

**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. )

**ORDER AWARDING CASE CONTRIBUTION AWARD**

Before the Court is Class Representatives’ Motion for Approval of Case Contribution Award (Doc. No. 84) (the “Motion”) and Memorandum of Law in Support Thereof (Doc. No. 85) (the “Memorandum”), wherein Mr. Abernathy and Ms. Wagner seek Case Contribution Awards of \$50,000 and \$25,000, respectively, for a total Case Contribution Award of \$75,000 to be paid out of the Gross Settlement Fund. The Court has considered the Motion and Memorandum, all matters submitted in connection therewith, and the proceedings on the Final Approval Hearing conducted on March 8, 2019. 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 its findings of fact and

conclusions of law from its Order Granting Final Approval of Class Action Settlement as if fully set forth herein.

3. The Court has jurisdiction to enter this Order, and jurisdiction over the subject matter of the Litigation and all parties to the Litigation, including all Settlement Class Members.

4. The Notice stated that Class Representatives would seek a Case Contribution Award of \$75,000 to be paid out of the Gross Settlement Fund. Notice of Class Representatives' request for a Case Contribution Award 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 a Case Contribution Award 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. Mr. Abernathy and Ms. Wagner provided the Court with abundant evidence in support of their respective requests for a Case Contribution Award, including: (1) the Motion and Memorandum; (2) the Declaration of Geoffrey P. Miller (Doc. No. 82); (3) the Declaration of Robert Abernathy (Doc. No. 91-1); (4) the Declaration of Kelsie Wagner (Doc. No. 91-2); and (5) the affidavits of multiple absent Class Members (Doc. Nos. 91-6, 91-7, 91-8, and 91-10). This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was subject to objection or otherwise refuted by any Settlement Class Member.

6. Mr. Abernathy is hereby awarded a Case Contribution Award of \$50,000 and Ms. Wagner is hereby awarded a Case Contribution Award of \$25,000, with each Award to be paid out of the Gross Settlement Fund. In making this Case Contribution Award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of \$14,950,000 in cash; resulted in material binding changes to Marathon's statutory interest payment practices and policies in Oklahoma, having a present value of at least \$17.1 million; and provided \$50,000 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 Representatives and Class Counsel;

(b) On January 8, 2019, JND caused the Notice of Settlement to be mailed via first-class regular mail using the United States Postal Service to 25,046 unique mailing records identified in the mailing data. *See* JND Decl. at ¶8. The Notice expressly stated that Class Representatives would seek a Case Contribution Award of \$75,000 to be paid out of the Gross Settlement Fund. *See* Exh. A to JND Decl. There were no objections to the requested Case Contribution Award;

(c) Mr. Abernathy and Ms. Wagner filed their Motion for Approval of Case Contribution Award fourteen (14) days prior to the deadline for Settlement Class Members to object. No objections were filed in opposition to Class Representative's Request for a Case Contribution Award;

(d) The Parties contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

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 hereby is, 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 ¶39;

(f) Applying federal common law,<sup>1</sup> federal courts regularly grant incentive awards to compensate named plaintiffs for the work they performed. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232 (10th Cir. 2009) ("Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be

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<sup>1</sup> Because the Parties here contractually agreed that federal common law controls the case contribution award, I find that the opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative of 0.5%, is inapplicable.

entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.”); *Laredo* Fee Order at 9 (case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.”) (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at \*9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (1.5% of \$1.06 billion fund, equaling \$15,900,000 to be split amongst nine class representatives and stating “[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at \*18-19 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23, 400 U.S. App. D.C. 428 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award”); *Rodriguez v. West Publ’g Corp.*,

563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class . . . .”);

(g) The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff’s services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be “untethered to any service or value [the lead plaintiff] will provide to the class”); Newberg § 17:18;

(h) Here, Class Representatives’ request is supported by the abundant evidence submitted by Class Representatives, including declarations from Mr. Abernathy, Ms. Wagner, Professor Geoffrey Miller, and multiple absent class members. *See* Newberg § 17:12 (evidence might be provided through “affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”). This evidence demonstrates Mr. Abernathy and Ms. Wagner are seeking reasonable payment for reasonable time expended on services that were helpful and non-duplicative to the litigation;

(i) Mr. Abernathy has extensive experience on matters related to oil and gas mineral interests. *See* Abernathy Decl. at Doc. No. 91-1 at ¶ 3. Mr. Abernathy is the President and founder of Chieftain Royalty Company (“Chieftain”). Chieftain actively purchases producing and non-producing mineral and royalty interests in eleven states and

owns hundreds of mineral and royalty interests in over 12,000 acres. Mr. Abernathy received a B.A. from Tulane University and a Juris Doctorate from Oklahoma City University School of Law. He is licensed to practice law in Oklahoma where he practiced for over 20 years, specializing in oil and gas, real estate, bankruptcy and probate law. He is a nationally recognized speaker on royalty ownership issues and he has spent over 11 years speaking to thousands of mineral interest owners around the country on all aspects of mineral ownership, including estate planning and Oklahoma Corporation Commission rulings and regulations. He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter. Mr. Abernathy is also a founding member of the American Royalty Council, and he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *See* Abernathy Decl. at Doc. No. 91-1 at ¶ 3.

(j) Ms. Wagner also has extensive experience in matters related to oil and gas mineral interests. *See* Wagner Decl. at Doc. No. 91-2 at ¶ 4. Ms. Wagner attended the University of Texas earning a B.B.A. in history. Ms. Wagner is the Trustee of the Kelsie Wagner Trust and the Successor Trustee of the Wade Costello Trust, and she manages a portfolio of royalty interests that have been in her family for four generations. The two Trusts have owned multiple royalty interests in Oklahoma and elsewhere for many years including interests in wells operated by Marathon, Apache, Vitruvian, Casillas Operating, LLC, TEP, Newfield, Sanguine Gas Exploration, LLC, and Chesapeake. Ms. Wagner owns minerals in 17 counties throughout Oklahoma, including Garvin, Grady, Stephens, Carter, McClain, Beckham, Cleveland, Dewey, Ellis, Greer, Lincoln, Logan, Oklahoma, Pottawatomie, Roger Mills, Seminole, and Woods. The Kelsie Wagner Trust's interests

are contained in roughly 20,075 gross acres and 1,075 net mineral acres. Similarly, the Wade Costello Trust's interests are contained in roughly 20,075 gross acres and 875 net mineral acres. Ms. Wagner relies on the income she receives from actively managing these mineral interests and has received royalty payments from these companies for several years

(k) As demonstrated by their respective Declarations, Mr. Abernathy dedicated approximately 175 hours to this Litigation and Ms. Wagner dedicated approximately 100 hours to this Litigation. *See* Abernathy Decl. at Doc. No. 91-1 at ¶ 17 and Wagner Decl. at Doc. No. 91-2 at ¶ 18. These hours were spent collecting documents for production, reviewing emails and draft pleadings from Class Counsel, consulting and/or meeting with Class Counsel, traveling to and from meetings and hearings, and attending mediation. *Id.* All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id.* Moreover, Mr. Abernathy and Ms. Wagner worked on behalf of the Settlement Class in preparation for the Final Fairness Hearing and Mr. Abernathy and Ms. Wagner will assist with administration of the Settlement. Mr. Abernathy and Ms. Wagner will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Mr. Abernathy and Ms. Wagner never worked another hour on this case, their respective requests of \$50,000 and \$25,000 would be reasonable;

(l) Indeed, Mr. Abernathy and Ms. Wagner were heavily involved in all aspects of the Litigation. They actively and effectively fulfilled their obligations as representatives of the Settlement Class, complying with all reasonable demands placed upon them during the prosecution and settlement of this Action, and they provided valuable assistance to Class Counsel. *See* Wagner Decl. at Doc. No. 91-2 at ¶¶ 8 - 10 and Abernathy Decl. at

Doc. No. 91-1 at ¶¶ 7 - 9. Mr. Abernathy has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed significantly to the prosecution and resolution of this case. *Id.* In addition, Mr. Abernathy and Ms. Wagner have produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended the formal mediation session in person, and actively participated in the negotiations that led to the settlement of this Action. *See* Wagner Decl. at Doc. No. 91-2 at ¶¶ 8 - 10 and Abernathy Decl. at Doc. No. 91-1 at ¶¶ 7 - 9;

(l) Mr. Abernathy and Ms. Wagner were never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See* Wagner Decl. at Doc. No. 91-2 at ¶ 19 and Abernathy Decl. at Doc. No. 91-1 at ¶ 18. In fact, Mr. Abernathy and Ms. Wagner understand and agree that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on his request. *Id.* In other words, Mr. Abernathy and Ms. Wagner fully support the Settlement as fair, reasonable, and adequate, even if they are awarded no case contribution award at all. *Id.* Neither Mr. Abernathy nor Ms. Wagner has any conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, multiple absent Class Members executed affidavits supporting Mr. Abernathy's and Ms. Wagner's respective requests for a Case Contribution Award. *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., LLC);

(m) Because Mr. Abernathy and Ms. Wagner have dedicated their time,

attention, and resources to this action, I find that Mr. Abernathy is entitled to his requested Case Contribution Award of \$50,000 and that Ms. Wagner is entitled to her requested Case Contribution Award of \$25,000, to reflect the important role that each played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement;

(n) Assuming *arguendo* that Oklahoma state law governs the case contribution award despite the express language to the contract in the Settlement Agreement, I find that Oklahoma law strongly supports incentive awards, particularly in royalty class actions such as this. In fact, Oklahoma state courts routinely grant percentage-based incentive awards to class representatives, which historically are much larger than the modest flat amount sought here. *See, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at \*9 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (“The incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . . [Collecting cases] . . .”); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) (“Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.”); and

(o) Thus, Class Representatives' request for an incentive award of \$50,000 to Mr. Abernathy and \$25,000 to Ms. Wagner is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See generally* Abernathy Decl.; Wagner Decl.; Miller Decl.; 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., LLC); and the Affidavit of Michael Starcevich.

7. Any appeal or any challenge affecting this Order Awarding Case Contribution Award shall in no way disturb or affect the finality of the Final Approval Order, the Settlement Agreement, or the Settlement contained therein.

8. Jurisdiction is retained over the Parties and the Settlement Class Members as provided in the Order and Judgment Granting Final Approval of Class Action Settlement.

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.

IT IS SO ORDERED this 8<sup>th</sup> day of March, 2019.

  
Steven P. Shreder  
United States Magistrate Judge  
Eastern District of Oklahoma