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Class Counsel submit the following memorandum of law in support of their Motion for Approval of Attorneys' Fees.

I. SUMMARY OF ARGUMENT

In connection with approval of the Settlement¹ in the above-captioned Litigation, Class Counsel respectfully move the Court for an award of attorneys' fees of \$1,600,000.00. The requested award will be paid from the \$4,000,000.00 Gross Settlement Fund and represents 40% of the Gross Settlement (the "Fee Request"). This request is fair and reasonable and therefore, should be approved.

Class Counsel have obtained an excellent recovery for the benefit of Class Members, which consists of a cash payment of \$4,000,000.00 to compensate the Settlement Class for past damages.² This is an outstanding recovery.³ Rule 23(h) of the Federal Rules of Civil Procedure requires the Court to assess the reasonableness of any fees "that are authorized by law or by the parties' agreement." Here, the Parties expressly agreed that all fees would be from a common fund as

¹ All capitalized terms not otherwise defined herein shall have the meaning given to them in the June 29, 2021 Stipulation and Agreement of Settlement ("Settlement Agreement"), a copy of which is 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 (the "Preliminary Approval Memorandum") (Dkt. No. 36).

² See Affidavit of Barbara A. Ley, CPA, CITP, CFF ("Ley Affidavit"), attached to Final Approval Memorandum as Exhibit 3.

³ See Declaration of Patrick M. Ryan, Andrew G. Pate, and Robert N. Barnes on Behalf of Class Counsel ("Joint Class Counsel Decl."), attached as Exhibit 2 to Final Approval Memorandum, at ¶¶7 & 12; Ley Affidavit at ¶4 (stating the \$4,000,000.00 recovery obtained in this case "yields a full recovery of the Settlement Class' alleged statutory interest underpayment for the claims identified in the Settlement Agreement within the Claim Period").

allowed under federal common law. *See* Settlement Agreement at ¶¶7.1, 11.8. Thus, federal common law governs the reasonableness of this agreement and the requested fee.

Class Counsel’s Fee Request is reasonable under federal common law. First, the Parties agreed that the Settlement Agreement shall be governed *solely* by federal law regarding the right to and reasonableness of attorney’s fees and expenses. *See* Settlement Agreement, ¶11.8. The Parties’ contractual choice of law—the well-developed and consistent body of federal common law that applies to common fund class action settlements where no fee shifting occurs—should be given effect as written. This Court, and other federal courts in Oklahoma, have upheld identical or similar choice of law provisions. *See, e.g., Miller v. DCP Operating Co., L.P.*, No. CIV-18-0199-JH (E.D. Okla. June 29, 2021) (Dkt. No. 98 at 3); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla. Apr. 27, 2021) (Dkt. No. 115 at 5-6); *McClintock v. Enterprise Crude Oil, LLC*, No. CIV-16-136-KEW (E.D. Okla. March 26, 2021) (Dkt. No. 120 at 4-5); *McClintock v. Continuum Producer Services, L.L.C.*, No. 17-cv-00259-JAG (E.D. Okla. June 4, 2020) (Dkt. No. 61 at 4-5); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 4-5); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 4-5); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 5); *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 4-5); *see also Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 165 (1939); *Restatement 2d of Conflict of Laws*, § 187; 7B Wright, Miller, Kane & Marcus, *Federal Practice and Procedure* § 1803 (3d ed.) (“The court’s authority for ... attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts.”). Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the

fund method in determining the award of attorneys' fees in common-fund cases. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 455-56 (10th Cir. 1988).⁴

The Fee Request represents 40% of the Gross Settlement Fund. In light of the exceptional work performed by Class Counsel and the circumstances of this case, the Fee Request is fair, reasonable, and comports with fee awards granted in similar cases and is fully appropriate under Tenth Circuit precedent.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of brevity, Class Counsel will not recite the background of this Litigation again. Instead, Class Counsel respectfully refer the Court to the Final Approval Memorandum, Joint Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated fully herein.

⁴ In this regard, the Tenth Circuit's decision in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017) is inapplicable, because the parties here contractually agreed to a choice of law provision. The *EnerVest* decision dealt with the application of *state law* choice of law principles, while the parties here, unlike in *EnerVest*, contractually agreed that *federal common law* controls the right to, and reasonableness of, attorneys' fees. This Court has previously upheld virtually identical choice of law provisions in the federal decisions cited *supra* at 2-3. Furthermore, the *EnerVest* decision is now completely at odds with, and contradicted by, the Oklahoma Supreme Court's recent decision in *Strack v. Continental Res., Inc.*, 2021 OK 21, 2021 Okla. LEXIS 22, which held Oklahoma's class action attorney fee statute (12 O.S. § 2023(G)) allows for the percentage-of-common-fund method in calculating attorney fees. *See id.* ¶17. The Tenth Circuit's long line of federal common law fee jurisprudence in common fund class actions governs the present fee request, but even if the Court were to disregard the Parties' choice of law provision, the requested fee is still reasonable under Oklahoma state law.

III. ARGUMENT

The Fee Request is fair and reasonable and should be approved.⁵ Pursuant to Rule 23(h), Federal Rules of Civil Procedure, “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*, 838 F.2d at 453. Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb*, 43 F.3d at 486. Here, the requested fees are authorized by an express agreement of the parties. Pursuant to the Settlement Agreement, federal common law governs both the right to, and reasonableness of, attorneys’ fees. *See* Settlement Agreement at ¶¶7.1, 11.8. Under this law, the Tenth Circuit has expressed a clear preference for the percentage of the fund method, the reasonableness of which is determined through application of the *Johnson*

⁵ *See generally* Declarations of Andrew G. Pate; Patrick M. Ryan; Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch; and Michael Burrage, attached as Exhibits 1-4 to Class Counsel’s Motion for Approval of Attorneys’ Fees. Although not submitted as part of this fee request, law professors Geoffrey Miller and Steven Gensler have provided declarations in support of fee requests similar to or greater than this fee request in previous class action settlements. *See Miller v. DCP Operating Co., L.P.*, No. CIV-18-0199-JH (E.D. Okla.) (Dkt. No. 81); *Chieftain Royalty Co. v. SM Energy Co.*, No. 18-cv-1225-J (W.D. Okla.) (Dkt. Nos. 102-103); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla.) (Dkt. Nos. 81-82); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-29-KEW (E.D. Okla.) (Dkt. Nos. 206, 209); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-87-KEW (E.D. Okla.) (Dkt. Nos. 92-93); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-113-KEW (E.D. Okla.) (Dkt. Nos. 63-64). Professor Miller is the Stuyvesant P. Comfort Professor of Law at New York University. For more than twenty years he has been involved in the area of class action litigation as a teacher, scholar, attorney, consultant, and expert witness. He is co-author of the leading empirical analysis of attorneys’ fees and expenses in class action cases, *Attorneys’ Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004), which has been extensively cited in federal court decisions on class action attorneys’ fees. Professor Gensler is the Gene and Elaine Edwards Family Chair in Law at the University of Oklahoma College of Law, where he teaches Civil Procedure and related classes. He is the author of the treatise *FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY* (Thomson Reuters 2019) and a wide range of articles on federal practice and procedure.

factors (discussed below). *Gottlieb*, 43 F.3d at 483. This methodology calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *Brown*, 838 F.2d at 454.

This Court has previously acknowledged the Tenth Circuit’s preference for the percentage method and rejected application of a lodestar analysis or lodestar cross check. *See, e.g., Miller v. DCP Operating Co., L.P.*, No. CIV-18-0199-JH (E.D. Okla. June 29, 2021) (Dkt. No. 98 at 3); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla. Apr. 27, 2021) (Dkt. No. 115 at 7); *McClintock v. Enterprise Crude Oil, LLC*, No. CIV-16-136-KEW (E.D. Okla. March 26, 2021) (Dkt. No. 120 at 5-6); *McClintock v. Continuum Producer Services, L.L.C.*, No. 17-cv-00259-JAG (E.D. Okla. June 4, 2020) (Dkt. No. 61 at 5-6); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. March 8, 2019) (Dkt. No. 120 at 5-6); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 5-6); *Cecil v. BP America Production*, No. 16-CV-410-KEW (E.D. Okla. Nov. 19, 2018) (Dkt. No. 260 at 6); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 6); *Reirdon v. XTO Energy, Inc.*, No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 5); *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)).⁶

⁶ The MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) also approves of the percentage of the fund method for determining attorneys’ fees. Professors Gensler and Miller have repeatedly noted the Tenth Circuit’s preference for the percentage of the fund method. *See, e.g., Chieftain Royalty Co. v. SM Energy Co.*, No. 18-cv-1225-J (W.D. Okla.) (Dkt. No. 102 at ¶29; Dkt. No. 103 at ¶¶46-47); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶37; Dkt. No. 64 at ¶27).

Other Oklahoma federal courts agree. *See, e.g., Hay Creek Royalties, LLC v. Roan Resources, LLC*, No. 19-CV-177-CVE-JFJ (N.D. Okla. April 28, 2021) (Dkt. No. 74 at 3-4) (rejecting lodestar analysis and following the Tenth Circuit’s preference for the percentage of the fund method); *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (“In the Tenth Circuit, the preferred approach for determining attorneys’ fees in common fund cases is the percentage of the fund method.”) (Dkt. No. 52 at 5) (the “*Laredo Fee Order*”); *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520-D (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.”) (Dkt. No. 150, n.1); *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R (W.D. Okla. May 31, 2013) (Dkt. No. 182 at 4 n.3); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. CIV-08-668-R (W.D. Okla. Oct. 5, 2012) (Dkt. No. 329).

A. The Parties Have Agreed Federal Common Law Controls the Right to, And Reasonableness Of, Attorneys’ Fees

The Parties 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:

To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and its nationwide application, this Settlement Agreement shall be governed *solely by federal law*, both substantive and procedural, as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, Case Contribution Award, *the right to and reasonableness of Plaintiff’s Attorneys’ Fees and Litigation Expenses*, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions.

Settlement Agreement at ¶11.8 (emphasis added). The Parties clearly intended to remove any doubt regarding which body of law would apply to certification, notice, and overall evaluation of

the fairness and reasonableness of the Settlement and associated requests for fees and expenses. Such an agreement directly aligns with the principles of the Class Action Fairness Act (“CAFA”), which was passed with the intent to provide certainty, uniformity, and confidence in the application of the class device to cases involving interstate commerce. 28 U.S.C. §1711(a)-(b).

As noted, this Court has previously enforced nearly identical choice of law provisions. *See supra* at 2-3. Thus, the Settlement Agreement’s choice-of-law provision should be enforced here. Further, the Tenth Circuit has recognized parties’ freedom to contract regarding choice of law issues and that courts typically honor the parties’ choice. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (“Absent 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.’”) (citing *Restatement (Second) of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988) (the *Restatement*); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006). The *Restatement* expands on this freedom to contract:

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.

Restatement (Second) of Conflict of Laws § 187, cmt. e; *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (enforcing parties’ contractual choice of law); *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.”). The Parties’ contractual agreement should be enforced here.⁷

B. Class Counsel’s Fee Request Is Reasonable

Under Tenth Circuit law, district courts have discretion to apply either the percentage of the fund method or the lodestar method, but the percentage of the fund method is clearly preferred. *Brown*, 838 F.2d at 454; *Gottlieb*, 43 F.3d at 483; *Laredo Fee Order* at 5. When 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. 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, the result is the same—the requested fee of \$1,600,000.00 is reasonable.

The twelve *Johnson* factors are: (1) 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)

⁷ Professors Gensler and Miller have previously opined that the parties’ contractual agreement regarding choice of law should be enforced. *See, e.g., Chieftain Royalty Co. v. SM Energy Co.*, No. 18-cv-1225-J (W.D. Okla.) (Dkt. No. 103 at ¶35); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶36; Dkt. No. 64 at ¶27).

the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Gottlieb*, 43 F.3d at 482 n.4.⁸

The *Johnson* factor that should be entitled to the most weight in this common fund case is the eighth factor—the amount involved in the case and the results obtained. *Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when “the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.”); Fed. R. Civ. P. 23(h), adv. comm. note (explaining for a “percentage” or contingency-based approach to class action fee awards, “results achieved is the basic starting point.”).

Here, the results obtained strongly support the Fee Request. The Gross Settlement Fund of \$4,000,000.00 represents a significant recovery for the Class and bestows a substantial economic benefit under the circumstances presented here. 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., Miller v. DCP Operating Co., L.P.*, No. CIV-18-0199-JH (E.D. Okla. June 29, 2021) (Dkt. No. 98 at 4); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla. Apr. 27, 2021) (Dkt. No. 115 at 8-9); *McClintock v. Enterprise Crude Oil, LLC*, No. CIV-16-136-KEW (E.D. Okla. March 26, 2021) (Dkt. No. 120 at 8); *McClintock v. Continuum Producer Services, L.L.C.*, No. 17-cv-00259-JAG (E.D. Okla. June 4, 2020) (Dkt. No. 61 at 7); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120 at 8-9); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105 at 7-8); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar.

⁸ An additional factor under Oklahoma law is the risk of recovery. *See* 12 O.S. §2023(G)(4)(e)(13). Even if the Court applied Oklahoma law, this factor would be easily met.

27, 2018) (Dkt. No. 231 at 8); *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 8); *Fager v. Centurylink Comm'cns*, No. 14-cv-00870, 2015 U.S. Dist. LEXIS 190795, at *7-8 (D.N.M. June 25, 2015) (collecting cases), *aff'd* 854 F.3d 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”). Here, the Settlement represents significant, concrete monetary benefits to the Settlement Class. And, as Professor Gensler has previously 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. *See Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶46); *Chieftain Royalty Co. v. SM Energy Co.*, No. 18-cv-1225-J (W.D. Okla.) (Dkt. No. 102 at ¶36). Accordingly, the “results obtained” factor strongly supports a fee award of \$1,600,000.00 to be paid from the immediate cash Settlement.⁹

⁹ The outstanding result obtained is in stark contrast to cases like *Hess v. Volkswagen of Am., Inc.*, 2014 OK 111, 341 P.3d 662, 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 (emphasis added). And, *Hess* 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 post-judgment interest. *Hess v. Volkswagen of Am., 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

The other *Johnson* factors also support the Fee Request. First, the time and labor involved supports the fee request. For almost two years, Class Counsel investigated and analyzed the Settlement Class's claims and conducted extensive discovery and document review, reviewing documents and a large amount of electronically produced data, including but not limited to organizational documents, well data, and historical proceeds payments for Oklahoma owners. Class Counsel spent significant time working with accounting experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a lengthy negotiation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required months of negotiations and extensive consultation with experts to evaluate and analyze damages. Overall, as evidenced through their submissions, Class Counsel dedicated substantial hours of attorney and professional time to this Litigation and anticipate dedicating additional hours through final approval and distribution.

Second, the difficulty of the questions presented in this action supports the Fee Request. Class actions are known to be complex and vigorously contested. 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's claims required Class Counsel to work with experts to analyze complex data to support their legal theories

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. 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.

and evaluate the amount of alleged damages. 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. Moreover, Defendant asserted a number of significant defenses to the Settlement Class's claims that would have to be overcome if the Litigation continued to trial. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, support the Fee Request. *Id.* at ¶¶14, 15 & 55.

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. 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 ¶57. The case required investigation and mastery of highly technical issues regarding proceeds payments in Oklahoma. *Id.* Class Counsel have years of experience litigating royalty underpayment class actions and statutory interest class actions in Oklahoma state and federal courts. *Id.* at ¶¶57-61. Class Counsel are also highly experienced in class action, commercial, *qui tam*, mass tort, securities, and other complex litigation and have successfully prosecuted and settled numerous class actions, including oil and gas royalty underpayment class actions. *Id.* Additionally, Class Counsel have taken on some of the world's largest corporations in contingent fee litigation, including the tobacco industry, the pharmaceutical industry, and the energy industry. *Id.* Class Counsel consist 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. *Id.* For example, the Court commended Nix

Patterson for its work in *CompSource Oklahoma v. BNY Mellon, NA*, No. CIV 08-469-KEW (E.D. Okla.), stating: “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. at Ex. 5.

Further, the law firm of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC (“Ryan Whaley”) is a litigation, energy, and environmental law firm based in Oklahoma City with national, regional, and state clients. *Id.* at ¶61. Ryan Whaley has litigated class actions and complex commercial litigations in courts across the country. *Id.* 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, Colorado, and securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Department of Justice. *Id.*

Further, the law firm of Barnes & Lewis has been lead counsel in at least fourteen (14) Oklahoma oil and gas class action cases that have been concluded and resulted in combined Common Funds exceeding \$700 million. *Id.* at ¶58. Barnes & Lewis holds the distinction of having been lead counsel in the first oil and gas class action nationwide to have been successfully tried to a jury. *Id.* That jury verdict was upheld on appeal and resulted in a total Common Fund of approximately \$110 million. *See Bridenstine v. Kaiser Francis*, Case No. 97, 117 (unpublished) August 22, 2003, *cert. denied*, June 26, 2006, Okla. Sup. Ct., Case No. DF-01569. *Id.*

The quality of representation by counsel on *both* sides of this Litigation was high. Defendant is represented by skilled class action defense attorneys who spared no effort in the defense of their client. *See, e.g., In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo.

1976)(competence of defense counsel was significant factor in awarding attorney's fee). Simply put, without the experience, skill, and determination displayed by *all* counsel involved, the Settlement would not have been reached. *See* Joint Class Counsel Decl. at ¶57. These factors strongly support the Fee Request.

The fourth and seventh *Johnson* factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—support the Fee Request. The Declarations prove that because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were limited in their ability to work on other cases and pursue otherwise available opportunities due to their dedication of time and effort to the prosecution of this Litigation. *See* Joint Class Counsel Decl. at ¶49. This case was filed in state court in October 2019, and it has required the devotion of substantial time, manpower, and resources from Class Counsel over that period. *Id.* Class Counsel have spent substantial time and effort in negotiating and preparing the necessary paperwork related to the Settlement. *Id.* Numerous time limitations have been imposed on Class Counsel throughout the course of this Litigation. A case of the size and complexity of this one deserves and requires the commitment of a significant percentage of the total time and resources of firms the size of those of Class Counsel. *Id.* Accordingly, these factors support the Fee Request.

The fifth and twelfth *Johnson* factors—the customary fee and awards in similar cases—further supports the Fee Request. Class Counsel and White Family Minerals LLC negotiated and agreed to prosecute this case based on a 40% contingent fee. *See* White Decl. at ¶7; Joint Class Counsel Decl. at ¶44. 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. *See* Joint Class Counsel Decl. at ¶45; *Chieftain Royalty Co. v. SM Energy Co.*, No. 18-cv-1225-J (W.D. Okla.) (Dkt. No. 102 at

¶45)(Gensler Decl.)(collecting cases); *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 63 at ¶51) (same); *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).

Federal and state courts in Oklahoma, including this Court, have approved similar fee awards in similar cases. *See, e.g., Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla. Apr. 27, 2021) (Dkt. No. 115 at 13-14); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Dkt. No. 120); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW (E.D. Okla. Dec. 18, 2018) (Dkt. No. 105); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231); *Reirdon v. XTO Energy Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124). Moreover, the Western District of Oklahoma approved a 40% fee and a 39% fee in similar royalty underpayment class actions. *See 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). Given the outstanding cash recovery, the fact that the Fee Request is in line with the typical fee award granted in similar cases supports its approval.

Moreover, the Fee Request is in line with the typical market rate for high quality legal services in royalty underpayment 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.”). This Court has 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.”). Here, Class Representative agreed Class Counsel would represent it on a contingency fee basis not to exceed 40%. *See White Decl.* at ¶7. Class Representative’s Declaration demonstrates its continued support of the fairness and reasonableness of the Fee Request. *Id.* at ¶14. This factor supports the Fee Request.

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 ¶72. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys’ fees, and as Professor Miller has aptly noted, “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 those they represent.” *Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 64 at ¶55); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla.) (Dkt. No. 115 at ¶60); *see also Joint Class Counsel Decl.* at ¶72. Class Counsel have 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.¹⁰ Simply put, it would not have been economically prudent

¹⁰ *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).

or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates.

Further, Class Representative negotiated and agreed Class Counsel would represent it on a contingency fee basis, not to exceed 40%. *See* White Decl. at ¶7; Joint Class Counsel Decl. at ¶44. 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 ¶¶72. Accordingly, this factor strongly supports the Fee Request.

The tenth *Johnson* factor—the undesirability of the case—also supports the Fee Request. Compared to most civil litigation, this Litigation clearly fits the “undesirable” test. *See* Joint Class Counsel Decl. at ¶72. Few law firms would be willing to risk investing the time, trouble, and expenses necessary to prosecute this Litigation for multiple years. *Id.* at ¶70. There was no doubt from the beginning that this lawsuit would be a lengthy undertaking. 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. And, this Litigation involved a number of uncertain legal and factual issues. *Id.* at ¶¶15, 32 & 40. For example, in another complex royalty class action, one Oklahoma state court explained:

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. The same principle holds true here. Class Counsel reviewed large amounts of electronically produced data, organizational documents, well data, and historical proceeds payments for Oklahoma owners. Joint Class Counsel Decl. at ¶¶12 & 50. Class Counsel and Plaintiff's Counsel also advanced \$75,418.38 in litigation expenses to date. *See* Decl. of Andrew G. Pate on Behalf of Nix Patterson, LLP at ¶11; Decl. of Patrick Ryan on Behalf of Ryan Whaley Coldiron Jantzen Peters & Webber at ¶15; and Decl. of Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch on behalf of Barnes & Lewis, LLP at ¶18 (attached as Exhibits 1-3 to Class Representative's Motion for Attorney's Fees). And, Class Counsel expended substantial hours of time over the length of this action. Joint Class Counsel Decl. at ¶68. This factor also supports the Fee Request.

The eleventh *Johnson* factor—the nature and length of the professional relationship with the client—also supports the Fee Request. Mr. White is an educated mineral interest owner with extensive experience dealing with mineral interests. *See* White Decl. at ¶¶4-5. He was and remains very active in this litigation. *Id.* at ¶¶8-11. White Family Minerals negotiated a 40% fee when it agreed to be class representative in this litigation. *See* White Decl. at ¶7; Joint Class Counsel Decl. at ¶44. Mr. White also supports the Fee Request. White Decl. at ¶¶16-17. Accordingly, this factor supports Class Counsel's fee request.

In summary, analysis of the *Johnson* factors under federal common law strongly demonstrates that the Fee Request should be approved.

Moreover, while a lodestar calculation is not required, Plaintiff's Counsel collectively spent over 930 hours of attorney and paraprofessional time to date prosecuting this Litigation behalf of the Settlement Class. *See generally* Declarations of Patrick M. Ryan; Andrew G. Pate; Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch; and Michael Burrage, attached

to Class Counsel's Motion for Approval of Attorneys' Fees as Exhibits 1-4. The resulting past lodestar is \$698,777.50. *Id.* Moreover, Plaintiff's Counsel anticipates spending at least another 282 hours to this case through Final Approval and distribution, for a total combined lodestar (including past and anticipated future hours) of \$932,735.50.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order granting approval of the Fee Request of \$1,600,000.00.

DATED: October 13, 2021.

Respectfully submitted,

/s/ Patrick M. Ryan

Patrick M. Ryan, OBA No. 7864

Jason A. Ryan, OBA No. 18824

Paula M. Jantzen, OBA No. 20464

RYAN WHALEY COLDIRON

JANTZEN PETERS & WEBBER PLLC

400 North Walnut Avenue

Oklahoma City, OK 73140

(405) 239-6040 telephone

(405) 239-6766 facsimile

pryan@ryanwhaley.com

jryan@ryanwhaley.com

pjantzen@ryanwhaley.com

Bradley E. Beckworth, OBA No. 19982

Andrew G. Pate, TX Bar No. 24079111

NIX PATTERSON, LLP

3600 N. Capital of Texas Hwy.

Building B, Suite 350

Austin, TX 78746

(512) 328-5333 telephone

(512) 328-5335 facsimile

bbeckworth@nixlaw.com

dpate@nixlaw.com

Susan Whatley, OBA No. 30960
NIX PATTERSON, LLP
P.O. Box 178
Linden, Texas 75563
(903) 215-8310 telephone
swhatley@nixlaw.com

Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N. Broadway Ave., Suite 300
Oklahoma City, OK 73103
(405) 516-7800 telephone
(405) 516-7859 facsimile
mburrage@whittenburragelaw.com

Robert N. Barnes, OBA No. 537
Patranell Lewis, OBA No. 12279
Emily Nash Kitch, OBA No. 22244
BARNES & LEWIS, LLP
208 N.W. 60th Street
Oklahoma City, OK 73118
(405) 843-0363 telephone
(405) 832-1007 facsimile
rbarnes@barneslewis.com
plewis@barneslewis.com
ekitch@barneslewis.com

CLASS COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically transmitted the attached document to the clerk of this Court using the ECF system for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

J. Todd Woolery – todd.woolery@mcafeetaft.com
Patrick L. Stein – patrick.stein@mcafeetaft.com
Daniel M. McClure – dan.mcclure@nortonrosefulbright.com

/s/ Patrick M. Ryan

Patrick M. Ryan