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

Kevin Hoog, on behalf of himself and all others similarly situated, Plaintiff, v. PetroQuest Energy, L.L.C., et al., Defendants.	Case No. 16-CV-463-KEW

MOTION FOR APPROVAL OF PLAINTIFF'S ATTORNEYS' FEES, LITIGATION EXPENSES, ADMINISTRATION, NOTICE, AND DISTRIBUTION COSTS, AND CASE CONTRIBUTION AWARD

Having obtained a cash settlement of $45 million, Class Representative respectfully moves the Court for an award of Plaintiff's Attorneys' Fees in the amount of forty percent of the Gross Settlement Fund, for Litigation Expenses to date of $592,492.38, Administration, Notice, and Distribution Costs of $20,720.52, and for a Case Contribution Award totaling one percent of the Gross Settlement Fund for service of the Class Representative in prosecuting this Litigation for the Settlement Class. In addition, Class Representative seeks a reserve of an additional $125,000.00 for anticipated future Litigation Expenses, and a reserve of an additional $55,279.48 for future Administration, Notice, and Distribution Costs incurred between the filing of this motion and the complete administration of the Settlement. Class Counsel will apply to the Court for approval of the payment of any such future expenses.

The requests for Plaintiff's Attorneys' Fees and a Case Contribution Award are based on the going rates for such fees in prior class action litigation of this type. The requests for Litigation Expenses and Administration, Notice, and Distribution Costs are based on the actual amounts incurred by Class Counsel in prosecuting the action and incurred or expected to be incurred in administering the Settlement. As set forth in the Notices and the Settlement

Agreement, the requested awards will be paid from the Gross Settlement Fund. For the reasons set forth in this Motion, the requested awards are fair and reasonable, and therefore should be approved.

BACKGROUND

In the interest of brevity, Class Representative will not recite the entire background of this Litigation on behalf of the Settlement Class. Rather, Class Representative refers the Court to the Motion for Preliminary Approval (Doc. 300), the Joint Declaration of Class Counsel ("Joint Counsel Decl.") (Doc. 307-4), the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated as if fully set out in this memorandum.

ARGUMENT & AUTHORITY

Each of the requests are warranted considering the work done and result achieved. They are also in line with similar requests recently granted by this Court and in other districts.

1. Federal Common Law Controls the Right to and Reasonableness of the Requests in this Motion

The Parties contractually agreed that federal common law governs the awards requested in this Motion. Doc. 300-1 at 39, ¶ 11.7. This contractual language removes any doubt about the applicable body of law as to class certification, notice, and overall evaluation of the fairness and reasonableness of the Settlement and the associated requests in this Motion. This choice of law provision has previously been enforced by this Court. *See Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 77 at 3 ("This choice of law provision should be and is hereby enforced.").[1]

[1] This Court previously considered nearly identical requests in *Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, so Class Counsel, for the sake of brevity, won't repeat the extensive case law cited by the Court in support of its rulings. No. 17-CV-336-KEW (E.D. Okla.).

2. The Request for Plaintiff's Attorneys' Fees Is Reasonable Under Federal Common Law

The forty percent fee request for Class Counsel is reasonable. The market rate for these types of class actions is forty percent as reflected in myriad federal and state court oil-and-gas class actions[2] and as reflected in the contingent fee agreements in this case, executed before Class Representative and Class Counsel knew how the litigation would progress and whether any recovery would be obtained. *See* Doc. 307-4, Joint Counsel Decl. at 9, ¶ 38.

Under Rule 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). An award of attorneys' fees is a matter uniquely within the discretion of the trial judge. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988). Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). Here, the parties' agreements expressly authorize the requested fee of forty percent of the common fund recovery and the requested fee is reasonable and should be approved.

a. Attorneys' Fees Are Calculated as a Percentage of the Fund under Tenth Circuit Law

"The court's authority for . . . attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Wright & Miller § 1803; *Sprague*, 307 U.S. at 165. Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the fund method in determining the award of attorneys' fees in common-fund cases. *See Gottlieb*, 43 F.3d at 483; *Brown*, 838 F.2d at 454; *Uselton v. Com. Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993). This method calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454.

This Court has acknowledged the Tenth Circuit's preference for the percentage

[2] *See, e.g., Chieftain*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 71 at 14 ("I find this fee [40%] is consistent with 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 fifteen (15) years.").

method and rejected application of a lodestar analysis or lodestar cross check. *See Chieftain*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 71 at 5 ("[I]n 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.").

b. Attorneys' Fees Are Calculated as a Percentage of the Fund under Tenth Circuit Law

When determining attorneys' fees under the preferred percentage-of-the-fund method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454–55. Not all factors apply in every case, and some deserve more weight than others depending on the facts at issue. *Id.*

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. *Gottlieb*, 43 F.3d at 482 n.4.

The *Johnson* factor entitled to the most weight in this common fund case is the eighth factor—the amount involved in the case and the results obtained. *See Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class."); 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").

Here, the result is exceptional—$45 million in cash to the Settlement Class. *See* Doc. 307-4, Joint Counsel Decl. at 3, ¶ 5. And these benefits are ***guaranteed*** and automatically bestowed upon the Settlement Class. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members must do is remain in the Settlement Class, *i.e.*, not opt out, and wait for distribution of their checks after the Court grants, if it does grant, final approval of the Settlement. Accordingly, the "results obtained" factor strongly supports a fee award of forty percent of the Gross Settlement Fund.

The other *Johnson* factors also support approval of the fee request. Although these factors do not merit as much weight as the results-obtained factor, the Joint Counsel Decl. (Doc. 307-4), incorporated by reference, addresses each of them. To summarize:

Time and Labor. The Joint Counsel Declaration shows Class Counsel invested substantial time in researching, investigating, prosecuting, and resolving the Litigation on behalf of the Settlement Class. *Id.* ¶¶ 6–30.

Novelty and Difficulty. Class actions are known to be complex and vigorously contested. The claims involve difficult and highly contested issues of Oklahoma oil-and-gas law and class certification law that are currently being litigated in multiple fora. Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel. Moreover, Defendants asserted numerous defenses to the claims that would have to be overcome if the Litigation continued to trial. Despite these hurdles, Class Counsel obtained a significant up-front cash recovery for the Settlement Class ($45 million). Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, support the fee request. *Id.* at 11, ¶ 44.

Skill required. Only a few firms handle oil-and-gas class litigation because of the nuanced intersection of class action and oil-and-gas law and the expense of funding such a large and

potentially long-lasting endeavor. *Id.* ¶ 45. Defendants are represented by experienced class action defense attorneys who can expend significant effort and expense in the defense of their client. This factor strongly supports the fee request.

Preclusion of Other Cases. Class Counsel has only a finite number of hours to invest in class action cases. Often, they must decline opportunities to pursue other cases because they have committed time and expense to cases, such as this one, where they have already accepted representation. *Id.* ¶ 46.

Customary Fee. Class Representative negotiated a contract to prosecute this case on a fully contingent basis, with a fee arrangement of 40% of any recovery obtained for the putative class after the filing of the Litigation on behalf of the Settlement Class. *Id.* at 11, ¶ 47; Doc. 307-3, Class Representative Decl. at 2, ¶ 7. This fee represents the market rate. *See, e.g., Chieftain*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 71 at 14 ("I find this fee [40%] is consistent with 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 fifteen (15) years.")

Fixed Hourly or Contingent Fee. As set forth above, Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval) and assumed a substantial risk that the Litigation would yield no recovery, leaving them uncompensated and without the ability to recover expenses. *See* Doc. 307-4, Joint Counsel Decl. at 12, ¶ 48. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See, e.g., Chieftain*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 71 at 17 ("If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses)."). 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. Accordingly, this factor strongly supports the fee request.

Time Limitations. This was not a factor in this case and should not influence the Court one way or the other. *See* Doc. 307-4, Joint Counsel Decl. at 12, ¶ 49.

Amount in Controversy and Result Obtained. In negotiating the Settlement, the Parties had varying damage models, as is customary in this type of litigation. The $45 million up-front cash settlement represents a significant portion of Class Counsel's overall damage model. *Id.* at 12, ¶ 50. Defendants, of course, argued they had *zero* liability for the claims asserted in the Litigation. The result obtained in a contingent fee case is by far the most important factor in determining the fee to award, as noted above. Many class actions have settled near or for a lower proportionate recovery of actual damages than here, and in Oklahoma, some actions have failed altogether. *Id.* This factor supports the fee request.

Experience, Reputation, and Ability of Counsel. Class Counsel have extensive experience and demonstrated ability in these types of class actions. *Id.* at 12, ¶ 51.

Undesirability. Defendants and their counsel are worthy adversaries that proved they were willing to litigate zealously. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming, and arduous undertaking. *Id.* at 13, ¶ 52. Very few attorneys have the desire to take on the risk involved in class actions, much less a class action against a well-financed oil-and-gas companies such as Defendants. *See, e.g., See Chieftain*, No. 17-CV-336-KEW (E.D. Okla. Mar. 3, 2020), Doc. 71 at 18 ("Compared to most civil litigation, this Litigation clearly fits the "undesirable" test and no other firms or plaintiffs have asserted these claims against Newfield . . . Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation[.]"). Nevertheless, Class Counsel did so and achieved an excellent recovery. This factor supports the fee request.

Nature and Length of Professional Relationship with Client. Although of little relevance in a case where the client does not engage regularly in litigation to warrant a discounted hourly rate, this factor supports the requested fee. Class Counsel worked extensively with

Class Representative throughout the Litigation to prosecute the claims on behalf of the Settlement Class. *See* Doc. 307-4, Joint Counsel Decl. at 13, ¶ 53; Doc. 307-3, Class Representative Decl. at 2, ¶¶ 8–9. And Class Representative supports the Fee Request. *Id.* at 4, ¶ 17. This factor supports the fee request.

Awards in Similar Cases. Forty percent is a customary fee award in royalty underpayment class action litigation and supports the Fee Request in this case. *See supra* at 6.

The analysis of the *Johnson* factors under federal common law strongly demonstrates approval of the fee request is warranted.

3. The Request for Reimbursement of Litigation Expenses and Administration, Notice, and Distribution Costs Is Reasonable under Federal Common Law

In connection with approval of the Settlement of the Litigation, and in accord with the Notice to the Settlement Class, Class Representative respectfully moves the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation and administering the Settlement (the "Expense Request"). As described above, Class Counsel has obtained an excellent recovery for the benefit of Class Members, which necessitated incurring expenses that Class Counsel paid or will be obligated to pay. To date, Class Counsel have advanced or incurred $592,492.38 in prosecuting and resolving this case. *See* Doc. 307-4, Joint Counsel Decl. at 13, ¶ 57. All the expenses incurred have been reasonable and necessary to the prosecution of the Litigation. *Id.* Class Counsel will incur an estimated $125,000.00 in additional expenses, primarily related to the allocation and distribution of settlement benefits to the Class Members and to prepare for the Final Fairness Hearing, which is consistent with the amount estimated in the Notices. *Id.* at 14, ¶ 58. Class Counsel will seek the Court's approval on all expenses before their payment from the Settlement.

In addition, the Settlement Agreement directs payment of the Administration, Notice, and Distribution Costs from the Gross Settlement Fund. Doc. 300-1 at 3. The Settlement

Administrator estimates such costs to be $20,720.52 as of the date of this Motion and anticipates an additional $55,279.48 in such costs to complete the settlement process, for an overall total cost of $76,000.00. *See* Doc. 307-5, Keough Decl. at 5, ¶ 18.

Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted.

a. The Expense Request Is Reasonable under Federal Common Law

"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." *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (citing *Blum*, 465 U.S. at 573); Fed. R. Civ. P. 23(h) (authorizing the Court to reimburse counsel for "non-taxable costs that are authorized by law."). Where a settlement agreement calls for the costs of administration to be borne by the settlement fund, the court should approve the same. *See, e.g., In re High–Tech Emp. Antitrust Litig.*, No. 11–CV–2509–LHK, 2013 WL 6328811, at *5 (N.D. Cal. Oct. 30, 2013) (permitting all costs incurred in disseminating notice and administering the settlement to shall be paid from the settlement fund, pursuant to the terms of a settlement agreement). All such expenses were reasonably and necessarily incurred and were related to the prosecution and resolution of this Litigation. The costs include, for example, routine expenses related to court fees, postage and shipping, and legal research, as well as expenses for experts, document production and review, database and information costs, and settlement administration, which are typical of large, complex class actions such as this. As such, the Expense Request is fair and reasonable and should be approved.

4. The Case Contribution Award Is Reasonable Under Federal Common Law

Class Representative also requests a $450,000.00 Case Contribution Award, which is 1% of the $45 million cash payment. *See* Doc. 307-4, Joint Counsel Decl. at 14, ¶¶ 61–62. The requested Case Contribution Award was included in the Notice provided to Class Members (Doc. 300-1 at 75) and is reasonable under the case law. Federal courts, including this Court,

regularly give incentive awards to compensate named plaintiffs. *See, e.g., Harris v. Chevron U.S.A., Inc., et al.*, No. 19-CV-355-SPS (E.D. Okla. Feb. 27, 2020), Doc. 40 at 17 (The class representative's "request for an award of two percent is consistent with awards entered by Oklahoma state and federal courts, as well as federal courts across the country."); *Hay Creek Royalties, LLC v. Mewbourne Oil Co.*, No. 20-CV-1199-F (W.D. Okla. July 11, 2022), Doc. 38 at 14 (awarding 2% of the up-front $3,950,000.00 cash settlement value). Evidence supporting an award request may 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." Newberg § 17:12.

Class Representative seeks a Case Contribution Award based on the demonstrated risk and burden as well as compensation for time and effort, as more fully set forth in the Class Representative Declaration. *See* Doc. 307-3, Class Representative Decl. at 5, ¶ 19. Having worked with Class Representative in the investigation, filing, prosecution, and settlement of this Litigation on behalf of the Settlement Class, Class Counsel fully supports the request. *See* Doc. 307-4, Joint Counsel Decl. at 15, ¶ 62. As such, Class Representative's request for a Case Contribution Award here is fair and reasonable and supported by the same evidence of reasonableness.

CONCLUSION

For the reasons set forth in this Motion, Class Representative and Class Counsel move the Court to grant this Motion and enter an Order approving the following, in accord with the Settlement Agreement and the Notices, to be deducted from the Gross Settlement Fund before Distribution Checks are mailed to the class from the remaining Net Settlement Fund: 1) Plaintiff's Attorneys' Fees in the amount of forty percent of the Gross Settlement Fund; 2) a Case Contribution Award in the amount of $450,000.00 (1% of the Gross Settlement Fund); 3) Litigation Expenses in the amount of $592,492.38 to date; 4) Administration, Notice, and Distribution Costs in the amount of $20,720.52 to date; and 5) a reserve of up to $180,279.48 for future Litigation Expenses and Administration, Notice, and Distribution Costs through

the Final Fairness Hearing and full implementation of the Settlement. Class Representative will submit a proposed order to the Court for the relief requested in this Motion prior to the Final Fairness Hearing and after the objection deadline passes on March 27, 2023.

Respectfully Submitted,

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CLASS COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that, on March 20, 2023, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Reagan E. Bradford
Reagan E. Bradford