

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

CHIEFTAIN ROYALTY COMPANY,)
KELSIE WAGNER TRUSTEE OF THE)
KELSIE WAGNER TRUST, AND)
KELSIE WAGNER SUCCESSOR)
TRUSTEE OF THE WADE)
COSTELLO TRUST)

Plaintiffs,)

v.)

Case No. 6:17-cv-00334-SPS

MARATHON OIL COMPANY,)

*(Removed from District Court of
LeFlore County, State of
Oklahoma, Case No. CJ-17-146)*

Defendant.)

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

I. SUMMARY OF 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 \$350,000 (the “Expense Request”)—the

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated December 11, 2018 (the “Settlement Agreement”), a copy of which was attached as Exh. 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 (Doc. No. 70-1).

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 have obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of \$14.95 million (the “Gross Settlement Fund”) to compensate the Settlement Class for past damages; and (2) Future Benefits 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 \$17.1 million, bringing the total value of the Settlement to at least \$32.05 million.³ The \$14.95 million cash Gross Settlement Fund alone is an outstanding recovery for Class Members.⁴

To achieve this remarkable recovery for the Class Members, Class Counsel were 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 seek reimbursement of those reasonable expenses, in an amount not to exceed \$350,000, - the amount set forth in the Notice.⁵ To date,

² To date, Class Counsel have incurred out-of-pocket expenses of \$ 175,197.16. Class Counsel may incur additional expenses between now and the Final Approval Hearing. As such, at the Final Approval Hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$350,000. 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 \$350,000. Class Counsel’s Expense Request does not include the Administration, Notice, and Distribution Costs associated with effectuating the Settlement.

³ See Affidavit of Barbara Ley at ¶3 (“Ley Aff.”), attached as Exh. 4 to Plaintiff’s Final Approval Memorandum).

⁴ See Declaration of Patrick Ryan and Robert N. Barnes on Behalf of Class Counsel at ¶5 (“Joint Class Counsel Declaration”), attached as Exh. 3 to Plaintiff’s Final Approval Memorandum; see also Ley Aff. 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.”), which is attached as Exh. 5 to Plaintiff’s Final Approval Memorandum.

Class Counsel have advanced \$ 175,197.16 in prosecuting and resolving this case. *See* Joint Class Counsel Decl. at ¶80. In addition to these expenses, Class Counsel may incur additional expenses between now and the Final Approval Hearing. *See id.* As such, at the hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$350,000. *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 \$350,000 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* Declaration of Geoffrey Miller at ¶91 [Doc. No. 82].

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 refer the Court to 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 fully set forth 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 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 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.

Settlement Agreement at ¶11.8 (Doc. No. 70-1) (emphasis added).

The Parties' decision to contractually agree that federal common law controls the reasonableness of attorneys' expenses should be enforced. *See Reirdon v. XTO Energy Inc.*, Case No. 16-cv-87-KEW, United States District Court, Eastern District of Oklahoma, Doc. No. 125 at 4-5; *Reirdon v. Cimarex Energy Company*, Case No. 16-cv-113-KEW, United States District Court, Eastern District of Oklahoma, Doc. No. 104 at 4-5; *see also* Miller Decl. at ¶39. This Court previously approved and held this exact contractual language to be enforceable. *See Reirdon v. XTO Energy Inc.*, Doc. No. 125 at 4-5 and *Reirdon v. Cimarex Energy Co.*, Doc. No. 104 at 4-5.

Moreover, the Tenth Circuit Court of Appeals has recognized parties' freedom to contract regarding choice of law issues, and 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.'" *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing *Restatement 2d of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988)); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006). Further expanding on this freedom to contract, the *Restatement* 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.

Restatement 2d of Conflict of Laws § 187, cmt. e (Am. Law Inst. 1988); *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (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

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 or by the parties' agreement.” *See 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) (citations omitted). 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.” Okla. Stat. tit. 12, § 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 Joint Class Counsel Decl. at ¶¶80-82.⁶ Class Counsel set forth in the Notice that they would seek up to \$350,000 in reimbursement of expenses. See JND Decl. To date, Class Counsel's out-of-pocket expenses are \$ 175,197.16.⁷ All of these expenses were reasonably and necessarily incurred by Class Counsel and they are directly related to the prosecution and resolution of this Litigation. See Joint Class Counsel Decl. at ¶81. 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. These types of expenses are typical of large, complex class actions such as this.⁸ *Id.* As such, the Expense Request is fair, reasonable, and should be granted. See Miller Decl. at ¶91.

In addition, multiple absent Class Members have executed affidavits in support of Class Counsel's Expense Request. See the Affidavit of Michael J. Weeks (on behalf of class member Pagosa Resources, LLC); the Affidavit of Phil Steffano (on behalf of class member Provident Energy, Ltd.); the Affidavit of Roger K. Brown (on behalf of class member Omega Royalty Co.,

⁶ In similar actions, this Court awarded Class Counsel (a) \$223,056.78 in past expenses and additional expenses up to \$300,000 (see Order Awarding Reimbursement of Litigation Expenses (Doc. No. 125) in *Reirdon v. XTO Energy Inc.*, Case No. 16-87-KEW (E.D. Okla. Jan. 29, 2018)) and (b) \$174,191.50 in past expenses and additional expenses up to \$250,000 (see Order Awarding Reimbursement of Litigation Expenses (Doc. No. 104) in *Reirdon v. Cimarex Energy Co.*, Case No. 16-cv-113-KEW (December 18, 2018)). In another action, this Court awarded Class Counsel litigation expenses in an amount not to exceed \$3,250,000. See Order Awarding Reimbursement of Litigation Expenses (Doc. No. 232) in *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018).

⁷ Because additional expenses will continue to be incurred through and after the Final Approval Hearing, Class Counsel specifically request reimbursement of \$175,197.16 *plus* the ability to recover additional expenses up to \$350,000—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.

⁸ As stated *supra*, Class Counsel's Expense Request does not include the Administration, Notice, and Distribution Costs associated with effectuating the Settlement.

LLC), and the Affidavit of Michael Starceovich, attached as Exhs. 6-8 and 10 to Plaintiff's Final Approval Memorandum.

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 \$350,000, upon fourteen (14) days written notice to the Court.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order granting approval of the Expense Request of \$ 175,197.16, *plus* the ability to recover additional expenses up to \$350,000—the noticed amount—to the extent such expenses are actually incurred.

DATED: February 8, 2019

Respectfully submitted,

s/Patrick M. Ryan

Patrick M. Ryan, OBA No. 7864

Phillip G. Whaley, OBA No. 13371

Jason A. Ryan, OBA No. 18824

Paula M. Jantzen, OBA No. 20464

RYAN WHALEY COLDIRON

JANTZEN PETERS & WEBBER PLLC

900 Robinson Renaissance

119 North Robinson

Oklahoma City, OK 73102

Telephone: 405-239-6040

Facsimile: 405-239-6766

pryan@ryanwhaley.com

pwhaley@ryanwhaley.com

jryan@ryanwhaley.com

pjantzen@ryanwhaley.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
Telephone: (405) 843-0363
Facsimile: (405) 843-0790
rbarnes@barneslewis.com
plewis@barneslewis.com
ekitch@barneslewis.com

Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburrage.com

Lawrence R. Murphy, Jr., OBA No. 17681
LAWRENCE R. MURPHY, JR., P.C.
624 South Boston, Floor 8
Tulsa, Oklahoma 74119
Telephone: (918) 592-3699
larrymurphypc@icloud.com

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Guy S. Lipe – glipe@velaw.com
Jay P. Walters – jwalters@gablelaw.com

s/Patrick M. Ryan

Patrick M. Ryan