

**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 CASE CONTRIBUTION AWARD

Before the Court is Class Representative’s Motion for Approval of Case Contribution Award (Dkt. No. 212) (the “Motion”) and Memorandum of Law in Support Thereof (Dkt. No. 213) (the “Memorandum”), wherein Chieftain Royalty Company (“Chieftain” or “Class Representative”) seeks a Case Contribution Award of \$225,000.00 to be paid from the Gross Settlement Fund. The Court has considered the Motion and Memorandum, all matters 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 Chieftain intended to seek a Case Contribution Award of up to \$225,000.00 to be paid from the Gross Settlement Fund. Notice of Chieftain's request for a Case Contribution Award 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 a Case Contribution Award 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. Chieftain provided the Court with abundant evidence in support of its request for a Case Contribution Award, including: (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) the Declaration of Robert Abernathy President of Chieftain Royalty Company ("Chieftain Decl.") (Dkt. No. 215-1); and (4) the affidavits of numerous absent Class Members (Dkt. Nos. 215-5 through 215-10). This evidence was submitted to the Court well before the objection and opt-out deadline.

6. Chieftain is hereby awarded a Case Contribution Award of \$225,000.00 to be paid from the Gross Settlement Fund. In making this Case Contribution 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, 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* Dkt. No. 215-4 (Declaration of Jennifer M. Keough on behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement) ("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 Representative intended to seek a Case Contribution Award of up to \$225,000 to be paid from the Gross Settlement Fund. *Id.* at Exhibit A;

(c) Chieftain filed its Motion ten (10) days prior to the deadline for Settlement Class Members to object. No objections were filed regarding Class Representative's Request for a Case Contribution Award;

(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 case contribution award:

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) This choice of law provision complies with Oklahoma conflicts of law and/or choice of law principles and should be and is hereby enforced. *See Reirdon v. XTO Energy Inc.*, Case No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Case Contribution Award (Dkt. No. 126) (“*Reirdon Case Contribution Award Order*”) at ¶6(e); *see also 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’”); Miller Decl. at ¶¶41-44;

(f) Applying federal common law, federal courts regularly grant incentive awards to compensate named plaintiffs for the work they performed. *See Reirdon Case Contribution Award Order* at ¶6(f); *see also, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232, 235 (10th Cir. 2009) (“Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the

class.”); *Chieftain Royalty Co. v. Laredo Petro. Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) (Docket No. 52) (“*Laredo Fee Order*”) at 9 (case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.”) (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *9-10 (W.D. Okla. Oct. 12, 2012) (granting incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (granting incentive awards equaling \$15,900,000, or 1.5% of \$1.06 billion fund, to be split amongst nine class representatives and stating “[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 in case contribution awards to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation

[merited] an incentive award”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class”);

(g) The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” *Reirdon Case Contribution Award Order* at ¶6(g) (quoting Newberg § 17:3). The award should be proportional to the contribution of the plaintiff. *Id.* (citing *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff’s services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be “untethered to any service or value [the lead plaintiff] will provide to the class”); Newberg § 17:18);

(h) Here, Class Representative seeks a modest award of \$225,000.00. This request is supported by the abundant evidence submitted by Class Representative, including a declaration from Robert Abernathy President of Chieftain Royalty Company, Professor Geoffrey Miller, and numerous absent class members. *See Reirdon Case Contribution Award Order* at ¶6(h) (citing Newberg § 17:12 (evidence might be provided through “affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”)). This evidence demonstrates Chieftain devoted at least 750 hours to this Litigation and expended approximately \$4,000 in out-of-pocket expenses and is seeking payment at a reasonable hourly rate for reasonable time expended on services that were helpful and non-duplicative to the litigation. *See Chieftain Decl.* at

¶¶7-13, 18-19; *see also Reirdon Case Contribution Award* at ¶6(h);

(i) Mr. Abernathy attended Tulane University, graduated from the University of Oklahoma with a B.A., and received a Juris Doctorate from Oklahoma City University School of Law. Chieftain Decl. at ¶4. Mr. Abernathy is licensed to practice law in Oklahoma where he has practiced for 25 years, specializing in oil and gas, real estate, bankruptcy and probate law. *Id.* Mr. Abernathy is a nationally recognized speaker on royalty ownership issues. *Id.* Over the past 11 years, he has spoken to thousands of mineral interest owners around the country on all aspects of mineral ownership including estate planning and Oklahoma Corporation Commission rulings and regulations. *Id.* He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter. *Id.* He is also a founding member of the American Royalty Council. *Id.* In addition, he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *Id.* He also is a shareholder and Vice President of ELM III, LLC, which owns and operates oil and gas wells in southwest Kansas and the Oklahoma panhandle, including commercial salt water disposal wells. *Id.* He also actively manages a real estate and ranching business. *Id.*;

(j) As demonstrated by the Chieftain Declaration, both the time and efforts of Chieftain are reasonable. Specifically, Chieftain had dedicated approximately 750 hours to this Litigation. Chieftain Decl. at ¶18. These hours were spent collecting documents for production, reviewing emails and draft pleadings from Class Counsel, consulting and/or meeting with Class Counsel and experts, traveling to and from meetings, hearings and mediations, attending mediations, and reviewing and discussing settlement documents, preliminary approval documents, and final approval documents. *Id.* at ¶¶8, 10, 18. All of

these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. Chieftain also anticipated spending additional time working on this case, including attending the Final Fairness Hearing, and did attend the Final Fairness Hearing on March 26, 2018 through its president, Mr. Abernathy. The additional time Chieftain spent on this Litigation through the Final Fairness Hearing is at least 25 hours. *Id.* at ¶19. And, Chieftain will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the administration of the Settlement. *Id.* Chieftain will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. *Id.* However, even if Chieftain never worked another hour on this case after the Final Fairness Hearing, it will have dedicated at least 750 hours to this Litigation, and the request of \$225,000.00 would come out to a reasonable and modest hourly rate of \$300.00;

(k) Chieftain was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition in December 2010. *Id.* at ¶¶7-10. It actively and effectively fulfilled its obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon it during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *Id.* at ¶18. Chieftain has worked with Class Counsel since before the inception of this Litigation, and its active participation has contributed significantly to the prosecution and resolution of this case. *Id.* at ¶¶7-12. In addition, Chieftain produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended two formal mediation sessions in person, and actively participated in the negotiations that led to the Settlement of this Action. *See id.* Chieftain also spent time

communicating with one of Class Representative's experts regarding the Settlement and approval process and procedure. Miller Decl. at ¶¶69, 94;

(l) Chieftain was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. Chieftain Decl. at ¶20. In fact, Chieftain understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on its request. *Id.* In other words, Chieftain fully supports the Settlement as fair, reasonable and adequate, even if it is awarded no case contribution award at all. *Id.* Chieftain has no conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, several absent Class Members executed affidavits supporting Chieftain's request for a Case Contribution Award. *See* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starcevich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; and Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust;

(m) Because Chieftain has dedicated its time, attention and resources to this Action, I find that Chieftain is entitled to the requested Case Contribution Award of \$225,000.00 to reflect the important role that it played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement;

(n) Assuming, *arguendo*, that Oklahoma state law governs the Case Contribution Award despite the express language to the contrary in the Settlement Agreement, I find that Oklahoma law strongly supports incentive awards, particularly in royalty underpayment class actions such as this. *See Reirdon Case Contribution Award Order at ¶6(n).* In fact, Oklahoma state courts routinely grant percentage-based incentive

awards to class representatives, which historically are much larger than the modest amount sought here. *See, e.g., id.; Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *9 (District Court of Beaver County, Oklahoma, July 2, 2015) (granting incentive award of 3/10th of 1% of \$119 million cash portion of settlement, or just over \$350,000.00, and finding “[t]he incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . . [Collecting cases] . . .”); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) (“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.”); and

(o) Thus, Class Representative’s request for a Case Contribution Award of \$225,000.00 is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See Reirdon Case Contribution Award Order at ¶6(o); see also generally* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starceвич; 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.

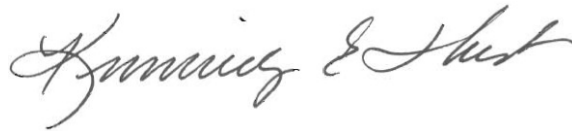
7. Any appeal or any challenge affecting this Order Awarding Case Contribution

Award 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.

A handwritten signature in cursive script, appearing to read "Kimberly E. West".

KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE