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

DORSEY J. REIRDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 6:16-cv-00087-KEW**
	)	
XTO ENERGY INC.,	)	
	)	
Defendant.	)	

ORDER AWARDING ATTORNEYS' FEES

Before the Court is Class Counsel's Motion for Approval of Attorneys' Fees (Dkt. No. 96) (the "Motion") and Memorandum of Law in Support Thereof (Dkt. No. 97) (the "Memorandum"), wherein Class Counsel seeks entry of an Order approving Class Counsel's request for Attorneys' Fees in the amount of $8,000,000—the amount set forth in the Notice. The Court has considered the Motion and Memorandum, all matters and evidence submitted in connection therewith and the proceedings on the Final Fairness Hearing conducted on January 24, 2018. The Court finds the Motion should be granted.

IT IS THEREFORE ORDERED as follows:

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

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

3. The Court has jurisdiction to enter this Order and over the subject matter of the

Litigation and all parties to the Litigation, including all Settlement Class Members.

4. The Notice stated that Class Counsel would seek attorneys' fees up to $8 million to be paid from the Gross Settlement Fund. Notice of Class Counsel's request for attorneys' fees was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the request for attorneys' fees is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.

5. Class Counsel provided the Court with abundant evidence in support of their request for attorneys' fees, including but not limited to: (1) the Motion and Memorandum; (2) Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, 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. 93); (3) Declaration of Steven S. Gensler in Support of the Stipulation and Agreement of Settlement, Notice of the Proposed Settlement, and Award of Attorney's Fees ("Gensler Decl.") (Dkt. No. 92); (4) Declaration of Bradley E. Beckworth and Patrick M. Ryan on Behalf of Class Counsel ("Joint Class Counsel Decl.") (Dkt. No. 95-2); (5) Declaration of Bradley E. Beckworth Filed on Behalf of Nix, Patterson & Roach, LLP ("NPR Decl.") (Dkt. No. 96-1); (6) Declaration of Patrick M. Ryan Filed on Behalf of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC ("RW Decl.") (Dkt. No. 96-2); (7) Declaration of Lawrence R. Murphy, Jr. on Behalf of Richards & Connor, PLLP ("R&C Decl.") (Dkt. No. 96-5); (8) Declaration of Robert N. Barnes and Patranell Britten Lewis ("B&L Decl.") (Dkt. No. 96-3); (9) Declaration of Michael Burrage ("WB Decl.") (Dkt. No. 96-4); (10) Declaration of Dorsey J. Reirdon ("Reirdon

Decl.") (Dkt. No. 95-1); (11) Declaration of Jennifer M. Keough on Behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement ("JND Decl.") (Dkt. No. 95-5); and (12) the Affidavits of Absent Class Members, Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust) (Dkt. No. 95-7); Earl Dwayne Sager (Dkt. No. 95-8); and Robert Lovelace (Dkt. No. 95-9). This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was objected to or otherwise refuted by any Settlement Class Member.

6. Class Counsel is hereby awarded Attorneys' Fees of $8 million, to be paid from the Gross Settlement Fund. In making this award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of $20,000,000 in cash, material binding changes to XTO's statutory interest payment practices and policies in Oklahoma, having a present value of at least $20 million, 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 December 1, 2017, JND caused the Notice of Settlement to be mailed via first-class regular mail using the United States Postal Service to 37,147 unique mailing records identified in the mailing data. *See* JND Decl. at ¶8. The Notice expressly stated that Class Counsel would seek attorneys' fees up to $8 million;

(c) Class Counsel filed its Motion fourteen (14) days prior to the deadline for

Settlement Class Members to object. One objection was filed in opposition to Class Counsel's Motion for Approval of Attorneys' Fees without any factual support or legal authority, and that objection is hereby overruled;

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

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

Settlement Agreement at ¶11.8;

(e) This choice of law provision should be and is hereby enforced. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)); *see also Williams v. Shearson Lehman Bros*., 917 P.2d 998, 1002 (Okla. Ct. App. 1995) (concluding that parties' contractual choice of law should be given effect because it does not violate Oklahoma's constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) ("Parties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity."); Miller Decl. at ¶¶30-31. The Court is aware of the Tenth Circuit's recent holding in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017). The Court is further aware that the Plaintiff in that case has filed a request for *en banc* review

and that further appeals are possible. The Court finds that the ultimate outcome of the *EnerVest* appeal does not bear on the Court's decision here because the Settlement Agreement in this case specifically includes the choice of law language set forth above and, as such, the Court's analysis is governed by the Tenth Circuit's long line of jurisprudence in common fund class actions under the common fund doctrine. *See Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993). However, as discussed further below, the Court has taken the time to conduct an extensive analysis of the requested fee under Oklahoma law, which is set forth in detail below;

(f) Federal Rule of Civil Procedure 23(h) states "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." An award of attorneys' fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *Brown v. Phillips Petroleum Co.*, 838 F.2d 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 requested fees are specifically authorized by law, federal common law, which is specifically authorized by an express agreement of the parties. Settlement Agreement at ¶¶7.1, 11.8. Under the Parties' chosen law (federal common law), district courts have discretion to apply either the percentage of the fund method or the lodestar method—but, in the Tenth Circuit, the percentage of the fund method is clearly preferred. *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) (Docket

No. 52 at 5) (the "*Laredo* Fee Order"). Further, in the Tenth Circuit, in a percentage of the fund recovery case such as this, where federal common law is used to determine the reasonableness of the attorneys' fee under Rule 23(h), neither a lodestar nor a lodestar cross check is required. *Id*.;

(g) This Court has acknowledged the Tenth Circuit's preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A. G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)).[1] Other Oklahoma federal district courts agree. *See, e.g., Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520 (W.D. Okla. July 31, 2014) ("The Court is not required to conduct a lodestar assessment of the hours versus a reasonable hourly rate. Nonetheless, even if such an assessment were made, the Court would reach the same conclusion that the requested fees are reasonable.") (Docket No. 150 at n.1); *see also Laredo* Fee Order at 5 ("In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method."); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R, (W.D. Okla. Oct. 5, 2012) (Docket No. 329);

(h) The percentage methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See Brown*, 838 F.2d at 454. When

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

determining attorneys' fees under this method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. Not all of the factors apply in every case, and some deserve more weight than others depending on the facts at issue. *Id.* at 456. Nevertheless, as discussed more fully below, I have taken the extra step of conducting a lodestar analysis to further verify the reasonableness of the requested fee in this case. Based upon that analysis, the applicable law, and the evidence submitted to the Court, I have concluded that whether these factors are applied as a check on the reasonableness of the percentage awarded (federal common law), or in the lodestar context to determine an appropriate multiplier or enhancement factor (Oklahoma state law), the result is the same—the requested fee of $8 million is reasonable;

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

[2] An additional factor under Oklahoma law is the risk of recovery. 12 O.S. §2023(G)(4)(e)(13). I find this factor is easily satisfied for, *inter alia*, the same facts and reasons that support the

(j) I find that the eighth *Johnson* factor—the amount involved in the case and the results obtained—weighs heavily in support of the requested fee. *See 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");

(k) Here, the evidence shows that, under the results obtained factor, the Fee Request is fair and reasonable. There are three critical components of this Settlement: (1) the Gross Settlement Fund of $20 million, which alone represents a significant recovery for the Class; (2) material, binding changes to XTO's statutory interest payment practices and policies in Oklahoma, which have a minimum present value of $20 million; and (3) payment of up to $750,000 in administration, notice and distribution costs, which benefits the Settlement Class significantly, as such funds would otherwise be paid from the Gross Settlement Fund. Thus, the result obtained here through the Settlement bestows a minimum total economic benefit of $40.750 million (the Total Settlement Value) upon the Class;

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

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second (novelty and difficulty of the questions presented by the litigation) and sixth (whether the fee is fixed or contingent) *Johnson* factors analyzed below.

1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) (explaining that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member" obtained through the "entire judgment fund"). Thus, in making this assessment, "the court should take into account the value of any future relief under the settlement." *Feerer v. Amoco Prod. Co.*, No. 95-0012 JC/WWD, 1998 U.S. Dist. LEXIS 22248, at *42-43 (D.N.M. May 28, 1998) (finding fee award of $20,542,665, which represented 41.9% of $49,000,000 cash portion of settlement and "approximately 27.7% to 29.5% of the current value of the settlement" based upon the agreed-upon future changes to royalty payment calculations, which had a present value of $21,000,000 to $25,600,000) (collecting cases)[3];

[3] *See also, e.g., Principles of the Law of Aggregate Litigation*, §3.13(b) (American Law Institute, 2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, ***with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement***."); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991) (instructing that courts should consider, among other factors, "***any non-monetary benefits conferred upon the class by the settlement***" in determining reasonable attorneys' fees to be paid from common fund recovery); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (holding "where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts may include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees") (citing *Boeing*, 444 U.S. at 478-79)); *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013) (awarding $46.5 million in attorneys' fees on a $155 million gross settlement fund, $40 million of which constituted future benefits) (the "*QEP* Fee Order"); *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *3-13 (D. Colo. Oct. 20, 2009) (finding, where settlement provided for up-front cash payment of $12,997,493.00 and future changes to royalty payment calculation methodology valued at approximately $10,400,00.00, the "Common Fund created" amounted to "approximately $23,397,493.00" and, thus, a fee award "in the amount of $5,900,000, which represent[ed] approximately 26% of the total economic benefit of the Class Settlement, net of litigation expenses, [which also represented 45% of the $12,997,493 initial cash payment]" was "warranted and reasonable" under Tenth Circuit law); *Droegemueller v. Petroleum Dev. Corp.*, No. 07-cv-1362-JLK-CBS, 2009 U.S. Dist. LEXIS 123875, at *11-12 (D. Colo. Apr. 7, 2009) (finding "results obtained" factor was measured by "total economic benefit for the Class," which included cash payment for past royalty underpayment claims and present value of changes to "method for calculating future royalties").

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

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

Gensler Decl. at ¶40. Accordingly, the "results obtained" factor strongly supports a fee award of $8 million to be paid from the immediate cash portion of the Settlement that represents no more than 19.6% of the Total Settlement Value[4];

[4] The outstanding result obtained is in stark contrast to cases like *Hess v. Volkswagen of America, Inc.*, 2014 OK 111, 341 P.3d 662, 670, where fees are based upon coupons or claims made settlements with no guaranteed common fund. *Hess* was a fee-shifting case where defendants contractually agreed to incur liability for the class' attorneys' fees, resulting in application of the lodestar method. *See id.* at 666. The concurring opinion even recognized there are other cases where ***"the attorney-fee award is based on a percentage of the plaintiffs' recovery***." *Id.* at 672, n.3. And, that case was an egregious outlier where the entire class got less than $46,000, but the lawyers were asking for over ***$14 million***—a result that could never pass muster under the "result obtained" factor. *See id.* at 673. On remand, the trial court, as instructed, subtracted the fees generated in the failed Florida litigation from the lodestar fee and "then reduced the lodestar by 70%" to arrive at an attorney fee in the amount of $983,616.75, together with expenses and postjudgment interest. *Hess v. Volkswagen of America, Inc.*, 2017 OK CIV APP 35, ¶2, 398 P.3d 27. Volkswagen appealed the trial court's award, arguing that "the new attorney fee award - an award which constitutes a mere 13.6% of the prior attorney fee award - is still too high," as it "equals approximately '21.5 times as much money as . . . recovered for the entire class[.]'" *Id*. The Court of Civil Appeals affirmed the trial court's *downward* reduction of the lodestar by 70% given the low recovery obtained in the case, even though the fee awarded and affirmed still represented 21.5 times as much money as recovered for the entire class (Fees of $983,616.75 vs. Class Recovery of $45,780); *see also, e.g., Fitzgerald Farms, LLC v.*

(n) I find that the other *Johnson* factors also support and weigh strongly in favor of the Fee Request. First, I find that the evidence of the time and labor involved weighs in favor of the Fee Request. The time and labor Class Counsel and Plaintiff's Counsel have expended in the research, investigation, prosecution and resolution of this Litigation is set forth in detail in the following declarations: (1) NPR Declaration; (2) RW Declaration; (3) R&C Declaration; (4) B&L Declaration; and (5) WB Declaration. These Declarations support the Fee Request. In summary, these Declarations prove that for almost two years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted extensive discovery and document review, reviewing thousands of pages of documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications, internal logs of royalty owner communications, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Class Counsel spent significant time working with engineering, accounting, marketing and lease and title analysis experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy and complex negotiation and mediation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required several months of negotiations, including a formal mediation session, telephone conferences, briefing on

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Chesapeake Operating, L.L.C., No. CJ-2010-38, 2015 WL 5794008, at *2 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding "recovery of 41% of damages within the statute of limitations period" to be "an outstanding benefit to the Settlement Class when compared against other royalty underpayment class action settlements approved by other Oklahoma district courts"). Given the amount involved in this Litigation and the Settlement achieved for the benefit of the Settlement Class, this highly significant factor strongly supports Class Counsel's Fee Request.

substantive factual and legal issues and extensive consultation with experts to evaluate and analyze damages. Overall, Class Counsel and Plaintiff's Counsel dedicated 4,144 hours of attorney and professional time to this Litigation and reasonably anticipate dedicating an additional 765 hours through final approval and distribution;

(o) Second, I find that the evidence regarding the novelty and difficulty of the questions presented in this action weighs in favor of the Fee Request. Class actions are known to be complex and vigorously contested. The Court notes that in addition to the pleadings on file, Declarations and arguments of the parties, the Court has presided over this case for nearly two years and finds that this case presented novel difficult issues. The legal and factual issues litigated in this case involved complex and highly technical issues. The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. The successful prosecution and resolution of the Settlement Class' claims required Class Counsel to work with various experts to analyze complex data to support their legal theories and evaluate the amount of alleged damages. I find the fact that Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case. Joint Class Counsel Decl. at ¶68; Miller Decl. at ¶48; Gensler Decl. at ¶49. Moreover, XTO asserted a number of significant defenses to the Settlement Class' claims that would have to be overcome if the Litigation continued to trial. Miller Decl. at ¶22; Gensler Decl. at ¶21. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, weighs in

favor of the Fee Request. Joint Class Counsel Decl. at ¶¶37, 64; Miller Decl. at ¶23; Gensler Decl. at ¶39;

(p) I find that the third and ninth *Johnson* factors—the skill required to perform the legal services and the experience, reputation and ability of the attorneys—supports the Fee Request. I find the Declarations prove that this Litigation called for Class Counsel's considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. *See* Joint Class Counsel Decl. at ¶66; Miller Decl. at ¶49; Gensler Decl. at ¶¶20-21; *see also* NPR Decl. at ¶¶13-17, 25; RW Decl. at ¶¶2, 4; B&L Decl. at ¶¶3-4, 13; WB Decl. at ¶¶2, 4; R&C Decl. at ¶¶2, 4. I have presided over this case and others where various members of Plaintiffs' Counsel were actively involved. I am familiar with the work of NPR, WB, RW, Larry Murphy and BL and find that these firms possess the type of experience, reputation and ability that supports the Fee Request. The case required investigation and mastery of highly technical issues regarding statutory interest payments in Oklahoma. *See* Joint Class Counsel Decl. at ¶66. NPR has years of experience litigating royalty underpayment class actions in Oklahoma state and federal courts. *Id.* at ¶68. NPR also is highly experienced in class action, commercial, *qui tam*, mass tort, securities, and other complex litigation and has successfully prosecuted and settled numerous class actions, including oil and gas royalty underpayment class actions. *Id.* at ¶67. Additionally, NPR has taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the pharmaceutical industry, the opioid industry, and the energy industry. *See, e.g.*, NPR Decl. at ¶¶13-16, 25. NPR

consists of some of the most experienced complex litigation attorneys in the country. Utilizing creativity and zealous advocacy, these attorneys have achieved huge results for their clients. *See, e.g.*, NPR Decl. at ¶¶13-17, 25; RW Decl. at ¶4. I witnessed this advocacy first-hand and commended NPR for their work in *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.): "It was a hard-fought case, and I think that the legal work on this case has just been absolutely spectacular, and I want to brag on all of you for the work that you put into it." *See* Final Approval Memo., Ex. 5; *see also* NPR Decl. at ¶14. And the same is true here.

(q) Further, I find the skill, reputation and ability of the law firm of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC also supports the Fee Request. *See generally* RW Decl. The firm has litigated class actions and complex commercial litigations in courts across the country. *Id.* at ¶2. With more than 48 years of experience in Oklahoma state and federal courts, Pat Ryan is best known for successful high-profile cases including his work as U.S. Attorney in the prosecution and conviction of Oklahoma City Bombing defendants Timothy McVeigh and Terry Nichols in Denver, and just recently securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Dept. of Justice. *Id.* at ¶4.

(r) I find that the quality of representation by counsel on *both* sides of this Litigation was high. *See* McGowan Decl. at ¶¶7, 17. XTO is represented by skilled class action defense attorneys who spared no effort in the defense of their client. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976). Simply put, without the experience, skill and determination displayed by *all* counsel involved, the Settlement would not have been reached. *See* Miller Decl. at ¶51; Gensler Decl. at ¶20; Joint Class

Counsel Decl. at ¶66; *see also* NPR Decl. at ¶¶13-16, 25; RW Decl. at ¶¶2, 4; B&L Decl. at ¶¶3-4, 13; WB Decl. at ¶¶2, 4; R&C Decl. at ¶¶2, 4. I find these factors strongly support the Fee Request;

(s) I find that the evidence regarding the fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—weighs in favor of the Fee Request. The Declarations prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were precluded from working on other cases and pursuing otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36; Miller Decl. at ¶52. This case was filed almost two years ago in January 2016, and has required the devotion of substantial time, manpower and resources from Class Counsel over that period. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. Class Counsel has spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. The schedules of the courts, witnesses and clients were accommodated on a regular basis by Class Counsel. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. A case of the size and complexity of this one deserves and requires the commitment of a large percentage of the total time and resources of firms the size of those of Class Counsel and works a significant hardship on them over the course of multiple years. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. Class Counsel had to forego taking on

numerous additional cases because of this litigation and the burden it placed on their time and resources. *See* Joint Class Counsel Decl. at ¶79; NPR Decl. at ¶36. Indeed, during the period this case has been pending, NPR states it investigated at least twelve cases that it ultimately was not able to pursue due to the time and resource constraints imposed by this case, including six oil and gas class cases. NPR Decl. at ¶36. Accordingly, I find these factors support the Fee Request;

(t) I find the evidence regarding the fifth *Johnson* factor—the customary fee and awards in similar cases—further weighs in favor of the Fee Request. Class Counsel and Mr. Reirdon negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶54; NPR Decl. at ¶4. I find this fee represents the market rate and is in the range of the "customary fee" in oil and gas class actions in Oklahoma state courts over the past 15 years. *See* Joint Class Counsel Decl. at ¶75; NPR Decl. at ¶¶4, 10, 23; Miller Decl. at ¶59 (collecting cases); Gensler Decl. at ¶45; *see also, e.g.*, *Fitzgerald Farms*, 2015 WL 5794008, at *3 (collecting Oklahoma cases to find in "the royalty underpayment class action context, the customary fee is a 40% contingency fee" and awarding 40% fee of $119 million common fund);

(u) Federal and state courts in Oklahoma often approve similar fee awards in similar cases. For example, the Western District of Oklahoma recently approved a 40% fee and a 39% fee in similar royalty underpayment class cases. *Laredo* Fee Order ("Class Counsel's request of forty percent (40%) of the $6,651,997.95 Settlement Amount is within the acceptable range of attorneys' fees approved by Oklahoma Courts as being fair and reasonable in contingent fee class action litigation ..."); *QEP* Fee Order at *6 (awarding a fee of $46.5 million, which represented approximately 39% of the cash

portion of a $155 million settlement); Miller Decl. at ¶53. The typical fee award in similar royalty underpayment class actions in Oklahoma state court is 40%. *See* Joint Class Counsel Decl. at ¶75; NPR Decl. at ¶¶4, 10, 23; Miller Decl. at ¶59 (collecting cases); Gensler Decl. at ¶45. And, comparable awards have been granted in other complex class actions across the country. Miller Decl. at ¶53. Given the outstanding cash recovery plus the substantial binding changes to XTO's statutory interest policies in Oklahoma, I find the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval. *Id.* at ¶¶53, 59;

(v) Moreover, I find a 40% fee is consistent with the market rate for high quality legal services in royalty class actions like this. *See Laredo* Fee Order at 8 ("The market rate for Class Counsel's legal services also informs the determination of a reasonable percentage to be awarded from the common fund as attorneys' fees."); Miller Decl. at ¶54. I have held a contingency fee negotiated at arms' length at the outset of the litigation "reflect[s] the value the Class Representatives placed on the future success of [the] [a]ction." *CompSource Oklahoma*, 2012 U.S. Dist. LEXIS 185061, at *23; *see also Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of this Litigation."); Miller Decl. at ¶¶54, 59. Here, Class Representative agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7; Miller Decl. at ¶55; Gensler Decl. at ¶45. His declaration demonstrates his continued support of the fairness and reasonableness of the Fee Request. Reirdon Decl. at ¶¶16-17. I find this factor supports the Fee Request. Further, Class Counsel submitted significant evidence

regarding the fee and market rate that supports this factor. Class Counsel and Plaintiffs' Counsel have specialized skill, experience and qualifications in the area of market value of attorneys' fees in complex litigation generally and complex oil and gas litigation specifically and have submitted significant testimony in their Declarations demonstrating that the fee structure negotiated with Mr. Reirdon is the market rate for such cases. *See* NPR Decl. at ¶¶13-23, 25-29; RW Decl. at ¶¶2-5; B&L Decl. at ¶¶2-4, 9-11; WB Decl. at ¶¶2-5; R&C Decl. at ¶¶2-5;

(w) I find the sixth *Johnson* factor—the contingent nature of the fee—also supports the Fee Request. Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the Litigation would yield no recovery and leave them uncompensated. *See* Joint Class Counsel Decl. at ¶¶80, 83; NPR Decl. at ¶¶5-7. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. Miller Decl. at ¶56. As Professor Miller aptly notes, "the risk of no recovery in complex cases of this type is very real and is heightened when plaintiffs' counsel press to achieve the very best results for their clients and the class." *See* Miller Decl. at ¶56; *see also* Joint Class Counsel Decl. at ¶83; NPR Decl. at ¶¶5-7. Indeed, Class Counsel expended thousands of hours litigating several similar royalty underpayment actions where the courts denied class certification and thus, Class Counsel received no remuneration whatsoever despite their diligence and expertise.[5] Simply put, it would not have been economically prudent or feasible if Class Counsel

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

were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates. *See* NPR Decl. at ¶¶5-7; Miller Decl. at ¶56;

(x) Further, as noted above, Class Representative negotiated and agreed Class Counsel would represent him on a contingency fee basis, not to exceed 40%. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶54; NPR Decl. at ¶4; Miller Decl. at ¶55; Gensler Decl. at ¶45. This agreed-upon fee reflects the value of this Litigation as measured when the risks and uncertainties of litigation still lay ahead. *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23-25; *Laredo* Fee Order at 8. If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses). Joint Class Counsel Decl. at ¶83; NPR Decl. at ¶5; *see also Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶¶11 & 15-23, 77 P.3d 1042. Prearranged fees, whether fixed or contingent, can be helpful in setting court awarded fees in class actions. *See, e.g., Adkisson, et al. v. Koch Indus. Inc., et al.*, Case No. 106,452 (Okla. Ct. Civ. App. Aug. 7, 2009) (unpublished), at ¶¶12-22[6]; *Sholer v. State ex rel. Dept. of Public Safety*, 1999 OK CIV APP 100, ¶14, 990 P.2d 294. Moreover, even though federal law, not Oklahoma law, governs this issue here, I note that when the attorneys' compensation is contingent, Oklahoma law recognizes any attorneys' fee award must account for the risks inherent in such engagements by adjusting "upward the basic hourly rate" to allow for a "risk-litigation" premium. *See, e.g., Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, ¶14 n.30, 977 P.2d 357 (citing *Brashier v. Farmers Ins. Co.*, 1996 OK 86, ¶11 n.22, 925 P.2d 20); *Oliver's*

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

Sports Ctr., Inc. v. Nat'l Std. Ins. Co., 1980 OK 120, ¶6, 615 P.2d 291. Accordingly, I find this factor strongly supports the Fee Request;

(y) I find the evidence shows that the tenth *Johnson* factor—the undesirability of the case—weighs in favor of the Fee Request. Compared to most civil litigation, this Litigation clearly fits the "undesirable" test and no other firms or plaintiffs have asserted these claims against XTO. *See* Joint Class Counsel Decl. at ¶83; NPR Decl. at ¶23; Miller Decl. at ¶57. Few law firms would be willing to risk investing the time, trouble and expenses necessary to prosecute this Litigation for multiple years. *See* Joint Class Counsel Dec. at ¶¶54, 80; NPR Decl. at ¶23. Further, XTO has proven itself to be a worthy adversary that will fight for years and years in bitter, adversarial litigation.[7] There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming and arduous undertaking. *See* Joint Class Counsel Decl. at ¶83. The investment by Class Counsel of their time, money and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature. *See* Joint Class Counsel Decl. at ¶¶54, 80; NPR Decl. at ¶23; *see also, e.g., Finnell v. Jebco Seismic*, 2003 OK 35, ¶17 n.36, 67 P.3d 339 (noting this factor also entails consideration of the "risk of non-recovery"). And, this Litigation involved a number of uncertain legal and factual issues. *See* Joint Class Counsel Decl. at ¶37; Gensler Decl. at ¶15. Indeed, in another complex royalty underpayment class action, one Oklahoma state court explained:

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

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

Fitzgerald Farms, 2015 WL 5794008, at *8. I find the same principle holds true here. Class Counsel reviewed thousands of pages of documents and many gigabytes more of electronically produced data, including emails, training manuals, organizational documents, check stubs, royalty owner communications, internal logs of communications with royalty owners, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners. Joint Class Counsel Decl. at ¶12. Class Counsel and Plaintiff's Counsel also advanced $223,056.78 in litigation expenses. NPR Decl. at ¶38; RW Decl. at ¶18; B&L Decl. at ¶19; WB Decl. at ¶13. And, Class Counsel and Plaintiff's Counsel expended approximately 4,144 hours of time over the length of this action. NPR Decl. at ¶¶32-35; RW Decl. at ¶¶13-16; B&L Decl. at ¶¶15-16; WB Decl. at ¶¶13-16; R&C Decl. at ¶¶13-16. I find this factor also supports the Fee Request. *See* Joint Class Counsel Decl. at ¶83; Miller Decl. at ¶57;

(z) I find the eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Mr. Reirdon is a highly educated royalty owner. *See* Reirdon Decl. at ¶¶4-5. He was and remains very active in this litigation. *Id.* at ¶¶8-11. Further, Class Counsel currently represents Mr. Reirdon in other litigation in Oklahoma courts. Joint Class Counsel Decl. at ¶86; Miller Decl. at ¶58. Mr. Reirdon negotiated a 40% fee when he agreed to be class representative in this litigation. *See* Reirdon Decl. at ¶7; Joint Class Counsel Decl. at ¶54; NPR Decl. at

¶4. And, he supports the Fee Request. Reirdon Decl. at ¶¶16-17. Accordingly, I find this factor supports Class Counsel's fee request[8];

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

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

[8] The foregoing twelve *Johnson* factors are also included in the statutory enhancement factors in Oklahoma and thus, are supported by the same evidence under Oklahoma state law, as discussed in more detail below. *See* 12 O.S. §2023(G)(4)(e). The only additional factor under Oklahoma law—the risk of recovery in the litigation—further supports the fee request here. As discussed above, this Litigation involved complex issues of law and fact that placed the ultimate outcome in doubt. There was no guarantee Plaintiff and the Class would prevail on their legal theories at class certification, summary judgment and/or trial. Indeed, XTO denies all allegations of wrongdoing or liability and denies that the Litigation could have been properly maintained as a class action. *See* Settlement Agreement at ¶11.1. In the absence of the Settlement, the outcome of the complex issues in this case would remain uncertain until their ultimate resolution by the Court or a jury, thus placing substantial risk on both Parties. Accordingly, if Oklahoma law were applicable here, I find this factor also weighs in favor of the Fee Request.

43 F.3d at 483 (while either the percentage of the fund or lodestar methodology may be permissible, "*Uselton* implies a preference for the percentage of the fund method"). Indeed, the lodestar method and lodestar cross-checks are a wasteful use of resources and are disfavored by the Tenth Circuit. *See, e.g.*, *Jewell*, 167 F.3d at 1242 ("The lodestar analysis, even when used as a cross check to determine a reasonable percentage award, has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage, namely 'incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar.' . . . The Court has expressly rejected the lodestar method because it is 'difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result.'"); *see also Gottlieb*, 43 F.3d at 487 (holding district court abused its discretion by replacing "the percentage fee method . . . with the lodestar plus multiplier method."); Miller Decl. at ¶43;

(cc) Nevertheless, in an abundance of caution, I have taken the extra step of evaluating the reasonableness of the Fee Request on a lodestar basis. I find that whether analyzed as a lodestar cross-check, or as a lodestar base amount with an enhancement analysis, the lodestar in this case weighs in favor of the reasonableness of the Fee Request. The aggregate total lodestar amount submitted by Class Counsel and Plaintiffs' Counsel is $3,138,887.19. *See* NPR Decl. at ¶¶32-35; RW Decl. at ¶¶13-16; B&L Decl. at ¶¶15-16; WB Decl. at ¶¶13-16; R&C Decl. at ¶¶13-16. Thus, the requested $8 million fee represents an enhancement lodestar multiplier of 2.55. *Id.* This multiplier is well within the range of multipliers approved in the Tenth Circuit, and other circuits, when a lodestar cross-check is used. *See, e.g., Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181-

JLK, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6 (D. Colo. April 28, 2017) (finding that "[t]ypical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds" and collecting federal cases to support conclusion that "multiplier of 2.41 is within the range of those frequently awarded in common fund cases."); *Campbell v. C.R. Eng., Inc.*, No. 2:13-cv-00262, 2015 U.S. Dist. LEXIS 134235, at *20 n.5 (D. Utah Sept. 30, 2015) (finding "lodestar crosscheck calculation here results in multiplier of 2.9, which is within a reasonable range" of approved multipliers within the Tenth Circuit); *see also, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 & n.6 (9th Cir. 2002) (affirming district court's fee award based on 3.65 lodestar multiplier and listing nationwide class action settlements from 1996-2001 approving multipliers ranging up to 8.5); Miller Decl. at ¶77; Gensler Decl.at ¶61;

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

(ee) The Oklahoma Legislature amended 12 O.S. 2023 in 2013 to add a new subsection governing the calculation of attorney's fees, 2023(G)(4)(e), which states that courts shall consider thirteen factors "in arriving at a fair and reasonable fee for class counsel," only one of which is the "time and labor required." *See* Gensler Decl. at ¶53. These factors include all of the *Johnson* factors (plus one) that federal courts consider, as set forth above. *Id.* As Professor Gensler states, "[t]he best reading of Section 2023(G)(4)(e) is that it supplanted *Burk* for class-action common fund cases, aligning Oklahoma practice with what had been prevailing Tenth Circuit practice." *Id.*;

(ff) Following the enactment of Section 2023(G)(4)(e), Oklahoma district courts have applied the rule "as a flexible scheme that is applied differently based on whether the case involves a common fund recovery or statutory fee-shifting." *Id.* at ¶54. For example, in *Fitzgerald Farms*, Judge Parsley applied the Section 2023(G)(4)(e) factors in approving a 40% fee but held that, in common fund cases, the primary factor is the percentage of recovery. 2015 WL 5794008, at *2 ("[W]here, as here, the legal representation is undertaken on a contingent fee basis and that representation results in a common fund recovery for the benefit of a class, Oklahoma applies a percentage analysis."); Gensler Decl. at ¶54. Even more recently, in *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. Aug. 30, 2017), Judge Kelly explained the lodestar method does not apply in contingent-fee common-fund cases, and approved a 40% award based on all of the Section 2023(G)(4)(e) factors, but primarily the percentage of recovery. *Id.* at 8 ("When the legal representation is undertaken on a contingent fee basis, and that representation results in a common fund recovery for the benefit of a class, Oklahoma law allows a percentage analysis to determine an appropriate fee."); Gensler Decl. at ¶55;

(gg) However, I do not have to decide what role a lodestar calculation should play in the fee analysis here because, as Professor Gensler opines, I find that "the fee award in this case is reasonable whether lodestar plays no role, whether it serves as a type of cross-check, or whether it serves as a baseline subject to a contingency-fee common-fund multiplier." Gensler Decl. at ¶56;

(hh) In *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, 661-62 (Okla. 1979), the Oklahoma Supreme Court discussed a two-step procedure

for determining reasonable attorney's fees, which entails the determination of a lodestar calculation that serves as a baseline subject to a contingency-fee common-fund multiplier:

> The court will analyze first the type of work involved in the case and the number of hours expended by [the attorney] on various efforts. The court then will consider the proper hourly fee to be charged for this work. After arriving at a strictly hourly figure, the court then will consider what amount, if any, should be added to the petitioner's compensation, based particularly on the contingent nature of this litigation, the benefits conferred on plaintiff class, the service rendered to the public, the difficulty of the issues involved and petitioner's skill in dealing with them, and the other factors set forth by the Court of Appeals in Evans v. Sheraton Park Hotel, supra.

598 P.2d at 661. Thus, the Court concluded that "the proper procedure to be followed by trial courts in establishing a reasonable attorney fee in this type of case is to first determine hourly compensation on an hours times rate basis, and to that factor add an amount determined from the applicable factors set forth in *Evans, supra.*" *Id.*[9] The factors set forth in *Evans* are the now well-known "*Johnson* factors," discussed at length above. *See id.* As shown above, I find that each of these factors are satisfied by overwhelming evidence here. The only additional inquiry under Oklahoma state law is the determination of the time compensation factor, *i.e.*, baseline lodestar. Time records supporting this factor need not be contemporaneous and may be "reconstructed." *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76 at ¶14, n.20, 171 P.3d 890, 895 (citing *Burk*, 1979 OK 115 at ¶12); *see also Conti v. Republic Underwriters Ins. Co.*, 1989 OK 128 at ¶23, 782 P.2d 1357 (finding "recapitulation of [attorney's] hours, based

[9] The Oklahoma Supreme Court found "no conflict existing between the federal decisions" the Court relied on to adopt this two-step procedure and the factors to be considered "as guides in determining the reasonableness of a fee" under ORPC 1.5(a). *See id.* at 661-62 (quoting 1971 version of ORPC 1.5(a), now codified at 5 OKLA. STAT., CH.1, APP. 3-A, RULE 1.5(a)).

upon notes included in his trial notes" satisfied *Burk*); *Usrey v. Wilson*, 2003 OK CIV APP 25, ¶6, 66 P.3d 1000, 1002 ("[N]othing in *Burk* or *Oliver's* prevents an attorney fee award based on a reconstruction of the time spent on a case based upon other records which verify the activity in the case, such as the court file or the attorney's copies of letters, pleadings, or file memoranda."); *Direct Traffic Control, Inc. v. Kidd*, 2013 OK CIV APP 103, ¶35, 313 P.3d 1015 (rejecting the argument that "time records submitted were inadequate because they were reconstructions rather than copies of time records actually billed" as unsupported by any authority).[10] Oklahoma courts also have found affidavits submitted by attorneys attesting to the work they performed sufficient to support *Burk*'s time records consideration. *See, e.g., JLEE Co., L.L.C. v. Reneau Seed Co.*, 2014 OK CIV APP 65, ¶¶6-9 332 P.3d 297 (finding five-page affidavit from attorney, outlining work performed and summarizing billing entries sufficient evidence under *Burk* to support fee award)[11];

(ii) In contingency-fee cases (like this one), where hourly billing invoices are not submitted to a paying client, Oklahoma courts often have found testimony based on the review of pertinent case files sufficient to meet *Burk*'s guidance. For example, the

[10] Indeed, in *Burk*, the attorneys "did not keep time records of their work as the litigation progressed, but rather they had to reconstruct the number of hours spent in various legal endeavors...based upon review of their files and court files, [and estimate] that they had spent approximately 2500 hours on the case." 1979 OK 115 at ¶12. They also were entitled to include the time they spent working on the fee request, challenges to that request, and appeal.

[11] *See also, e.g., City of Purcell v. Wilbanks*, 1998 OK CIV APP 170, ¶10, 968 P.2d 352 (affirming fee award under prevailing party statute where expert testified to "reasonableness of claimed fee" and attorney submitted a "letter narrative delineating his efforts on [party's] behalf through the course of litigation"); *Circle F Ranch Co. v. Strehlau*, 1989 OK CIV APP 39, ¶10, 776 P.2d 855 (affirming fee award under prevailing party statute because "trial court was furnished ample evidence to support the requested fee" where fee motion was "accompanied by a brief and a detailed affidavit setting forth the hours expended and the hourly rate" in accord with *Burk*).

Oklahoma Supreme Court rejected the argument that a fee award was excessive because an attorney "did not submit detailed time records as appellant maintains were required by" *Burk* and *Oliver's Sports*, holding instead the "testimony of the expert witnesses" that the contingency agreement was "reasonable for this case" sufficiently supported the trial court's fee award. *See Root v. Kamo Elec. Co-op*, 1985 OK 8, ¶¶46-47, 699 P.2d 1083; *see also Unterkircher v. Adams*, 1985 OK 96, ¶¶3, 10-11, 714 P.2d 193 (finding attorneys' and expert witnesses' testimony that the contingency contract was reasonable in light of the *Burk* and ORPC 1.5(a) factors "ample evidence" to support the trial court's fee award); *Abel v. Tisdale*, 1983 OK 109, ¶¶6-8, 673 P.2d 836 (finding that "testimony of several practicing attorneys" supported time and labor factor under ORPC 1.5(a) and established reasonableness of one-third contingency-fee agreement); *Hamilton v. Telex Corp.*, 1981 OK 22, ¶¶23-27, 625 P.2d 106 (finding testimony of attorneys based on examination of "litigation file" and "time records" justified fee calculation). Thus, under Oklahoma law, the "proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors which are applicable to each case." *Id.* at ¶21. "Exclusive imposition of an hourly rate ignores the required analysis of the several interacting factors mandated by *Burk*, *Oliver* and *Sneed*." *Unterkircher*, 1985 OK 96 at ¶10[12];

(jj) Consistent with the foregoing Oklahoma precedent, Class Counsel and

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

Plaintiff's Counsel have submitted attorney declarations that include the number of hours worked in this Litigation by each individual and their hourly rates. *See* NPR Decl. at ¶¶32-34; RW Decl. at ¶¶13-16; R&C Decl. at ¶¶13-16; B&L Decl. at ¶¶15-16; WB Decl. at ¶¶13-16. These Declarations also provide considerable evidence regarding the specialized skill, experience, education and qualifications Plaintiff's Counsel have, not only as lawyers, but as practitioners with expertise in the area of fees, rates, and the many factors that impact fees in complex commercial litigation locally and nationally. *Id*. These records demonstrate Class Counsel and Plaintiff's Counsel expended over 4,144 hours on this Litigation. *Id*. Moreover, Class Counsel has provided hourly rates for each attorney and staff member for the services performed for different types of legal work. *Id*. As required by *Burk*, these rates are "predicated on the standards within the local legal community." 1979 OK 115 at ¶20; *see also Finnell*, 2003 OK 35 at ¶17 ("An attorney seeking an award must submit to the trial court detailed time records and must offer evidence of the reasonable value of the services performed **based on the standards of the legal community in which the attorney practices**."). I find the legal community in which Class Counsel practices is a national complex litigation firm. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (explaining that, in the lodestar context, courts generally look to the current billing rates of the attorneys in "the relevant marketplace, i.e., 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)); *see also* Miller Decl. at ¶67; NPR Decl. at ¶¶13-23, 25-29; RW Decl. at ¶¶2-5; B&L Decl. at ¶¶2-4, 9-11; WB Decl. at ¶¶2-5; R&C Decl. at ¶¶2-5;

(kk) I find the use of an hourly rate in a contingent fee case is an inefficient endeavor in the context of commercial litigation and typically results in the gross understatement of hourly rates. *See* NPR Decl. at ¶¶7, 24. This is so because most attorneys do not desire to advance costs and expenses and work by the hour with no guarantee of success without also negotiating a guaranteed multiple of that rate upon being successful. *Id.* at ¶24. Further, as Class Counsel state, "our goal is always to achieve the best result possible for the class under the circumstances at the time, and if possible, resolve all claims as quickly and efficiently as possible." *Id.* at ¶7;

(ll) However, because some courts wish to apply a lodestar cross-check to determine the fairness of a percentage fee in a complex class action case, and in some cases it may be necessary to submit hourly rates to support a request for payment of attorneys' fees in a fee shifting scenario, Class Counsel negotiated hourly rates with Mr. Reirdon that take into account the highly complex and contingent nature of this litigation. *Id.* at ¶24; Reirdon Decl. at ¶7; RW Decl. at ¶¶8-9; B&L Decl. at ¶¶12; WB Decl. at ¶¶8-9; R&C Decl. at ¶¶8-9. Mr. Reirdon and Class Counsel understood that Class Counsel would work on a fully contingent basis and that such hourly rates would only be used if ordered by the Court and, even then, would be the basis for a request for an enhancement multiplier given that Class Counsel worked on a fully contingent basis, at risk of non-payment, and advanced all costs and expenses. NPR Decl. at ¶9; Reirdon Decl. at ¶7; RW Decl. at ¶¶8-9; B&L Decl. at ¶¶12; WB Decl. at ¶¶8-9; R&C Decl. at ¶¶8-9;

(mm) With that understanding in mind, Mr. Reirdon and Class Counsel negotiated hourly rates, with an expectation that the negotiated 40% would be applied but, if applicable, these rates would be analyzed against a multiplier to be set by the

Court. NPR Decl. at ¶¶26-27; Reirdon Decl. at ¶7; RW Decl. at ¶¶8-9; B&L Decl. at ¶¶12; WB Decl. at ¶¶8-9; R&C Decl. at ¶¶8-9. I find the hourly rates submitted by Class Counsel are in line with rates approved by federal courts across the country as well as in Oklahoma courts in complex litigation involving energy companies. NPR Decl. at ¶¶27-29; RW Decl. at ¶¶8-10; B&L Decl. at ¶16; WB Decl. at ¶¶8-10; R&C Decl. ¶¶8-10. For example, in 2015, Judge Lee R. West of the Western District of Oklahoma approved partner rates ranging from $850 - $1,150 per hour in a complex shareholder derivative action, *In re Sandridge Energy, Inc. S'holder Derivative Litig.*, No. CIV-13-102-W, 2015 U.S. Dist. LEXIS 180740 (W.D. Okla. Dec. 22, 2015). There, Judge West relied upon attorney declarations similar to the ones submitted by Class Counsel here to assess the time and labor expended by the lead counsel in the action. *See id.* at *10-11 & n.10 (citing counsel's declarations for amount of time expended in litigation). And, those declarations demonstrate that the lodestar submitted in the *Sandridge* matter was comprised of hourly rates billed two years ago for partners in national complex litigation firms (including one of Plaintiffs' Counsel here (Whitten Burrage)) like Class Counsel here, that ranged from $850 per hour (Whitten Burrage (Dkt. No. 328-2)) to $940 per hour (Kaplan Fox (Dkt. No. 328-3)) to $1,150 per hour (Jackson Walker (Dkt. No. 328-4)). The Tenth Circuit affirmed this order on November 17, 2017;

(nn) Moreover, Professor Miller has opined that, from an empirical standpoint, numerous different data sources can be evaluated to compare the rates submitted by Class Counsel to those regularly charged for comparable representation in the national complex litigation legal community. Miller Decl. at ¶70. For example, Professor Miller has found that "public filings in sophisticated federal bankruptcy litigation—an area of law in which

many national complex litigation firms practice—often reveal the hourly rates that such firms charge for representation by their partners in complex bankruptcy matters, *where there is no risk of nonpayment of fees*." *Id.* Professor Miller's research shows that the standard hourly rate approved for partners from prominent complex litigation firms on the defense-side in high-stakes matters in one bankruptcy court between 2010 and 2012 (five to seven years ago) significantly exceeds the rates submitted by Class Counsel here. *Id.* (citing partner rates ranging from $580 - $1,140). Professor Miller further found that substantial survey data demonstrates a similar pattern. *Id.* at ¶71. For example, a report published in December 2009 shows the rates for bankruptcy lawyers at firms that regularly represent defendants in complex litigation approached $1,000 per hour over eight years ago. *Id.* (citing partner rates ranging from $810 - $980). Additional data regarding energy companies with a place of business in Oklahoma demonstrates a similar pattern of hourly rates and supports the rates requested by Class Counsel here. *Id.* at ¶72 (citing partner rates ranging from $475 - $1,445). Further, Professor Miller reviewed comparable billing rates for national complex litigation firms on the plaintiffs' side in prior class action settlements in complex matters. *Id.* at ¶73. Professor Miller's study of hourly rates approved from 2008 through 2012 in class action settlements in the U.S. District Court for the Southern District of New York—the court in which Professor Miller's previous empirical studies on class action settlements and attorneys' fees found the most class actions consistently were filed—reflects a "reasonable cross-section of market rates for qualified plaintiffs' counsel in complex class actions nationwide over the past decade." *Id.* (citing partner rates ranging from $460 - $975). A 2014 dataset collected by the *National Law Journal* regarding 2014 billing rates reported national

average partner rates that ranged from $345 to $1,055 per hour and *average* associate rates that ranged from $135 to $678 per hour. *See* ALM Legal Intelligence, 2014 NLJ Billing Report (2014); Miller Decl. at ¶74. Professor Miller further found the "reasonableness of Class Counsel's rates is further demonstrated by the fact that '59% of corporate counsel at large companies now pay at least one law firm $1,000 per hour' and many corporations pay hourly rates of up to $2,000 per hour." Miller Decl. at ¶75 (citing a May 2016 study). Moreover, other courts have approved Class Counsel's rates of $850/hour and higher. *See, e.g.*, *In re MGM Mirage Sec. Litig.*, No. 2:09-cv-01558-GMN-VCF (D. Nev. Mar. 1, 2016) (Order Awarding Attorneys' Fees and Expenses (Dkt. No. 396)), *affirmed by* No. 16-15534 (9th Cir. Sept. 2017) (unpublished); Miller Decl. at ¶75. And, based on Class Counsel's personal experience, the hourly rates submitted here are well below the actual market rate because no firm who works on an hourly basis would agree to work at these rates without also negotiating a guaranteed multiple of that rate upon being successful. NPR Decl. at ¶¶10, 24; RW Decl. at ¶10; B&L Decl. at ¶¶15-18; WB Decl. at ¶10; R&C Decl. at ¶10;

(oo) In sum, I find the collective empirical data and competent evidence submitted demonstrates the reasonableness of the hourly rates submitted by Class Counsel here;

(pp) As demonstrated above, when attorney compensation is not guaranteed—*i.e.*, the representation is based on a contingency-fee agreement—Oklahoma courts "must adjust the basic hourly rate...by assessing the likelihood of success at the outset of the

representation." *Oliver's Sports*, 1980 OK 120 at ¶6.[13] The enhancement factors account for the fact that, especially in cases taken on a contingency-fee basis, an amount of reasonable attorneys' fees cannot appropriately be determined by inserting numbers "mechanically into a universally valid formula." *Robert L. Wheeler*, 1989 OK 106 at ¶21.[14] Thus, the "proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors which are applicable to each case." *Id.* at ¶21. And, the total enhanced fee "must bear some reasonable relationship to the amount in controversy." *Finnell*, 2003 OK 35 at ¶17. Here, I find every "enhancement" factor supports an "incentive fee" in addition to Class Counsel's base lodestar, as detailed above. The analysis of the *Johnson* factors under federal common law set forth above applies equally under the Oklahoma statutory factors or *Burk* enhancement factors and is hereby incorporated;

(qq) The purpose of the multi-factored analysis set forth in *Burk* and its progeny is to ensure an award of ***reasonable*** attorneys' fees in circumstances where

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

[14] *See also, e.g., Sneed v. Sneed*, 1984 OK 22, ¶3, 681 P.2d 754 ("Often contingent fee agreements are the only means possible for litigants to receive legal services – contingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their day in Court."); *Unterkircher*, 1985 OK 96 at ¶10 ("if time is the singular calculation, inexperience, inefficiency, and incompetence may be rewarded ***while skillful and expeditious disposition of litigation is penalized unfairly***" (emphasis added)); *Lindy*, 487 F.2d at 168 ("***No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended***." (internal citations omitted, emphasis added)).

compensation "cannot fairly be awarded on the basis of time alone." *Oliver's Sports*, 1980 OK 120 at ¶6. Contingency fee agreements allow those "who could not otherwise afford to assert their claims to have their day in Court[,]" *Sneed*, 1984 OK 22 at ¶3, and reward the "skillful and expeditious disposition of litigation[.]" *Unterkircher*, 1985 OK 96 at ¶10. Therefore, in recognition of the risk involved in funding litigation, especially complex litigation, under an agreement that does not guarantee *any* compensation whatsoever, Oklahoma law holds that fair and reasonable compensation in such cases necessarily entails an upward adjustment of any baseline lodestar. *Id.*; *see also, e.g.*, *Robert L. Wheeler*, 1989 OK 106 at ¶¶7, 13. Under these principles, I find the substantial evidence supporting each *Burk* factor here demonstrates the enhancement of Class Counsel's baseline lodestar by a factor of 2.55 is both fair and reasonable;

(rr) Whether viewed as a total dollar amount ("incentive fee") or as a percentage "multiplier" of the baseline hourly fee ("lodestar multiplier"), I find this enhancement falls well within the range of "incentive fees" frequently awarded by Oklahoma state courts in royalty underpayment class actions. *See, e.g.*, *Fitzgerald Farms*, 2015 WL 5794008, at *7-8 (awarding multiplier of 5 and finding the award to be "well-within the parameters of Oklahoma case law"); Miller Decl. at ¶77. In *Fitzgerald Farms*, for example, the Oklahoma District Court of Beaver County found that, in "a large common fund case such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7." *Id.* at *8 (citing, *inter alia*, *Lobo v. BP* (Beaver Cty. 2005) (8.7 multiplier); *Brumley v. ConocoPhillips* (Texas Cty.) (3.85 multiplier); *Laverty v. Newfield* (Beaver Cty. 2007) (4.2 multiplier); *Bridenstine v. Kaiser Francis* (Texas Cty. 2004) (5.25 multiplier); *Simmons v. Anadarko Petro.* (Caddo Cty. 2008) (4.2 multiplier);

Mitchusson v. EXCO Res. (Caddo Cty. 2012) (6.3 multiplier)).[15] I have reviewed these well-reasoned opinions of these honorable Oklahoma state court judges and find these cases comparable to the case at bar. Moreover, federal cases applying a "lodestar multiplier" to cross-check the reasonableness of a percentage-based fee award in common fund cases have found that multipliers of up to 8.5 are reasonable. *Cook*, 2017 U.S. Dist. LEXIS 181814, at *10, *16-17 & n.6; *see also, e.g.*, *Campbell*, 2015 U.S. Dist. LEXIS 134235, at *20 n.5; *Vizcaino*, 290 F.3d at 1051-52 & n.6 (collecting federal cases awarding multipliers of up to 8.5); Miller Decl. at ¶77; Gensler Decl. at ¶61;

(ss) Further, I find that after the addition of the enhancement factor, the total amount of the Fee Request bears a "reasonable relationship" to the amount in controversy. *See Arkoma Gas Co. v. Otis Eng'g Corp.*, 1993 OK 27, ¶6, 849 P.2d 392. Unlike outlier cases in which the class attorneys sought fees that *exceeded* the amount of monetary benefits the *entire class* received as a whole, *see, e.g.*, *Hess* 2014 OK 111, at ¶¶34-36, the total Fee Request here does not come close to exceeding the Gross Settlement Fund. Instead, the total Fee Request is less than the 40% contingency fee agreed to between Class Counsel and Class Representative and, thus, less than the maximum amount Class Counsel stated it would seek in the Notice. It is also less than the 50% contingency fee allowed under Oklahoma law. *See* 5 OKLA. STAT. §7. Moreover, the total Fee Request represents 20% of the Gross Settlement Fund and Future Benefits, and 19.6% of the Total Settlement Value, which is less than both the typical

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

market rate and typical fee award of 40% in complex royalty underpayment class actions in Oklahoma state and federal courts;

(tt) In sum, I find that each of the Oklahoma statutory enhancement factors, individually and as a whole, support an enhancement of 2.55 of Class Counsel's baseline lodestar. Further, I find the total Fee Request clearly bears a "reasonable relationship" to the amount in controversy. As such, I find the requested enhancement should be granted; and

(uu) For the foregoing reasons, Class Counsel is hereby awarded Attorneys' Fees of $8 million, to be paid out of the Gross Settlement Fund. I find this amount imminently reasonable under both federal common law and Oklahoma state law.

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

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

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

10. All objections to Class Counsel's Fee Request are hereby overruled in their entirety. Only one objection was filed with the Court purportedly concerning the fee request by Class Counsel from LaDoris Jordan. *See* Dkt. No. 90. The objection cites no legal authority and provides no evidence that the fee request is unreasonable. Ms. Jordan did not object to the

application of federal common law. Ms. Jordan did not object to any of Class Counsel's evidence in support of the fee request. Ms. Jordan did not appear at the hearing. Moreover, Ms. Jordan states that she only objects to a fee greater than 25%. *See* Dkt. No. 90. Class Counsel's fee request represents less than 20% of the total value of the Settlement. As such, the objection is moot and, regardless, overruled.

11. The Court finds that all objections are overruled and hereby severed from this action for the purposes of appeal. In the event any objector appeals this Fee Order or any other rulings of this Court, such objector is hereby ordered to post a cash bond in an amount to be set by the Court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay, not less than two percent (2%) per annum.

IT IS SO ORDERED this 29th day of January, 2018.

KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE