IN THE DISTRICT COURT OF TEXAS COUNTY, OKLAHOMA

TEXAS COUNTY
FILED
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M. RENEE ELLIS
COURT CLERK
By _____ Deputy

Shelly Nash Fitzgerald, as Trustee of the Nash Family Mineral Trust UTA dated October 27, 1992, on behalf of themselves and all others similarly situated, Plaintiffs, v. Lime Rock Resources II-A, L.P., Defendant.	Case No. CJ-2017-31 Judge Jon K. Parsley

ORDER GRANTING CLASS COUNSEL FEES AND EXPENSES

On April 24, 2019, this matter came before the Court for an evidentiary hearing on the Settlement Class's Motion for Class Counsel Fees and Expenses, including Administration Expenses. The Court has considered all submissions and evidence, including all matters presented at the hearing and now grants the motion in its entirety. In doing so, the Court has considered and followed 12 O.S. § 2023 (G)(4)(e) ("the Statute") which governs the award of fees to Class Counsel. The Court, acting as a fiduciary on behalf of the Settlement Class as the Statute directs, has considered each factor in determining that a fair and reasonable attorneys' fee is 40% of the $1,700,000.00 Settlement Proceeds ($680,000). In addition, this Order awards reimbursement of reasonable Litigation and Administration Expenses of $54,867.24 to Class Counsel and a reasonable incentive award of $34,000, or 2% of the Settlement Proceeds to the Class Representative. The Court further approves reserving $20,000.00 from the Settlement Proceeds to

pay future expenses of administering the Settlement. The Court's analysis for each award is set forth below.

AWARD OF ATTORNEYS' FEES

With the Settlement Class's Motion, it submitted the Declaration of Steven S. Gensler in Support of Class Counsel's Renewed Application for Attorney's Fees in *Chieftain Royalty Co. v. SM Energy Co., et al.,* No. CIV-011-177-D (W.D. Okla. Aug. 16, 2019) (ECF 295, "Gensler Decl."). The Court found the thorough historical analysis of Oklahoma law on awards of attorney's fees and the history and effect of 12 O.S. § 2023(G)(4)(e) in the 51-page Gensler Declaration very helpful. It reinforces this Court's analysis and experience with awards of attorney's fees and the application of the long-standing percentage-of-the-fund methodology in common-fund contingency-fee royalty-underpayment class actions like this one. *See* Gensler Decl. ¶¶ 49, 53, 64, 78, 87, 89, 108, 109, 111, 112, 115 & 116 (citing my decision in *Fitzgerald Farms, LLC v. Chesapeake Operating, LLC,* No. CJ-2010-38, 2015 WL 5794008 (D. Beaver Cty, July 2, 2015)). As I stated in *Fitzgerald Farms,* the percentage-of-the-fund methodology rewards good results, promotes efficiency, and aligns the interests of class counsel with the class members. 2015 WL 5794008, at *6.

Upon consideration of all 13 factors, individually and collectively, in 12 O.S. § 2023 (G)(4)(e), the Court concludes the award of 40% of the Settlement Proceeds is a fair and reasonable fee for the Settlement Class and for Settlement Class Counsel. The Court analyzes each factor in the order of importance to class action litigation:

1. **Whether the fee is fixed or contingent** (factor 6). Because this case is a common fund case, not a fee shifting case, the Court's analysis begins with the basis under which counsel accepted the representation. Here the Declarations of Shelly Nash Fitzgerald and Rex A. Sharp

state that the case was undertaken on a contingent, not a fixed or hourly, basis. Fitzgerald Decl. ¶ 7; Sharp Decl. ¶ 4. This evidence is undisputed.

This fact has legal significance because, had the representation been undertaken on a fixed basis, *i.e.* hourly rate multiplied by the number of hours, or were this a fee-shifting, rather than a common fund, case where a statute or a contract provision shifts the attorneys' fee from one party to another, Oklahoma law applies a lodestar/multiplier analysis rather than the percentage analysis discussed below. In fixed hourly fee or fee shifting cases, the most important factor among the 13 factors in 12 O.S. § 2023 (G)(4) is factor 1, time and labor required, the hourly rate, and the multiplier.[1]

Like most, if not all class actions, the legal representation for this case was undertaken on a contingent-fee basis, where the attorneys' fees and expenses of the litigation are paid from the common fund recovered for the benefit of the Class. The common-fund doctrine, which federal and Oklahoma courts alike have recognized for centuries, "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also, e.g., Okla. Tax Comm 'n v. Ricks*, 1994 OK 115, ¶6, 885 P.2d 1336, 1339 (finding "Oklahoma case law has long recognized the [common-fund] doctrine[,]" which holds that "[w]hen an individual's efforts succeed in creating or preserving a fund which benefits similarly situated non-litigants, equity powers may be invoked to charge that fund with attorney's fees for legal services rendered

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[1] In determining a reasonable fee in fee shifting cases, there does not appear to be a percentage cross-check. Under Oklahoma law, before the enactment of 12 O.S. § 2023 (G)(4)(e), it was unclear whether a lodestar/multiplier cross-check was required in a common fund case. In enacting 12 O.S. § 2023 (G)(4)(e), the Oklahoma legislature did not provide for a lodestar cross-check. *See* Gensler Decl. ¶¶ 24-61.

in its creation or preservation"). The doctrine is important because most class members cannot afford to finance a class action on a fixed hourly basis or, even if they could, doing so would be uneconomical because the cost to prosecute an action would exceed any individual benefit sought. Hence, "[m]any of the hourly related factors, such as time spent, client relationship length, client-imposed deadlines, and hourly rates are of lesser importance in most class actions." Final Order Granting Class Counsel Fees, Litigation Costs and Incentive Award, *Cornett, et al. v. Samson Resources, Co.*, No. CJ-09-81 (Okla. Dist. Ct., Dewey Cnty., Dec. 23, 2013) at 2. Instead, in contingent fee representations, the most important factor is factor 8, the result obtained, which, in this case, is $1,700,000.00 cash settlement plus Future Benefits valued at an estimated $37,000.00 per month for as long as Defendant owns and operates the leases and Class Wells.[2] While it is appropriate for Settlement Class Counsel to seek an award of attorneys' fees based on the total value to the Settlement Class, Class Counsel here bases its application on only the Settlement Proceeds, i.e. the cash portion of the Settlement.[3] The typical range of contingent fee

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[2] Not all settlements are for cash. Some are for coupons, claims made or injunctions. *See Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.3d 662 (holding that the amount the settlement class actually claimed, not the amount that it could have claimed, was important, and noting that not one Oklahoman made a claim). The Settlement here involves no claim process; the Settlement Administrator will mail Distribution Checks directly to the Settlement Class Members, most of whom are Oklahomans, once the Settlement becomes Final and Non-Appealable.

[3] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010); *see also, e.g., Strack, et al. v. Continental Resources, Inc.*, CJ-10-75 (D. Ct. Blaine Cty. July 13, 2018), Judgment and Order Approving Attorneys' Fees and Class Representatives' Case Contribution Award, at 8, ¶15 (taking value of future benefit into account even though class counsel were not seeking fees from it); *Brumley, et al. v. ConocoPhillips Company, et al.*, CJ-20015 (D. Ct. Texas Cty. 2005), Order on Class Counsels' Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, at 4 (awarding class counsel attorneys' fees based on a reasonable percentage of the "Total Common Fund" that was comprised of $30,000,000 in unpaid royalties and "future benefits of approximately $7,590,000" in royalty payments that would be made in the future due to royalty calculation changes agreed to in the parties' settlement); *Robertson, et al. v. Sanguine, Ltd., et al.*, CJ-02-150 (D. Ct. Caddo Cty. July 11, 2003), Order on Class Counsel's Motion for Attorneys' Fee, Representatives' Fee and

representations in oil and gas class action litigation in Oklahoma is between 33 1/3% with an additional 5-7% in the event of an appeal or a flat 40%. *See* # 3, *infra*; Ex. C to Sharp Decl. (summarizing 56 awards in royalty underpayment class actions in Oklahoma). It is my job to establish the appropriate percentage of the recovery.

2. **The amount in controversy and the results obtained** (factor 8). In *Hess*, the Oklahoma Supreme Court repeatedly recognized this factor is the most important factor in assessing a fair and reasonable fee. *See, e.g.*, *Hess,* 2014 OK 111, 341 P.2d at 667; *id.* at 672 (Taylor, J., concurring); *see also, Tibbetts v. Sight 'n Sound Appliance Centers, Inc.*, 2003 OK 72, ¶ 4, 77 P.3d 1042, 1046, *as corrected* (Sept. 30, 2003) (citing *Farrar v. Hobby,* 506 U.S. 103, 114 (1992)).

Here, the amount in controversy was approximately $1,700,000.00, not including the Future Benefits. A 100% recovery of the damages, without interest, is an outstanding benefit to the Settlement Class when compared against other royalty underpayment class action settlements approved by other Oklahoma district courts. And, the future benefit is a valuable part of the overall Class recovery. Class Counsel could have limited their negotiations to past damages. But that would mean that, from the Settlement date going forward, Class Members would be in the same position they had been in before. This Settlement protects them until Lime Rock sells the Class Wells. It clarifies the royalty calculations and buys peace for the Settling Parties, for as long as they comply with the Settlement Agreement. In my experience, this is a unique option that is available only through settlement and is of significant value to Class Members. Importantly, the

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Reimbursement of Litigation Expenses from the Common Fund, at 6 (taking value of future benefit into account even though counsel were not seeking fees on it, and observing that the effective percentage fee rate dropped from 40% to 32.6% when the future benefits were considered). Were the Court to include the value of future benefits for even one year in determining a reasonable fee, Class Counsel's request for 40% of the Settlement Proceeds would be reduced to 31.7% of the value of the Settlement, which is less than a reasonable fee.

Settlement also provides a cash recovery that will be distributed to Class Members automatically, meaning without requiring them to complete claim forms or provide documents. Indeed, Class Members need not do anything to receive their benefits after the Settlement becomes Final and Non-appealable. This too has value to Class Members. This factor supports the reasonableness of Class Counsel's request.

3. **The customary fee** (factor 5). The customary fee is the second most important factor and is set by the competitive market for attorneys willing and able to handle the type of case. In a contingent fee context, the percentage of recovery is set before the case is filed and before discovery and motion practice determines whether the case will be a loser or winner, and, if a winner, how much of a winner. In the royalty underpayment class action context, the customary fee is a 40% contingency fee. *See* Gensler Decl. ¶¶78-79; Order on Motion for Attorney Fees, Litigation Expenses, and Class Representatives Fee, *Continental Resources, Inc. et al. v. Conoco, Inc., et al.*, No. CJ-1995-739 (Okla. Dist. Ct., Garfield Cnty., Aug. 22, 2005) (Perry, J.), at 8 ("These types of cases (oil and gas class action cases) are handled on a contingent fee. **The fee percentage in these types of cases is typically 40% of the gross fund.**") (emphasis added); Findings of Fact, Conclusions of Law, and Order Finally Approving Class Certifications, Class Settlements, and Class Counsel's Motion for Attorney Fees, Litigation Costs, and Class Representatives Fees from the Common Fund, *Velma-Alma Indep. School Dist. No. 15, et al. v. Texaco, Inc., et al*, No. CJ-2002-104 (Okla. Dist. Ct., Texas Cnty. Dec. 22, 2005), at 27 ("The 'customary fee' in cases of this nature is a contingency fee in the range of the 40%-50%.").[4]

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[4] In approving a royalty underpayment class action settlement in 2013, another Oklahoma district court similarly found,

> The evidence establishes, and the Court from its own experience confirms, that an award of 40% of the value of the recovery is the typical in class action royalty

Looking at the chronology of fees awarded in royalty owner underpayment class actions, almost all of the recent orders have coalesced around 40%, with some slightly lower and some higher. *See* Sharp Decl. at ¶¶ 24 & 31, & Exhibit C thereto.[5] This factor supports the reasonableness of Class Counsel's request.

4. **Awards in similar cases** (factor 12). This factor looks to what courts have determined to be reasonable fee awards in similar cases. Oklahoma courts have frequently stated that a 40% award is customary or typical in a royalty underpayment class action when class counsel worked on a contingency fee basis and sought fees out of the common fund created by the litigation. *See Fitzgerald Farms*, 2015 WL 5794008, *3-4. This too is an important factor. In his declaration, Professor Gensler states: "In every fee order entered since Section 2023(G)(4) first took effect in September 2009, where the basis of the award is identified, the court has used a percentage-of-the-fund approach and awarded fees equal to 40% of the common fund." Gensler Decl. ¶51 & 90. Exhibit C to the Sharp Declaration lists 56 awards in similar cases. The chart shows that 41 of the 56 (over 70%) Oklahoma state court oil and gas class action settlements exceed a one third fee, and the more recent contingent fee percentages in oil and gas class actions

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> litigation. That is the market rate in cases like this and the determination of the free market deserves credence from this Court. Not surprisingly, many other courts have found a 40% award of attorneys' fees is typical, fair and reasonable in cases like this.

Final Order Granting Class Counsel Fees, Litigation Costs, and Incentive Award, *DSR v. Devon Energy*, No. CJ-11-12 (Okla. Dist. Ct., Dewey Cnty., Dec. 13, 2013), at 4 (citing *Laverty v. Newfield* and *Cont'l Resources v. Conoco, Inc.*).

[5] Older cases sometimes awarded lower percentages (when the customary fee may have been lower). *See, e.g.,* Order on Class Counsel's Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, *Bridenstine v. Kaiser Francis Oil Co.*, No. CJ-2000-1 (Okla. Dist. Ct., Texas Cnty., Oct. 13, 2004) at 4 (class counsel asked for only a 30% fee to comport with contingent fee agreement entered almost 10 years earlier).

in Oklahoma have been clumped around the 40% level (more than half have been 40% or higher). Indeed, an award below 40% would be atypical. *Id.* The awards in similar cases heavily favor a 40% fee in this case.

5. **The risk of recovery in the litigation** (factor 13). The Oklahoma Legislature specifically added this factor when it enacted Section 2023(G)(4)(e). It codifies the teaching of *Oliver's Sports Center*, where the Oklahoma Supreme Court emphasized that "[t]he litigation risk factor must be considered" in cases where the lawyer is not guaranteed compensation. *Oliver's Sports Center, Inc. v. National Standard Ins. Co.*, 1980 OK 120, 615 P.2d 291, 294. The Court added that the risk factor is to be evaluated "by assessing the likelihood of success at the outset of the representation." *Id.* If the litigation was without risk, the customary fee would be much lower, such as in workers compensation cases where a recovery is virtually assured, but the amount of recovery is uncertain. In most class actions, the risk of no or minimal recovery is high.[6] This factor supports the reasonableness of Class Counsel's request.

The defendants in royalty owner class actions—typically large and well-funded oil and gas companies represented by highly-skilled and highly-compensated lawyers from top-shelf law firms—are formidable adversaries who put up a sustained and vigorous defense. When setting out

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[6] *See, e.g., Whisenant v. Strat Land Expl. Co.*, 2018 OK CIV APP 65, 429 P.3d 703 (vacating class certification order); *Pummill v. Hancock Exploration LLC*, 2014 OK 97, 341 P.3d 69 (vacating summary judgment order and remanding for decision on disputed fact issues); *Panola Indep. Sch. Dist. No. 4 v. Unit Petroleum Co.*, 2012 OK CIV APP 94, 287 P.3d 1033, *cert. denied* Oct. 8, 2012 (reversing trial court's order granting class certification); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012) (denying class certification); *Foster v. Apache Corp.*, 285 F.R.D. 632 (W.D. Okla. 2012) (same); *Morrison v. Anadarko Petroleum, Corp.*, 280 F.R.D. 621 (W.D. Okla. 2012) (same); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646, 654 (W.D. Okla. 2011) (same); *Gillespie v. Amoco Prod. Co.* (BP), No. CIV-96-063-VML (E.D. Okla. 1999) (same); *Rees v. BP Am. Prod. Co.*, 211 P.3d 910 (Okla. Civ. App. 2008) (same); *Panola Indep. Sch. Dist. No. 4 v. Unit Petroleum Co.*, 287 P.3d 1033 (Okl. Civ. App. 2012) (same), *cert. denied* Oct. 8, 2012.

at the start of this type of case, Class Counsel can anticipate that the defendants will vigorously contest both the merits of the claim and whether the case can be tried as a class action. If class certification is denied—at the district court level or on appeal—there is no recovery for the class at all. Beyond the certification hurdle, the class must still prevail on the merits or obtain a settlement.

At the outset of a royalty owner class action, plaintiff's counsel has no assurance of any recovery. Cases on behalf of royalty interest owners against producers are riddled with complex issues. Class certification can be denied at the district court or on appeal. *See,* n.6, *supra.*[7] Even if class certification is granted (and sustained on appeal), the Class can lose on the merits during summary judgment, trial, or on appeal. *See* Order Granting Approval of Settlement Agreement and Findings of Fact and Conclusions of Law, *Lawrence v. Cimarex Energy Co.*, No. CJ-2004-391 (Okla. Dist. Ct., Caddo Cnty., Feb. 24, 2006) at 13 (noting "in *Bridenstine* ...the jury found that the gas attributable to a class of royalty owners was in fact marketable at the wellhead"). Class Counsel accepts the risk that the claims may prove to be weaker than expected, reducing the value of the claims for settlement and potentially leading to an adverse judgment and must factor all of this into the contingent fee set at the outset of the case. This factor supports the reasonableness of Class Counsel's request for 40% of the Settlement Proceeds.

6. **Experience, reputation, and ability of counsel** (factor 9). Settlement Class Counsels' qualifications, skills, experience, ability, and reputation in class actions in general and in royalty underpayment cases in particular, are highly regarded by state and federal courts

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[7] Virtually no other cases have interlocutory appeals. So, a plaintiff class must win two appeals—one on class certification and another on the merits--making cases brought on behalf of a class of people doubly risky and doubly long in duration.

throughout Oklahoma and Kansas. Sharp Decl. at ¶ 35; B. Wright Decl. ¶ 2; G. Wright Decl. ¶ 2. There was no evidence to the contrary. Their performance in this case lived up to their reputations as being among the very best in the field. This factor supports the reasonableness of Class Counsel's request.

7. **The novelty and difficulty of the questions presented by the litigation** (factor 2). Having presided over several royalty owner class actions, the Court knows them to be complex and fraught with difficult questions. The actions are often at the forefront of procedural frontiers—some known in advance and some unexpected. The legal and factual questions involved in royalty underpayment class actions under Oklahoma law are enormous and challenging. The Court has witnessed firsthand the complexities of this action by presiding over the ongoing litigation. Moreover, the complexity involved in royalty underpayment cases in Oklahoma is demonstrated by the case of *Pummill, et al. v. Hancock Exploration LLC, et al.*, 2018 OK CIV APP 48, 419 P.3d 1268, *cert. denied* (Okla. May 21, 2018)—a royalty underpayment case involving a single well that was tried to judgment and defended on appeal all the way to the Oklahoma Supreme Court on two separate occasions. Substantial litigation risks existed in this case, both at the certification stage and on the merits. Sharp Decl. ¶¶ 26-28. This factor supports the reasonableness of Class Counsel's request.

8. **The skill required to perform the legal services properly** (factor 3). The nature of this litigation, coupled with the complex procedural, legal, and factual issues, required the Class be represented by highly skilled counsel. To prosecute these claims against a well-financed defendant with vast resources, represented by well-known defense counsel, necessitated assembling a team of qualified, skilled, and experienced oil and gas litigation attorneys. Settlement Class Counsel collectively have decades of experience in oil and gas litigation and have prosecuted

numerous class actions and complex cases. *See* Sharp Decl., B. Wright Decl. and G. Wright Decl. This factor supports the reasonableness of Class Counsel's request.

9. **The preclusion of other employment** (factor 4). Settlement Class Counsel are engaged in the on-going practice of law. Had they not committed their limited time and resources to this litigation, they could have accepted other matters. Sharp Decl. ¶ 30. The prosecution of this Class Lawsuit has reduced Class Counsel's opportunity for employment in other matters. This factor supports the reasonableness of Class Counsel's request.

10. **Time and labor required** (factor 1). Although this factor is the most important in a fee shifting case, its relevance in the contingent fee common fund class actions such as this one is only to show that the case was not a lay-down winner where little time was invested and little risk actually assumed. *Fitzgerald Farms,* 2015 WL 5794008, at *6. The history of this litigation and creation of the common fund demonstrate that more than 720 hours were invested by Settlement Class Counsel. *See* Sharp Decl., B. Wright Decl. and G. Wright Decl.

But Oklahoma courts have long preferred the percentage method for awarding fees in Oklahoma oil and gas class actions.

> In class actions (common fund cases), most courts have abandoned the "lodestar approach" (hours expended X hourly rate X multiplier, which is typically utilized in fee-shifting cases) as the primary approach for determining the reasonableness of the fee. The preferred method for determining a reasonable fee in a class action is the percentage of the common fund.

Findings of Fact, Conclusions of Law, and Order Finally Approving Class Certification, Class Settlements, and Class Counsels' Motion for Attorney Fees, Litigation Costs, and Class Representatives Fees from the Common Fund, *Velma-Alma Indep. School Dist. No. 15 v. Texaco, Inc.,* No. CJ-2002-304, CJ-04-581, CJ-2005-496M (Okla. Dist. Ct., Stephens Cnty. Dec. 23, 2005) at 24. The Honorable Ronald Kincannon summarized the reasons:

> The percentage fee has important advantages to the Class in that it provides self-regulating incentives for efficiency. First, it compensates counsel on the real value of the services provided (the amount of benefit conferred). Second, the percentage approach awards efficiency. Not only is there no reward for inefficiency, there is a penalty due to the fact that, if the work is unnecessary, the lawyer has wasted his time. Third, percentage method encourages counsel to go the extra mile. Counsel has an incentive to push beyond a "good" recovery to an "excellent" recovery.

Order on Class Counsels' Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses, *Bridenstine v. Kaiser-Francis, et al.*, No. CJ-2000-1 (Okla. Dist. Ct., Texas Cnty. Oct. 13, 2004), at ¶ 3. Other district courts have quoted this language and adopted this reasoning. *See* Order on Class Counsels' Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, *Kouns, et al. v. Conoco, Inc.*, No. CJ-98-61 (Okla. Dist. Ct., Dewey Cnty., Dec. 2, 2004) at ¶ 6 (quoting same); Order on Motion for Attorney Fees, Litigation Expenses and Class Representative's Fee, *Laverty v. Newfield Exploration Mid-Continent, Inc.* (Okla. Dist. Ct. Beaver Cnty. Aug. 27, 2007) at 5 (same); Order on Attorney Fees, Litigation Expenses and Class Representatives Fee, *Brown, et al. v. Citation Oil & Gas Corp.*, No. CJ-04-217 (Okla. Dist. Ct., Caddo Cnty., Dec. 23, 2009), at 5 (same); Order on Class Counsel's Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, *Robertson, et al. v. Sanguine, Ltd., et al.*, No. CJ 02-150 (Okla. Dist. Ct., Caddo Cnty., July 11, 2003) at ¶ 9 (same). At nearly 100% of the damages, without interest, the recovery here was excellent.

Courts in the Midwest, including those in the Tenth Circuit, use neither lodestar nor a lodestar cross-check.[8] Although nowhere mentioned in 12 O.S. § 2023 (G)(4)(e), some of the

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[8] Oklahoma Federal Magistrate Judge West recently recognized that "a majority of circuits recognize that trial courts have the discretion to award fees based solely on the fund approach and are not required to conduct a lodestar analysis in common fund class actions. *See e.g. Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)." *Compusource Okla. Bd. of*

opinions cited in Exhibit C to the Sharp Declaration do mention lodestar. *See Velma-Alma v. Texaco*, at 30.[9] *But see Robertson/Taylor v. Sanguine* (not determining the lodestar amount at all); *Shockey v. Chevron* (same); Order Granting Approval of Settlement Agreement and Findings of Fact and Conclusions of Law, *Lawrence v. Cimarex Energy Co.*, No. CJ-2004-391 (Okla. Dist. Ct., Caddo Cnty. Feb. 24, 2006) at 31 ("Counsel have made substantial time and labor commitments which have now inured to the financial benefit of the Class. The Court finds that a lodestar calculation would be inappropriate.").

The Court, however, is mindful of the decision of the two judge panel for the U.S. Court of Appeals for the Tenth Circuit in *Chieftain Royalty Company v. EnerVest Energy Inst. Fund MITA, L.P., et al.*, No. 16-6022, 888 F.3d 455 (10th Cir. April 11, 2018) (amended *nunc pro tunc)* ("Panel Opinion"), which remanded the award of attorneys' fees in a royalty owner class action settlement pending in federal court under diversity jurisdiction for application of a lodestar analysis and re-examination under Oklahoma law. But the Panel Opinion is not binding on this Court and seems erroneously decided.

Trustees v. BNY Mellon, N.A., et al., 2012 WL 6864701, at *8 (E.D. Okla. Oct. 25, 2012) (no lodestar analysis in a federal securities fraud class action).

[9] These cases seem to misread *Burk* which was not a class action and was initiated on an hourly rather than contingent basis. *State ex rel. Burk v. City of Oklahoma*, 1979 OK 115, 598 P.2d 659 (1979). The courts that, based on *Burk,* did consider lodestar were careful to distinguish it. "The Court recognizes that *Burk* was not a class action and that the equitable fund created by the attorneys' effort benefited only the City of Oklahoma City. The attorneys fee award in that case amount to 100% of the equitable fund currently available and all of the benefit due the City for several years into the future." *Taylor v. Chevron*, p. 7, n. 2; *Laverty v. Newfield*, p. 5, n. 7. *See also Brumley v. ConocoPhillips*, pp. 13-14 ("Judge Burrage testified that there was no such limitation and that all subsequent district court attorneys' fee awards in royalty owner class actions have been on a percentage of the common fund basis" and the Court held: "Thus, to read *Burk* case as somehow limiting attorneys' fees in royalty owner class actions to 140% of lodestar is a view which the Court rejects."). *See also* Gensler Decl. ¶¶ 8, 37-39, 42, 47 (analyzing *Burk*).

First, citing the *Burk* case from 1979, the Panel Opinion mistakenly suggests that Oklahoma courts must set class action fee awards using the lodestar method. That is not correct. Oklahoma courts never interpreted *Burk* as imposing any such mandate in common fund contingency cases. To the contrary, Oklahoma courts uniformly relied on the percentage-of-fund method, using lodestar as, at most, a cross-check. More fundamentally, the Oklahoma Legislature has since enacted a statute-12 O.S. § 2023(G)(4)—governing fee awards in class action. In doing so, the Oklahoma Legislature intended to relieve Oklahoma courts of any need to follow lodestar methodology when determining class action fees, deliberately endowing Oklahoma courts with discretion to select whatever calculation methodology best fit the circumstances. In substance and effect, the Oklahoma Legislature codified the practices Oklahoma courts had developed and used during the preceding three decades. Since Section 2023(G)(4)(e) took effect, Oklahoma courts have continued to award class counsel fees on a percentage-of-the-fund basis in common fund contingency fee royalty underpayment cases.

Second, citing the *Hess* case, the Panel Opinion mistakenly suggests that Oklahoma has rejected the use of multipliers when the lodestar method is used. That too is not correct. The Oklahoma Legislature deliberately eschewed adopting any range or cap for multipliers when it enacted Section 2023(G)(4). Moreover, the Panel Opinion misreads *Hess* in two ways. First, it misreads the applicability of *Hess* because it failed to appreciate the fee-shifting-case context of *Hess*, a setting wholly distinct from the common-fund setting here. Second, it missed the fact that the few references in *Hess* to using the lodestar method in the common fund setting affirmatively recognize and support the use of multipliers. Since *Hess*, Oklahoma courts applying Section 2023(G)(4)(e) in common-fund contingency fee cases have consistently grasped these distinctions and have used multipliers when incorporating a lodestar component in their analyses.

Exercising discretion and considering the evidence presented and the performance of Class Counsel in achieving excellent results, the Court here follows decades of Oklahoma law to apply the percentage-of-the-fund method.

11. **The undesirability of the case** (factor 10). Measuring the desirability of this case against other civil contingent fee cases and its "attractiveness" to counsel willing and able to represent a class of almost 3,000 royalty owners, this class action satisfies the "undesirable" factor. Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, to advance payment of tens of thousands of dollars in consultants and expert witness fees, administration expenses, and to invest 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. Sharp Decl. ¶ 36. Defendant's counsel bears no such risk as payment of their hourly fees and recovery of their out-of-pocket expenses are assured, especially where, as here, Defendant is well-financed and well represented. When Settlement Class Counsel accepted the representation and filed suit, the risk of success, as well as failure, was unknown. Class Counsel's investment of time, treasure, and effort, paired with the risk of losing that investment given the complexity of class action and oil and gas law, makes the case undesirable such that most law firms would not take it.

12. **Time limitations imposed by client or circumstances** (factor 7). Although not a significant factor in this case, or in most class actions, plaintiffs who have been harmed would like to be made whole sooner rather than later, especially where, as here some may be older and may not be alive at the end of protracted class litigation. Otherwise, there were no unique time limitations by circumstances, such as atypical court deadlines, that impact this Court's evaluation of the reasonableness of attorneys' fees.

13. **The nature and length of the professional relationship with the client** (factor 11). In cases accepted on an hourly basis or where the client and attorney have had a long-standing relationship or where the client provides a significant volume of business to the attorney, the client may expect and receive a discounted fee. These scenarios do not apply to a class action accepted on a contingent fee basis. Therefore, the Court evaluates this factor as neutral in determining the reasonableness of the attorneys' fee request here.

Another factor that should be mentioned, although it is not listed in Section 2023(G)(4)(e), is that no Class Member objected to the fee request. The Class Notice itemized all of the requests that would be submitted to the Court for approval, including attorneys' fees and incentive award, and not a single Class Member objected to them. Remarkably, no one even opted out. And the Class Representative supports the requests. These facts too weigh in favor of approving the requested Class Counsel Fees and Expenses.

Having reviewed each of the 13 factors in the Statute, the Court finds the 40% contingency fee request to be fair and reasonable. It is within the range of contingency fee percentages approved by other Oklahoma district courts in oil and gas class actions. Consequently, the percentage is well known to royalty owners in class action litigation generally and to the Settlement Class Members in this litigation particularly. The Court hereby approves 40% of the recovery as a fair and reasonable attorneys' fee.

II. Litigation and Administration Expenses Are Reasonable and Necessary.

Class Counsel has incurred $40,518.62 in Litigation Expenses to-date as supported by the Sharp and B. Wright Declarations. In addition, Class Counsel has advanced and will advance the Administration Expenses under the Settlement Agreement, paragraph 1.1, subject to recoupment from the Settlement Proceeds. To date, Class Counsel has paid $14,348.62 in Administration

Expenses and will incur future Administration Expenses that have been estimated at $14,538.50 by the Settlement Administrator. Keough Decl. ¶ 19. In addition, Class Counsel estimates its expert will require $4,000.00 to complete his work related to the final allocation and distribution of the Net Settlement Amount. Sharp Decl. ¶ 43. The requested expenses incurred to-date total $54,867.24. Additional future Administration Expenses total $18,538.50. To allow for additional future Litigation Expenses up through the Settlement Fairness Hearing, the Court approves a reserve of $20,000 to be set aside from the Settlement Proceeds to pay these Expenses. Sharp Decl. ¶43. All of the expenses incurred, or to be incurred, are reasonable and necessary to the prosecution of this case. After due consideration of the evidence, the Court expressly so finds and concludes $54,867.24 shall be paid from the Settlement Proceeds to reimburse Class Counsel for reasonable and necessary Litigation and Administration Expenses, with $20,000 set aside for payment of future Litigation and Administration Expenses upon motion and court order.

III. 2% Incentive Award to the Class Representative Is Reasonable.

Based on this Court's observations while presiding over this matter and the evidence presented, the Class Representative has performed well. Without the Class Representative's willingness to litigate on behalf of other royalty owners, this case could not have proceeded and no recovery would have been obtained for the Settlement Class. As the Fitzgerald Declaration details, the Class Representative pursued the case by providing documents and making itself available to consult with Settlement Class Counsel throughout all stages of the Class Lawsuit. The Representative's participation enabled the Settlement Class's recovery on its claims.

The award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded approximately 1-2% of the settlement proceeds to class representatives in royalty owner class actions. *See* Order on Motion for Attorney Fees, Litigation Expenses, and

Class Representatives Fee, *Continental Res. Inc. v. Conoco, Inc.*, Consolidated Cases CJ-95-739 and CJ-2000-356 (Okla. Dist. Ct., Garfield Cnty., Aug. 22, 2005), at 11 ("Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund"); Findings of Fact, Conclusions of Law, and Order Finally Approving Class Certifications, Class Settlements, and Class Counsels' Motion for Attorney Fees, Litigation Costs, and Class Representatives Fees from the Common Fund, *Velma-Alma Independent School District No. 15 v. Texaco, Inc.*, Consolidated Case Nos. CJ-2002-304, CJ-04-581-E and CJ-2005-496M (Okla. Dist. Ct.. Stephens Cnty., Dec. 22, 2005), at 32 (awarding 1.07% of the respective total settlement amounts); Order on Class Counsels' Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, *Robertson v. Sanguine, Ltd.,* No. CJ-02-150, (Okla. Dist. Ct., Caddo Cnty., July 11, 2003), at 2 (approving 1.00%); Judgment, *Fazekas v. ARCO*, No. C-98-65 (Okla. Dist. Ct., Latimer Cnty., Mar. 15, 2002), at 6 (awarding $400,000 out of $6.25 million or 6.40%); Judgment, *Rudman v. Texaco*, No. CJ-97-1-E (Okla. Dist. Ct., Stephens Cnty. Nov. 16, 2001), at 7 (awarding $250,000 out of $25 million or 1.00%); Order on Class Counsels' Motion for Attorneys' Fee, Representatives' Fee and Reimbursement of Litigation Expenses from the Common Fund, *Brumley v. ConocoPhillips*, No. CJ-2001-5 (Okla. Dist. Ct., Texas Cnty., Feb. 8, 2005), at (awarding 0.88%); Final Order Granting Class Counsel Fees, Litigation Costs, and Incentive Award, *DSR v. Devon*, No. CJ-11-12 (Okla. Dist. Ct., Dewey Cnty., Dec. 13, 2013), at 7 (awarding 1.00%). A fee of 2% of the Settlement Proceeds to the Class Representative is certainly reasonable; thus, it is approved.

IV. Conclusion

The Court finds reasonable, approves, and orders: (1) an award of 40% of the Settlement Proceeds ($680,000) as a fee to Class Counsel; (2) an award of $54,867.24 in Litigation and Administration Expenses incurred to Settlement Class Counsel; (3) a set aside of $20,000 from the Settlement Proceeds for Litigation and Administration Expenses to be incurred (to be distributed upon motion to and order from the Court); and (4) an incentive award of 2% of the Settlement Proceeds ($34,000) to the Class Representative, all of which shall be paid from the Settlement Proceeds.

There is no reason for delay in the entry of this Judgment. Pursuant to 12 O.S. § 994 of the Code of Civil Procedure of the State of Oklahoma, the Court directs the Clerk of the Court to immediately enter this Judgment. The adjudication of the claims of the Class Members is final. Since there is no dispute or standing to appeal, there will be no appeal.

IT IS SO ORDERED THIS 24th DAY OF APRIL 2019.

JON K. PARSLEY
DISTRICT COURT JUDGE