

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

DORSEY J. REIRDON,

Plaintiff,

v.

XTO ENERGY INC.,

Defendant.

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Case No. 6:16-cv-00087-KEW

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

I. SUMMARY OF THE ARGUMENT

In connection with approval of the Settlement¹ in the above-captioned Litigation, Class Counsel respectfully move the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation not to exceed \$300,000, plus interest (the “Expense Request”)—the amount set forth in the Notice.² This request is fair and reasonable, and, therefore, Class Counsel respectfully request that it be approved.

Class Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of \$20 million (the “Gross Settlement Fund”) to compensate the Settlement Class for past damages; (2) up to \$750,000 in administration, notice and distribution costs, which is a significant benefit to the Settlement Class as such funds would otherwise be paid from the Gross Settlement Fund; and (3) Future Benefits to the Settlement Class consisting of binding changes to Defendant’s statutory interest payment practices and policies in Oklahoma. These Future Benefits are estimated to have a present value of at least \$20 million, bringing the

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated October 9, 2017 (the “Settlement Agreement”), a copy of which was attached as Exhibit 1 to Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (Dkt. No. 76).

² To date, Class Counsel has incurred out-of-pocket expenses of \$155,885.19. Class Counsel may incur additional expenses between now and the Final Approval Hearing on January 24, 2018. As such, at the January 24, 2018 hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$300,000. Likewise, Class Counsel likely will incur future expenses after the Final Approval Hearing, and may seek reimbursement for such future expenses, up to a total of \$300,000. Class Counsel’s Expense Request does not include the Administration, Notice and Distribution Costs associated with effectuating the Settlement, as XTO has agreed to pay up to \$750,000 of such Costs. *See* Settlement Agreement at ¶1.1.

total value of the Settlement to at least \$40.750 million.³ The \$20 million cash Gross Settlement Fund alone is an outstanding recovery for Class Members.⁴

In order to achieve this remarkable recovery for the Class, Class Counsel was required to expend a significant amount of out-of-pocket expenses that were necessary and reasonable for the prosecution of this action. Class Counsel now seeks reimbursement of those reasonable expenses, in an amount not to exceed \$300,000, plus interest—the amount set forth in the Notice.⁵ To date, Class Counsel have advanced \$155,885.19 in prosecuting and resolving this case. *See* NPR Decl. at ¶38; RW Decl. at ¶18; B&L Decl. at ¶19; WB Decl. at ¶13. In addition to these expenses, Class Counsel may incur additional expenses between now and the Final Approval Hearing on January 24, 2018. *See id.* As such, at the hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$300,000. *Id.* In addition, Class Counsel reserve their right to make additional expense requests following the Final Approval Hearing; however, in no event will Class Counsel’s cumulative expense requests exceed the \$300,000 stated in the Notice. Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted. *See* Miller Decl. at ¶81.

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of brevity, Class Counsel will not recite the factual and procedural background of this Litigation again herein. Instead, Class Counsel respectfully refers the Court to

³ *See* Affidavit of Barbara Ley (“Ley Affidavit”), attached as Exhibit 3 to Final Approval Memorandum, at ¶3.

⁴ *See* Declaration of Bradley E. Beckworth and Patrick Ryan on Behalf of Class Counsel (“Joint Class Counsel Declaration”), attached as Exhibit 2 to Final Approval Memorandum, at ¶¶5-7; Ley Affidavit at ¶3.

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

the Final Approval Memorandum, the Joint Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein.

III. ARGUMENT

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

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

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

Settlement Agreement at ¶11.8 (emphasis added).

The Parties' decision to contractually agree that federal common law controls the reasonableness of attorneys' expenses should be enforced. *See* Miller Decl. at ¶30. The Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and also the fact that courts typically honor the parties' choice of law. Indeed, the Tenth Circuit has explained, "[a]bsent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'" *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)). Further expanding on this freedom to contract, the Restatement of Conflict of Laws states:

These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

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.").

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

Applying the Parties' chosen law—federal common law—Rule 23(h) allows courts to reimburse counsel for “non-taxable costs that are authorized by law.” FED. R. CIV. P. 23(h). “As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000). Similarly, should the Court choose to disregard the Parties' choice of law and instead apply Oklahoma state law, the Oklahoma class action statute provides “the court may award...nontaxable costs that are authorized by law or by the parties' agreement.” 12 O.S. §2023(G)(1).

Class Counsel respectfully request reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Litigation. *See* NPR Decl. at ¶38; RW Decl. at ¶18; B&L Decl. at ¶19; WB Decl. at ¶13. Class Counsel set forth in the Notice that they would seek up to \$300,000 in reimbursement of expenses. JND Decl., Ex. A. To date, Class Counsel's out-of-pocket expenses are \$155,885.19.⁶ All of these expenses were reasonably and necessarily incurred by Class Counsel, and are directly related to their prosecution and resolution of this Litigation. *See* NPR Decl. at ¶38; RW Decl. at ¶18; B&L Decl. at ¶19; WB Decl. at ¶13. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, document production and review, and mediation, which are typical of large, complex class actions such as this.⁷ *Id.* As such, the Expense Request is fair, reasonable and should be granted. *See* Miller Decl. at ¶81.

In addition, several Class Members executed affidavits in support of Class Counsel's Expense Request. *See* Affidavits of Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust), Earl Dwayne Sager, and Robert Lovelace, attached as Exhibits 6-8 to Final Approval Memorandum.

⁶ For the Court's convenience, the NPR Declaration (¶38), the RW Declaration (¶18), the B&L Declaration (¶19), and the WB Declaration (¶13) include charts summarizing and categorizing Class Counsel's and Plaintiff's Counsel's expenses. Because additional expenses will continue to be incurred through and after the Final Approval Hearing on January 24, 2018, Class Counsel specifically request reimbursement of \$155,885.19 *plus* the ability to recover additional expenses up to \$300,000—the noticed amount—to the extent such expenses are actually incurred. At the Final Approval Hearing, Class Counsel will provide the Court with updated charts of Class Counsel's actual expenses incurred.

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

Therefore, Class Counsel respectfully request the Court award the Expense Request in full and award any additional amount Class Counsel may incur after the filing of this Memorandum not to exceed \$300,000, upon 14 days' written notice to the Court.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests the Court enter an order granting approval of the Expense Request of \$155,885.19, *plus* the ability to recover additional expenses up to \$300,000—the noticed amount—to the extent such expenses are actually incurred.

Dated: December 27, 2017.

Respectfully submitted,

s/ Bradley E. Beckworth

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PLAINTIFF'S COUNSEL

CERTIFICATE OF SERVICE

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

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

DATED: December 27, 2017.

s/ Bradley E. Beckworth

Bradley E. Beckworth