Counsel’s actual expenses incurred.

actions such as this.⁷ *Id.* As such, the Expense Request is fair, reasonable and should be granted. *See Reirdon* Litigation Expenses Order at ¶6(g); Miller Decl. at ¶96.

In addition, several Class Members executed affidavits in support of Class Counsel's Expense Request. *See* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starceovich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust, attached as Exhibits 5-10 to Final Approval Memorandum.

Therefore, Class Counsel respectfully request the Court award the Expense Request in full and award any additional amount Class Counsel may incur after the filing of this Memorandum not to exceed \$3,250,000, upon 14 days' written notice to the Court.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests the Court enter an order granting approval of the Expense Request of \$1,579,455.43, *plus* the ability to recover additional expenses up to \$3,250,000—the noticed amount—to the extent such expenses are actually incurred.

Dated: February 26, 2018.

Respectfully submitted,

s/ Bradley E. Beckworth

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⁷ Class Counsel's Expense Request does not include the Administration, Notice and Distribution Costs associated with effectuating the Settlement, which Defendant will bear in an amount up to \$750,000. *See* Settlement Agreement at ¶1.1.

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CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: February 26, 2018.

s/ Bradley E. Beckworth
Bradley E. Beckworth