THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CHIEFTAIN ROYALTY COMPANY	)	
and JACK LANCET	)	
Plaintiffs	)	
	)	
v.	)	Civil Action No. CIV-11-212-R
	)	
QEP ENERGY COMPANY	)	
Defendant	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND CASE CONTRIBUTION AWARD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

In connection with the approval of the Settlement[1] in this Action, Class Representatives and Class Counsel respectfully move the Court for: (1) attorneys' fees constituting one-third of the $155 Settlement Amount (the "Fee Request"); (2) reimbursement of expenses incurred in successfully prosecuting this Action not to exceed $1,350,000 (the "Expense Request"); and (3) an aggregate Case Contribution Award for Class Representatives constituting 0.5% of the Settlement Amount, as compensation for their time and effort. These requests—which are to be paid out of the Settlement Cash Amount—are fair, reasonable and adequate and, therefore, should be granted.

Class Counsel has obtained an excellent recovery, which consists of a $115 million Settlement Cash Amount and changes to QEP's fee-deduction and royalty calculation policies that began in March 2013 ("Binding Royalty Methodology Benefits" or "Binding Benefits") estimated to have a minimum present value of $40 million (collectively "Settlement Amount").[2] As explained in detail below, this is a conservative estimate of the present value of the Binding Benefits. That is, the value of these Binding Benefits carried out over 30 years Class will accumulate to a sum of over $206 million—$138 million when discounted to presented value—brining the total estimated net present value of the Settlement to over $253 million. *See id.* at ¶11, Exhibit A. Nonetheless, the

[1] All capitalized terms not otherwise defined herein shall have the meaning given to them in the February 13, 2013 Stipulation and Agreement Settlement ("Stipulation"), attached as Exhibit 1 to Class Representatives Memorandum in Support of the Settling Parties Joint Motion to Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice, and Set Date for Final Fairness Hearing ("Preliminary Approval Memorandum"). Docket No. 119.

[2] *See* Affidavit of Scott Gutberlet ("QEP Affidavit"), Docket No. 148-1; at ¶13.

$115 million Settlement Cash Amount alone is an outstanding recovery for Class Members. Even after Attorneys' Fees, Litigation Expenses, and Case Contribution Awards are paid out of the Settlement Cash Amount, the cash portion of the Settlement still represents over 100% of the principal amount of the Class's past claims for royalty underpayment, plus a substantial amount of interest and other litigation claims.[3] In fact, if the Class' recovery were limited to the five-year statute of limitations period, the Class' entire Claim would be approximately $20.4 million in past royalty underpayment.[4] If the five-year statute of limitation does not apply, the Class claim for royalty underpayment would be approximately $43.5 million. *See id.* Thus, the $115 million cash payment is an outstanding recovery, representing the second largest gas royalty settlement in Oklahoma history and, to Class Counsel's knowledge, the third largest nationwide. *See* Class Counsel Declaration at ¶6. Even after the Fee Request, Expense Request, and Case Contribution Award are paid out of the Settlement Cash Amount, the cash left over to distribute to Class Members will be no less than $61,213,500.[5] This amount is nearly three times more than the five-year estimated past royalty underpayment of $20.4 million and almost $18 million more than the uncapped estimated past royalty underpayment of $43.5 million. *Id.* And, on top of this, the Class will receive millions more in cash as a result of the Binding Benefits over the life of the Class Leases.

---

[3] *See* Declaration of Bradley E. Beckworth and Robert N. Barnes on Behalf of Class Counsel ("Class Counsel Declaration"), attached as Exhibit 1 to Class Representatives Memorandum in Support of the Settling Parties' Joint Motion for Final Approval, filed contemporaneously herewith, at ¶¶70.

[4] *See* Declaration of Barbara Ley ("Ley Declaration"), Docket No. 149, at ¶2.

[5] *See* Declaration of Steven S. Gensler in Support of Award of Attorneys' Fees ("Gensler Declaration"), Docket No. 154, at ¶18.

Moreover, unlike similar class action, Defendant, QEP Energy Company ("QEP"), has agreed to pay for administration and notice costs, which are normally paid out of the gross settlement fund. *See* Stipulation at ¶1.1; Gensler Declaration at ¶18. To date, this part of the Settlement has provided approximately $275,000 in value to the Class that normally would have been deducted from the cash proceeds. *See* Class Counsel Declaration at ¶7. This amount likely will be doubled by time final distribution is completed. *Id.*

In addition to the $115 million Settlement Cash Amount, the Settlement provides a number of material Binding Benefits, which QEP estimates to have a present value of *at least* $40 million. *See* QEP Affidavit at ¶13; Ley Declaration at ¶5. Unlike other cases where such benefits are illusory or hypothetical, here, the Binding Benefits provide concrete present value to the Class Members.[6] These Binding Benefits, which are explained in detail in the Stipulation, primarily consist of changes to QEP's fee-deduction and royalty-calculation methods. *See id.* at ¶2.2(a)-(f). For example, QEP has agreed to make no deductions from Class Member's royalty payments for fees associated with a number of midstream gas processing services, which QEP has improperly deducted since 1988. *Id.* at ¶2.2; Compl. at ¶16. In other words, QEP has adopted most of the payment methodology practices that Class Representatives and Class Counsel have argued should have been used all along. Among other things, QEP will no longer deduct from royalty

[6] *See* Gensler Declaration at ¶26; 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 and Request For Case Contribution Award, and Notice of Proposed Settlement ("Miller Declaration"), Docket No. 152, at ¶41.

payments the costs of gathering, compressing, dehydrating, and treating gas in gas gathering systems and gas plants—even when the gas is marketed under the terms of percentage of proceeds ("POP") type contracts. *See* Stipulation at ¶2.2. QEP will also pay royalty at agreed index-type prices for fuel gas used off the lease and in gas plants. *Id*. at ¶2.2(c). Additionally, QEP has agreed to cap gas-processing fees where it receives NGL value and to seek better gas marketing terms from midstream companies to maximize value to royalty owners. *Id.* at ¶2.2(a).

QEP's Vice President of Commercial and Technical Services, Scott Gutberlet, states, "I believe it is fair and reasonable to conclude that the estimated net present value of the increased royalty from the binding changes in the Settlement Agreement is at least $40 million." QEP Affidavit at ¶13. This calculation "shows an estimated net present value of over $40 million after 16 years of production." *Id.* at ¶12. When these same calculations are carried out to 30 years, which, according to Mr. Gutberlet, "is a conservative period to estimate the life of production," the additional net present value of principal to be paid to the Class will likely exceed $138 million. *See id.* at ¶11, Exhibit A. Class Representatives' experts have verified these calculations. *See* Ley Declaration at ¶5. To put it plainly, under the binding changes to QEP's royalty payment methodology going forward, Class Members will receive at least $40 million (discounted to present value) more in 16 years and $138 million (discounted to present value) more in 30 years than they would have received were QEP to continue using the scheme it had been using. Thus, the $155 million Settlement Amount, which is based on the $40 million calculation, is a conservative estimate of the total present value of the Settlement.

The Binding Benefits began in March 2013, and will continue without limitation for the life of each well (and any future wells), regardless of transfer or assignment from QEP to other oil companies. *See* Stipulationc at ¶2.2. As such, the Binding Benefits will instantly increase the value of every Class Lease and Class Force Pooled Royalty Interest (collectively, the "Class Leases") to the Class Members. *See* Miller Declaration at ¶41. If a Class Lease is sold, assigned, devised or transferred, the Binding Benefits run with the lease or interest. *See* Stipulation at ¶2.2. And, the requirement to provide these benefits will apply to any successor, assignee, or transferee of QEP. *Id.* Moreover, Class Representatives and Class Counsel secured an agreement that Chieftain can conduct a bi-annual audit, at QEP's expense, to ensure that these Binding Benefits are being provided to the Class. *Id.* at ¶2.2(f). And the Settlement also includes an arbitration provision under which any failure of QEP to provide such Binding Benefits can be resolved by arbitration, at QEP's expense, in lieu of additional litigation. *Id.* at ¶2.2(g). This arbitration provision will save the Class and the Court considerable time and resources. *See* Class Counsel Declaration at ¶42.

These Binding Benefits are real, substantial and quantifiable. *See* Gensler Declaration at ¶28. They comprise a material part of the overall consideration provided in exchange for the release of the Class' Claims.[7] Additionally, the Binding Benefits apply to all royalty owners in every "royalty pot" for every class well no matter what differences may exist between lease language. *See* Ley Declaration at ¶7. The Binding

[7] *See* Declaration of Francis McGovern ("McGovern Declaration"), Docket No. 141, at ¶8.

Benefits equally apply to force pooled royalty interests. *Id.* In short, QEP has given up the 'leases are different' argument.

Based on the outstanding recovery Class Counsel and Class Representatives obtained for the Class, and in light of the work performed and the expenses incurred, the requests for Attorneys' Fees, reimbursement of Litigation Expenses, and Case Contribution Awards are fair and reasonable and should be approved. Additionally, these requests comport with fee and expense requests and case contribution awards granted in similar cases and are fully appropriate under Tenth Circuit precedent. *See* Miller Declaration at ¶¶45-46. Therefore, and for the reasons demonstrated below, Class Counsel and Class Representatives request that the Court grant their Motion for Approval of Attorneys' Fees, Litigation Expenses, and Case Contribution Award (the "Motion").

II. SUMMARY OF THE ARGUMENT

Class Representatives and Class Counsel have achieved an excellent Settlement with QEP. Again, the $155 million Settlement consists of a Cash Amount of $115 million and Binding Benefits with an estimated present value of at least $40 million. As demonstrated in the Settling Parties' Joint Motion for Final Approval and Class Representatives' Memorandum in Support thereof, both of which are being filed contemporaneously herewith, the terms and conditions of the Settlement are fair, reasonable and adequate and in the best interests of the Class, and the Settlement should be finally approved. *See also* Class Counsel Declaration at ¶64.

Further, the Fee Request of one-third of the $155 million Settlement Amount, to be paid from the cash proceeds, is both fair and reasonable. The extraordinary Settlement

reached in this Action simply would not have been possible without Class Counsel's particular skill, diligent efforts, and expenditure of nearly $1 million in out of pocket expenses to prosecute the case. As demonstrated below, the Fee Request comports with all factors examined by courts in the Tenth Circuit under the percentage of the fund method for evaluating the reasonableness of attorneys' fees. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988); Gensler Declaration at ¶¶32-38; Miller Declaration at ¶¶58-71.

Moreover, the Fee Request is particularly appropriate for a number of additional reasons:

First, the Fee Request is within the range of reasonable fees awarded in the Tenth Circuit. *See Brown*, 838 F.2d at 455 n.2; Miller Declaration at ¶¶45-46.

Second, the typical fee awarded in royalty underpayment class actions in Oklahoma is 40%. *See* Miller Declaration at ¶46. Professor Miller states, "it is clear that in Oklahoma state court the prevailing reasonable attorneys' fee in a royalty class action ranges from one-third to 40%." Miller Declaration at ¶31; *see e.g.*, *Mitchusson v. EXCO*, CJ-2010-32, District Court of Caddo County, Oklahoma (2012) (Judge Van Dyck awarding 40% of the $23,5000,000 fund); *Simmons v. Anadarko***,** CJ-2004-57, District Court of Caddo County, Oklahoma (2008) (Judge Hill awarding 40% of the $155,000,000 fund); *Lobo v. BP*, CJ-97-72, District Court of Beaver County, Oklahoma (2005) (Judge Riffe awarding 40% of the $150,000,000 fund in a working-interest owner

class action).[8] Thus, a fee of one-third is below the typical 40% fee awarded in Oklahoma royalty cases.

Third, the requested fee is below the market rate for the high level of representation Class Counsel provided the Class in resolving this Action. *See* Miller Declaration at ¶¶47-53. Class Representative, Chieftain Royalty Company, negotiated the attorneys' fee in this Action and still endorses it today.[9] Chieftain's president, Robert Abernathy, who is an attorney, was personally involved in the negotiations that led to Class Counsel representing the Class for up to a 40% contingency fee. *Id*. Class Representative, Jack Lancet, also agreed to the 40% fee when he became a Class Representative.[10] Further, Dan Little, a Class Member and class action attorney in Oklahoma, has filed a Declaration with the Court stating that, in his experience, a

[8] Additional Oklahoma State class actions involving oil and gas issues include: *Tatum v. Devon Energy Corp.*, CJ-10-77, District Court of Nawata County, OK (April 18, 2013) (Judge Gibson awarding 45% of $3.8 million fund); *Taylor v. ChevronTexaco*, CJ-2002-204, District Court of Texas County, OK (2009) (Judge Riffe awarding 40% of $12 million fund); *Brown v. Citation*, CJ-04-217, District Court of Caddo County, OK (2009) (Judge Van Dyck awarding 40% of $5,250,000 fund); *Laverty v. Newfield*, CJ-98-06012, District Court of Tulsa County, OK (2007) (Judge Thorbrugh awarding 40% of $17,250,000 fund); *Continental v. Conoco*, CJ-95-739 & CJ-2000-356, District Court of Garfield County, OK (2005) (Judge Perry awarding 40% of $23 million fund); *Velma-Alma v. Texaco*, CJ-2002-304, District Court of Stephens County, OK (2005) (Judge McCall awarding 40% of $27 million fund); *Kouns v. ConocoPhillips*, CJ-98-61, District Court of Dewey County, OK (2004) (Judge Linder awarding 42% of $4,300,000 fund); *Robertson v. Sanguine*, CJ-02-150, District Court of Grady County, OK (2003) (Judge Van Dyck awarding 40% of $13,250,606 fund); *McIntoush v. Questar*, CJ-02-22, District Court of Major County, OK (2002) (Judge Barefoot awarding 40% of $1.5 million fund); *Rudman v. Texaco*, CJ-97-1E, District Court of Stephens County, OK (2001) (Judge Hetherington awarding 40% of $25 million fund).

[9] *See* Declaration of Robert S. Abernathy on Behalf of Chieftain Royalty Company ("Abernathy Declaration"), Docket No. 140, at ¶7.

[10] *See* Declaration of Jack Lancet ("Lancet Declaration"), Docket No. 139, at ¶5.

contingency fee range between one-third to 40% is the market rate for quality legal services in similar actions.[11] Michael Burrage, a Class Member and former federal judge, also filed a declaration stating the typical fee awarded in similar class actions is between one-third and 40% of the settlement.[12] Nevertheless, Class Counsel is only seeking a fee of one-third of the Settlement Amount. Class Representatives, Mr. Little, and Judge Burrage all approve of Class Counsel's efforts and support the Fee Request here.[13] In addition, six other absent Class Members have filed declarations in support of the Fee Request. *See* Docket Nos. 131-36. These facts illustrate that the requested fee is below the market rate for the quality representation that Class Counsel provided on behalf of the Class.

Fourth, the Fee Request comports with fees awarded in similar actions. Just last year, this Court awarded one-third of the settlement in *Hill v. Marathon Oil Co.*, Case No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650, (W.D. Okla. 2012) and 42% of the settlement in *Naylor Farms, Inc. v. Anadarko OGN Company, et al*., Case No. CIV-08-668-R, Docket No. 329 (W.D. Okla. Oct. 5, 2012). Also Judge Leonard awarded 36% in *Fankhouser v. XTO Energy, Inc.,* Case No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, *8 (W.D. Okla. Oct. 12, 2012).[14] Importantly, unlike the settlements in *Hill*,

[11] *See* Declaration of Dan Little ("Little Declaration"), Docket No. 137, at ¶10.
[12] *See* Declaration of Michael Burrgae in Support of Case Contribution Awards, Attorneys' Fees, and Expenses ("Burrage Declaration"), Docket No. 138, at ¶4.
[13] *See* Abernathy Declaration at ¶¶17-18; Lancet Declaration at ¶¶14-15; Little Declaration at ¶11; Burrage Declaration at ¶8.
[14] While plaintiff's counsel in *Fankhouser* also requested a fee on the future benefits the settlement attempted to provide, the Court held that "these benefits, however, cannot be calculated with reasonable certainty at this time and should not be used to determine the

Naylor Farms, and *Fankhouser*, the Settlement in this case provides substantial, concrete Binding Benefits that have an objectively quantifiable value verified by QEP and Class Representatives' experts. *See* QEP Affidavit at ¶13; Ley Declaration at ¶5; Gensler Declaration at ¶24. District courts in this Circuit also have awarded fees beyond the typical range set out in *Brown*, such as the Eastern District of Oklahoma's recent award of a 42% fee in *Been v. O.K. Indus.*, No. 02-CV-285-RAW, 2011 U.S. Dist. LEXIS 115151, at *32 (E.D. Okla. Aug. 16, 2011). Thus, the Fee Request comports with attorneys fees awarded in similar actions.

Fifth, Court-appointed Special Master, Francis E. McGovern, a professor at Duke Law School and an expert in alternative dispute resolution, mediated the Settlement and has filed a declaration stating that the Settlement was a result of Class Counsel's diligent efforts in this Action. *See* McGovern Declaration at ¶¶15-16. Special Master McGovern also states the Settlement is fair and reasonable and that the Fee Request is appropriate. *Id.* at ¶¶13, 15. Similarly, Layn Phillips, former judge for the Western District of Oklahoma, recently filed a declaration in *Hitch Enterprises, et al. v. Cimarex Energy Company, et al.*, a royalty underpayment class action very similar to this Action, stating that the one-third fee request there was "imminently reasonable." *See* Case No. CIV-11-13-W, Docket No. 82-2, ¶19 (W.D. Okla 2013). Here, Special Master McGovern's

---

amount of fees and expenses to award." *Id.* at *4-5. Thus, the Court only awarded attorneys fees on the $37 million cash portion of the settlement, stating, "[t]his amount represents nearly 36 percent of the Settlement Fund…." *Id.* at *8. Here, however, the Binding Benefits *can* be calculated with reasonable certainty, and the net present value of the Binding Benefits is *at least* $40 million. *See* Ley Declaration at ¶5.

endorsement of Class Counsel's Fee Request should be given due consideration in support of approving the Fee Request.

In addition to the above, the relevant *Johnson* factors also support the Fee Request by highlighting Class Counsel's diligent prosecution of this case for over two years on a wholly contingent basis to achieve a remarkable recovery for the Class. *See* Miller Declaration at ¶¶58-71. Spending nearly $1 million in out of pocket expenses and over two years of work in prosecuting this Action, Class Counsel risked receiving no payment whatsoever. *Id.* at ¶105. Indeed, Class Counsel engaged in hard-fought litigation in this Action, including extensive discovery and document production (approximately 12 gigabytes, 30,300 files, and 782,000 pages of digital data); taking multiple depositions; preparing expert reports; briefing and arguing numerous motions, including class certification; reviewing and analyzing accounting and financial statements; examining and analyzing royalty owners' lands and leases; consulting with and preparing expert witnesses; engaging in multiple formal mediation sessions over the course of several months; participating in ongoing settlement negotiations; developing a damages model; and engaging in an extensive and laborious notice campaign. *Id.* at ¶12. These efforts resulted in a Settlement that not only recovers more than two and one-half times the Class's claimed principal amount of past royalty underpayment but, also, provides binding changes to QEP's royalty calculation and payment methodology that will earn the Class at least $40 million (reduced to present value) over 16 years and $138 million (reduced to present value) over 30 years. By highlighting Class Counsel's diligent prosecution of this case and the remarkable recovery achieved for the Class, the *Johnson*

factors support the Fee Request.

Put simply, the Fee Request is fully justified by the facts of this case, the law, and fee awards in similar cases, and is fair and reasonable. As such, the Court should grant Class Counsel's requested fee of one-third of the $ 155 million Settlement.

In addition to the Fee Request, Class Counsel seeks reimbursement of reasonable Litigation Expenses not to exceed $1,350,000. The Notice[15] issued to the Class stated that Class Counsel would seek up to $1,350,000 in expenses. *See* Class Counsel Declaration at ¶97. To date, Class Counsel has actually advanced $903,502.79 in out-of-pocket expenses in prosecuting this case. *See id.* ¶98.[16] In addition, Class Counsel's Expense Request will include any future costs related to administration, distribution, litigation, and appeal. *Id.* at ¶98. However, Class Counsel will only seek reimbursement of such costs if they are actually incurred, and in no event will Class Counsel's Fee Request exceed $1,350,000. *Id.* Therefore, Class Counsel submits that the Expense Request also is fair and reasonable and should be granted. *See* Miller Declaration at ¶75.

Finally, Class Representatives are entitled to an aggregate Case Contribution Award of 0.5% of the Settlement Amount as compensation for their invaluable efforts and assistance throughout this litigation. Class Representatives have been actively engaged in the prosecution and resolution of this Action, staying in constant communication with and providing invaluable assistance to Class Counsel, producing

[15] Notice is attached as Exhibit C to the Affidavit of Tore Hodne on Behalf of Settlement Administrator Rust Consulting, Inc. ("Rust Affidavit"), Docket No. 153.
[16] Class Counsel has chosen to forego certain actual expenses totaling $50,516.76. *Id.* at ¶99.

large volumes of documents, participating in live and telephonic mediation sessions, and negotiating the terms of the Settlement, among other efforts. *See* Abernathy Declaration at ¶¶8-11; Lancet Declaration at ¶¶7-10; Class Counsel Declaration at ¶¶102-09. Class Representatives carried out these tasks without compensation on behalf of the Class and at all times acted in the best interests of the Class. *See* Class Counsel Declaration at ¶107.

Moreover, Class Representative, Chieftain Royalty Company, has agreed to take on the responsibility of auditing QEP in the future to ensure that QEP is complying with the Binding Benefits provided under the Settlement. *See* Abernathy Declaration at ¶13; Class Counsel Declaration at ¶105. Also, the request for an award of 0.5% of the Settlement Cash Amount is on the low end of case contribution award requests, which are usually 1.0% or more. *See* McGovern Declaration at ¶17. And, even after the requested Case Contribution Award is paid out of the Settlement Cash Amount, the Class will still receive 100% of the claimed principal amount of past royalty underpayment. *See* Class Counsel Declaration at ¶108. As such, Class Representatives request an aggregate Case Contribution Award of 0.5% of the Settlement, to be split appropriately among Class Representatives. This request is fair and reasonable and should be granted. *See id.* at ¶109; Miller Declaration at ¶¶72-74; Little Declaration at ¶14; Burrage Declaration at ¶9.

III. FACTUAL AND PROCEDURAL SUMMARY

The factual and procedural background of this case is well known to the Court. Additionally, the Final Approval Memorandum and the Class Counsel Declaration provide a thorough description of this background. *See* Final Approval Memorandum at

Section III; Class Counsel Declaration at ¶¶9-35. 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 the Final Approval Memorandum, the Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated as if set forth fully herein.

IV. ARGUMENT

In their Motion, Class Representatives and Class Counsel respectfully move the Court for: (1) attorneys' fees constituting one-third of the $155 Settlement Amount; (2) reimbursement of in Litigation Expenses incurred in successfully prosecuting this litigation not to exceed $1,350,000; and (3) an aggregate Case Contribution Award for Class Representatives constituting 0.5% of the Settlement Cash Amount, as compensation for their time and effort. These requests are to be paid out of the $115 million Settlement Cash Amount, and even after these deductions are made from the Settlement Cash Amount, the Class will still receive over 100% of their past royalty underpayment principal. As demonstrated below, these requests are fair, reasonable and adequate and, therefore, should be granted.

A. The Fee Request is Fair and Reasonable and Should be Approved

The Fee Request is fair and reasonable and should be approved. Under Federal Rule of Civil Procedure 23(h), "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). "Attorneys who recover a common fund for a class are entitled to a reasonable fee, costs, and expenses from the fund." *Been*, 2011 U.S. Dist. LEXIS 115151, at *9. 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. As such, an award of attorneys' fees will only be reversed for abuse of discretion. *Id.*; *Gottlieb v. Barry*, 43 F.3d at 486 (10th Cir. 1994).

In the Tenth Circuit, the preferred approach for determining attorneys' fees in common fund cases is the percentage of the fund method. *CompSource Okla. v. BNY Mellon, N.A.*, Case No. CIV-08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *22-23 (E.D. Okla. Oct. 25, 2012); *Gottlieb*, 43 F.3d at 483 ("In our circuit . . . *Uselton* implies a preference for the percentage of the fund method.")).[17] Under the percentage of the fund method an appropriate fee is equal to a reasonable percentage of the common fund. *Brown*, 838 F.2d at 454.

When utilizing the percentage of the fund approach, the trial court must evaluate the reasonableness of the requested percentage by analyzing the applicable 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. This analysis is sufficient, and "[a] majority of circuits recognize that trial courts. . . are not required to conduct a lodestar analysis in common fund class actions." *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23 (citing *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)). Importantly, there is no requirement under Tenth Circuit or Oklahoma law that either requires a lodestar cross check or puts a limit on the range of accepted fees in common

[17] The *Manual for Complex Litigation, (Fourth)* § 14.121 (2004) also approves the percentage of the fund method of determining attorneys' fees.

fund cases. *See* Miller Declaration at ¶31; Gensler Declaration at ¶13. Further, as noted above, it is clear that in Oklahoma state court the prevailing reasonable attorneys' fee in royalty class actions is 40%. *Id.*

Here, the Court should use the percentage of the fund approach to award attorneys' fees on the entire $155 million Settlement Amount. Unlike settlements in which the future benefit is uncertain or unquantifiable, here, the Settlement, including the Binding Benefits, has a concrete present value of *at least* $155 million. *See* Miller Declaration at ¶41; Gensler Declaration at ¶28, Ley Declaration at ¶5; QEP Affidavit at ¶13. Therefore, Class Counsel respectfully requests an attorneys' fee of one-third of the $155 million Settlement Amount to be paid out of the Settlement Cash Amount.

Class Counsel's Fee Request of one-third of the Settlement Amount is fair and reasonable for a number of reasons in addition to the relevant *Johnson* factors. First, a fee of one-third of the Settlement is on the low end of the acceptable range of reasonable fees awarded in the Tenth Circuit. Second, the Fee Request is below the normal 40% fee awarded in similar actions in Oklahoma state court. Third, the Fee Request was negotiated by two sophisticated Class Representatives and is below the market rate for high-level representation in a complex royalty owner class action such as this one. Fourth, the Fee Request comports with fees awarded in similar large class actions. Fifth, Special Master McGovern endorses the Settlement and Fee Request as fair and reasonable. And finally, the relevant *Johnson* factors (which overlap with the above supporting reasons) support the Fee Request by illustrating the time, effort, and resources Class Counsel has dedicated to this Action to achieve an outstanding recovery in the face

of complex legal and factual issues and serious risks and uncertainty. Therefore, the Fee Request is fair and reasonable and should be approved.

1. *An Award of One-Third of the Settlement is Well Within the Tenth Circuit's Range of Acceptable Fee Awards*

The Fee Request is within the Tenth Circuit's typical range of reasonable fee awards. In *Brown*, the Tenth Circuit, looking to different courts around the nation, recognized that a typical percentage award in a common fund case is up to 37% and even higher. 838 F.2d at 455 n.2. In general, district courts in this Circuit agree with that finding. *See e.g.*, *Anderson v. Merit Energy Co.*, No. 07-CV-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *10 (D. Colo. Oct. 20, 2009) ("The customary fee to class counsel in a common fund settlement is approximately one-third of the economic benefit bestowed on the class."); *Vaszlavik v. Storage Tech. Corp.*, Civil Action No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *9 (D. Colo. Mar. 9 2000) ("A 30% common fund fee award is in the middle of the ordinary 20%-50% range and is presumptively reasonable."). Also, *Newberg on Class Actions* recognizes, "fee awards in class actions average around one-third of the recovery." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6, at 551 (4th ed. 2002).

Of course, each particular fee award should be supported by the specific circumstances of the case and the application of the relevant *Johnson* factors. *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *26; *Ramah Navajo*, 250 F. Supp. 2d at 1316; *see also*, *Been*, 2011 U.S. Dist. LEXIS 11515, *28 ("Upon evaluation of each of the *Johnson* factors, and considering all the evidence, the Court finds that the requested 42% fee

award is reasonable."). Here, Class Counsel seeks one-third of the $155 million Settlement Amount, which is well within the acceptable range of attorneys' fees awarded in the Tenth Circuit. *See* Miller Report at ¶45-46.

2. *The Fee Request is Below the Normal 40% Fee Awarded in Oklahoma State Courts*

The Fee Request is below the typical attorneys' fee awarded in Oklahoma State Courts. The typical fee in Oklahoma for royalty class cases is around 40%. *See* Miller Declaration at ¶46; Burrage Declaration at ¶7; Little Declaration at ¶10; *Been*, 2011 U.S. Dist. LEXIS 115151, at *16 (noting in Oklahoma oil and gas class action settlements "there is a consensus for a 40% fee award."). In fact, in recent Oklahoma oil and gas class action litigation, 88% of the contingent fee awards were between one-third and 40%. *See* Miller Declaration at ¶55; *see e.g.*, *Mitchusson v. EXCO*, CJ-2010-32, District Court of Caddo County,Oklahoma (2012) (Judge Van Dyck awarding 40% of the $23,5000,000 fund); *Simmons v. Anadarko***,** CJ-2004-57, District Court of Caddo County, Oklahoma (2008) (Judge Hill awarding 40% of the $155,000,000 fund); *Lobo v. BP*, CJ-97-72. District Court of Beaver County, Oklahoma (2005) (Judge Riffe awarding 40% of the $150,000,000 fund in working-interest owner action).[18] These fees are notable

[18] *See also Tatum v. Devon Energy Corp.*, CJ-10-77, District Court of Nawata County (April 18, 2013) (Judge Gibson awarding 45% of $3.8 million fund); *Taylor v. ChevronTexaco*, CJ-2002-204, District Court of Texas County, OK (2009) (Judge Riffe awarding 40% of $12 million fund);; *Brown v. Citation*, CJ-04-217, District Court of Caddo County, OK (2009) (Judge Van Dyck awarding 40% of $5,250,000 fund); *Laverty v. Newfield*, CJ-98-06012, District Court of Tulsa County, OK (2007) (Judge Thorbrugh awarding 40% of $17,250,000 fund); *Continental v. Conoco*, CJ-95-739 & CJ-2000-356, District Court of Garfield County, OK (2005) (Judge Perry awarding 40% of $23 million fund); *Velma-Alma v. Texaco*, CJ-2002-304, District Court of Stephens County, OK

because federal district courts often compare the fee request being considered to fee awards in similar actions in state court. *See e.g., Been*, 2011 U.S. Dist. LEXIS 115151, at *16; *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, Dkt. No. 404 (D. Kan. 2012).

Here, Class Counsel only seeks a Fee Request of one-third of the Settlement. Thus, the fact that the Fee Request is below the 40% fee typically awarded in Oklahoma royalty cases supports approval of the Fee Request. *See* Gensler Declaration at ¶37.

3. *The Fee Amount was Negotiated by Sophisticated Clients and is Actually Below the Market Rate for Quality Representation in a Complex Oil and Gas Class Action*

A one-third fee is below the market rate for the quality representation provided by Class Counsel in this complex oil and gas class action. *See* Miller Declaration at ¶47-53; Gensler Declaration at ¶31. "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 attorney fees." *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *26. And, "[a] useful measure of the customary fee for a particular case is the fee agreed to when the full difficulty and uncertainty of the case lies ahead, and there is no assurance of recovery." *Been*, 2011 U.S. Dist. LEXIS 115151, at *23; *see also Millsap*, 2003 U.S. Dist. LEXIS 26223, at *26 ("One measure of the market rate is any contingency agreement negotiated at the outset of the litigation, when the risk of loss still existed.").

(2005) (Judge McCall awarding 40% of $27 million fund); *Kouns v. ConocoPhillips*, CJ-98-61, District Court of Dewey County, OK (2004) (Judge Linder awarding 42% of $4,300,000 fund); *Robertson v. Sanguine*, CJ-02-150, District Court of Grady County, OK (2003) (Judge Van Dyck awarding 40% of $13,250,606 fund); *McIntoush v. Questar*, CJ-02-22, District Court of Major County, OK (2002) (Judge Barefoot awarding 40% of $1.5 million fund); *Rudman v. Texaco*, CJ-97-1E, District Court of Stephens County, OK (2001) (Judge Hetherington awarding 40% of $25 million fund).

Here, the Fee Request is below the actual fee amount contractually agreed to by the Class Representatives. Each Class Representative agreed to a contingent fee of 40% of the judgment or settlement. *See* Abernathy Declaration at ¶7; Lancet Declaration at ¶5. As Class Counsel's client, Chieftain—through its President, Robert Abernathy, who also is an attorney—negotiated at arms' length and agreed to a 40% fee at the outset of this litigation. *See* Abernathy Declaration at ¶¶6-7. Mr. Abernathy states in his declaration:

> Based on my evaluation of this complex Action, the risks associated with litigating the Action, the potentially significant expenses Class Counsel could be required to incur and the high level representation to be provided by Class Counsel, Class Counsel and I agreed that Class Counsel would represent Chieftain on a contingency fee not to exceed 40%. At the time this agreement was reached, I believed the ceiling of a 40% contingency fee to be at or below the market rate. Class Counsel and I executed a written agreement that Class Counsel could seek a fee of 40% of any gross recovery.

Id. at ¶7. After the Court appointed Jack Lancet as the second Class Representative, Mr. Lancet also agreed to a 40% contingent fee in arm's length negotiations. *See* Lancet Declaration at ¶5. Class Representatives, one of whom is a sophisticated gas royalty company with significant mineral interests managed by a Mr. Abernathy, an attorney, negotiated these contingency agreements "when the risk of loss still existed," indicating the value Class Representatives placed on the future success of this Action. *See Millsap*, 2003 U.S. Dist. LEXIS 26223, at *26; *CompSource*, 2012 U.S. Dist. LEXIS 185061, at *14-15 (finding that sophisticated class representatives agreed to the requested fee at the start of litigation, "reflecting the value the Class Representatives placed on the future success on this Action."). This fact supports the Fee Request here.

Moreover, as noted by absent Class Members, Judge Burrage and Mr. Little, both of whom are prominent Oklahoma attorneys, a 40% contingency agreement is typical in royalty owner class actions in Oklahoma. *See* Burrage Declaration at ¶7; Little Declaration at ¶10.

The 40% contingency fee agreements also reflect the quality representation Class Representatives and the Class received from Class Counsel. Both Barnes & Lewis ("B&L") and Nix, Patterson & Roach ("NPR") have considerable experience successfully litigating royalty underpayment class actions. *See* Class Counsel Declaration at ¶¶90-91; Gensler Declaration at ¶38, n.3; Miller Decalration at ¶63. Mr. Abernathy states, "I retained B&L and NPR because I believed these firms possessed the requisite expertise in complex, nationwide litigation and had sufficient legal and financial resources to vigorously prosecute this Action on behalf of all Class Members against a well-funded and well-defended opponent." Abernathy Declaration at ¶7. As Mr. Abernathy recognized, the resolution of this Action required particular skill in oil and gas law and the advancement the significant costs related to litigating large class actions of any nature. *See* Class Counsel Declaration at ¶¶90. Thus, the 40% contingency fee to which Class Representatives agreed represents the market rate for the representation the Class received in this Action.

However, Class Counsel is not seeking the agreed 40%. Rather, Class Counsel requests only one-third of the Settlement Amount. Thus, the Fee Request actually is considerably below the market rate for Class Counsel's services. According to attorneys' fees expert, Professor Steven Gensler, "[t]he fact that the requested fee is 7% less than

the contingency fee negotiated by Class Representatives at the outset of their representation and comports with the market rate for contingency fees in similar royalty class actions further supports the reasonableness of the fee requested." Gensler Declaration at ¶37.

Additionally, both Chieftain and Mr. Lancet endorse the Fee Request as fair and reasonable. *See* Abernathy Declaration at ¶¶16-18; Lancet Declaration at ¶14-16. Indeed, Mr. Lancet states, "I support this request for attorney's fees and expenses because it is consistent with, and actually lower than, my negotiated fee agreement with Class Counsel and I have been pleased with the manner in which Counsel conducted the Action, and more importantly, with the results achieved." Lancet Declaration at ¶16. Mr. Abernathy stated in his declaration, "as a result of their extensive, efficient and excellent work, I have approved Class Counsel's application for a fee award equal to thirty-three and one-third (33 1/3%) of the total settlement value of $155 million, which is less than the 40% Chieftain approved before entering the Action." Abernathy Declaration at ¶17. Moreover, at least ten absent Class members, including Judge Burrage and Mr. Little, have filed declarations in support of the Fee Request. *See* Docket Nos. 131-38, 155-57.

Because a fee of one-third of the Settlement is below the market rate for the representation Class Counsel has provided—as evidenced by Class Representative's contracts and several other factors discussed below—the Fee Request should be approved as fair and reasonable.

4. *The Fee Request is Supported by the Fact that Courts in Similar Cases Have Awarded Comparable Fees*

The fact that courts in cases similar to this Action have awarded similar or greater fees also supports the Fee Request. As noted above, this Court awarded attorneys' fees of one-third of the settlement in *Hill*, 2010 U.S. Dist. LEXIS 56650, and 42% of the settlement in *Naylor Farms*, Case No. CIV-08-668-R, another case involving QEP. Also Judge Leonard awarded 36% in *Fankhouser*, 2012 U.S. Dist. LEXIS 147197, *8. All three of these cases involved royalty owner claims similar to the claims asserted in this Action. Specifically, the classes in *Hill, Naylor Farms*, and *Fankhouser* alleged that the defendants improperly deducted fees from royalty payments and withheld royalty on gas used as fuel off the lease premises. As in this Action, the classes there claimed such deductions and withholdings from royalty are improper under the implied duty to market established by Oklahoma law. And, in all three cases, the Court awarded attorneys' fees equal to or greater than one-third. However, unlike this case, none of these cases provided binding changes to the defendants' royalty calculation and payment methodologies that could be reduced to an ascertainable present value.

Thus, the Fee Request comports with attorneys' fees awarded in similar actions brought in this Court. Accordingly, the awards in similar class actions support the Fee Request here.

5. *Special Master McGovern has Declared that the Fee Request is Reasonable and Appropriate*

The Fee Request also is endorsed by well-respected mediator and law professor Francis McGovern, who the Court appointed as Special Master to oversee the Settlement

of this Action. *See* Docket No. 117. Special Master McGovern has served as a mediator, special master, or neutral in numerous large class actions. *See* McGovern Declaration at ¶2. In addition to this experience, Special Master McGovern is a long-time professor of law, teaching various classes on alternative dispute resolution at Duke Law School and other prestigious institutions. *Id.* In fact, Special Master McGovern has served as a professor, visiting professor, or fellow at Berkeley School of Law, Stanford Law School, Harvard Law School, the Massachusetts Institute of Technology, Boston University School of Law, University of Alabama Law School, and Cumberland School of Law, among others. *Id.*; Miller Declaration at ¶¶56-57.

Special Master McGovern oversaw the mediation of this Action and was integrally involved in all settlement negotiations. As such, he is keenly aware of the parties' litigation efforts, respective arguments in favor of and/or against their respective liability and damages theories, their respective positions regarding the settlement value of this case, and the Court's previous orders. *Id.* Given his knowledge, experience, professional background, and familiarity with this case, Special Master McGovern's views regarding the Settlement and the Fee Request should be given particular weight.

In his Declaration, Special Master McGovern states that both the terms of the Settlement and the Fee Request is fair and reasonable. *Id.* at ¶¶13, 15. Special Master McGovern also states this case was not settled easily; rather, a compromise was reached only after a number of face-to-face sessions and ongoing communications. *See id.* at ¶¶5-13. After recounting Class Counsel's extensive efforts in this litigation, Special Master

McGovern opines that Class Counsel's request for one-third of the Settlement is fair and reasonable under the specific facts and circumstances of this case. *See id.* at ¶15.

Similarly, Judge Layn Phillips, former federal Judge for the Western District of Oklahoma, filed a declaration in support of the one-third fee request in *Hitch v. Cimarex*, a case very similar to this one. *See* Case No. CIV-11-13-W, Docket No. 82-2, at ¶19. Judge Phillips served as the United States Attorney for the Northern District of Oklahoma before being appointed as a United States District Judge for the Western District of Oklahoma. *Id.* at ¶¶4-6. As a federal Judge, Judge Phillips presided over trials in all three Oklahoma Districts and sat by designation on the Tenth Circuit. Since leaving the bench, Judge Phillips has successfully mediated a number of royalty owner class actions such as this one. *Id.* In fact, Judge Phillips mediated the settlement in the *Hitch v. Cimarex* litigation. *Id.* at ¶1. In his declaration, Judge Phillips stated that attorneys' fees between one-third and 40% are reasonable and appropriate and comport with awards approved by courts in the Western District of Oklahoma and the Tenth Circuit. *Id.* at ¶19. Thus, according to Judge Phillips, the one-third fee request in *Hitch* is "imminently reasonable." *Id.* As Judge Phillips did in *Hitch*, here, Special Master McGovern, who mediated this Action, endorses the Fee Request as fair and reasonable.

Class counsel respectfully submits that Special Master McGovern's opinion in this matter should be afforded considerable weight in support of the Fee Request. *See* Class Counsel Declaration at ¶60.

6. *The Additional Johnson Factors Also Support the Fee Request*

In *Brown*, the Tenth Circuit expressly adopted twelve factors from a Fifth Circuit

case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, to be considered when determining a reasonable fee in common fund cases. 838 F.2d at 454-55.[19] The twelve *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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. *Id.* The weight assigned to each *Johnson* factor is within the court's discretion depending on the facts and issues of the case. *Id.* at 456; *Gottlieb*, 43 F.3d at 482 n.4. And, "rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation." *Brown*, 838 F.2d at 456.

A number of these factors and related considerations already have been shown to support the Fee Request in the above sections. *See* Gensler Declaration at ¶¶32-38; Miller Declaration at ¶¶58-71 As demonstrated below, the remaining relevant *Johnson* factors also support the Fee Request.

[19] The Fifth Circuit has now joined the majority of circuits in officially recognizing 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. *Union Asset Mgmt. Holding A.G. v. Dell, Inc*., 669 F.3d 632, 644 (5th Cir. 2012).

a. The Amount Involved and the Results Obtained Support the Requested Fee

The amount involved and the substantial recovery obtained for the Class also support the Fee Request. "Courts have consistently held that the most important factor within this analysis is what results were obtained for the class." *Lane v. Page*, 2012 U.S. Dist. LEXIS 74273, at *215 (D.N.M. May 22, 2012) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)); *Brown*, 838 F.2d at 456 (noting that this factor may properly be given greater weight than others in some cases). Here, Class Counsel has obtained an excellent recovery consisting of a $115 million Settlement Cash Amount and at least $40 million in Binding Benefits—a number that likely will rise to more than $138 million (reduced to present value) over the next 30 years.

As noted by Class Representative's expert, Professor Gensler, states, "[i]n my opinion, the benefits attained for the Class alone justify this fee award." Gensler Declaration at ¶37. According to Professor Miller, the results Class Counsel obtained on behalf of the Class are remarkable for several reasons:

> First, as discussed above, the Settlement Cash Amount alone of $115 million makes Plaintiffs and the Class Members whole for the actual amount of past royalty they allege they are owed. The Class' alleged past royalty underpayments are estimated to be $43.5 million. As such, the Settlement Cash Amount in and of itself provides more than 100% recovery to the Class for QEP's past royalty underpayment as well as significant interest even after fees and expenses are deducted. Second, the $115 million cash portion of the Settlement alone represents the second largest royalty owner class action settlement in Oklahoma history and, upon information and belief, the third largest nationwide. Third, Class Counsel also obtained substantial and material binding changes to QEP's royalty payment methodology for the life of the Class Leases for Class Members having a present value of at least $40 million.

Miller Declaration at ¶59.

In furtherance of these expert opinions, and as noted above, if the Class' recovery were limited to the five-year statute of limitations period, the Class' claim for the principal amount of royalty underpayment would be approximately $20.4 million. *See* Ley Declaration at ¶2. If the five-year statute of limitation does not apply, the Class claim for royalty underpayment would be approximately $43.5 million. *Id.* Thus, the $115 million Settlement Cash Amount alone (without even considering the substantial Binding Benefits discussed below) is an outstanding recovery, representing the second largest gas royalty settlement in Oklahoma history and, to Class Counsel's knowledge, the third largest nationwide. *See* Class Counsel Declaration at ¶6. Even after attorneys' fees and expenses are paid out of the Settlement Cash Amount, the cash left over to distribute to the Class Members will be no less than $61,213,500. *See* Gensler Declaration at ¶18. This amount is nearly three times more than the five-year estimated past royalty principal underpayment of $20.4 million and almost $18 million more than the uncapped estimated past royalty underpayment of $43.5 million. *Id.* And, as described in detail below, the Class will receive considerable additional cash in the future as a result of the substantial Binding Benefits. *Id.* Because fees and expenses are to be paid out of the Settlement Cash Amount, the Class will received 100% of the future royalty payments calculated in accordance with the binding changes to QEP's royalty payment methodologies. *Id.*

On top of all of this, QEP has agreed to pay for administration and notice costs, a benefit not provided by most common fund settlements where such expenses are

normally paid out of the gross settlement fund. *See* Stipulation at ¶1.1. To date, this has saved the Class approximately $275,000—an amount that likely will double by the time of final distribution—all of which will be distributed to Class Members. *See* Class Counsel Declaration at ¶7.

In addition to the $115 million Settlement Cash Amount, QEP will also provide to the Class a number of material Binding Benefits, which QEP estimates to have a present value of *at least* $40 million. *See* QEP Affidavit at ¶13; Ley Declaration at ¶5. These Binding Benefits are concrete and provide immediate value to the Class Members, unlike other settlements that only provide illusory, hypothetical, or contingent future benefits. *See* Miller Declaration at ¶41; Gensler Declaration at ¶28; *see e.g.*, *Fankhouser*, 2012 U.S. Dist. LEXIS 147197, *8. These Binding Benefits, which are spelled out in great detail in the Stipulation, consist of changes in QEP's fee-deduction and royalty-calculation policies with respect to the Class Leases. *See* Stipulation at ¶2.2(a)-(f). In short, QEP has agreed to change its corporate policies regarding the payment of royalty on the current and future Class Wells and adopt most of the payment methodology that Class Representatives and Class Counsel have argued should have been used all along. Thus, QEP will no longer charge royalty owners for the costs of gathering, compressing, dehydrating, and treating gas in gas gathering systems and gas plants—even when the gas is marketed under the terms of percentage of proceeds (POP) type contracts. *Id.* at ¶2.2. QEP also will pay royalty at agreed index-type prices for fuel gas used off the lease and in gas plants. *Id*. at ¶2.2(c). Additionally, QEP has agreed to cap gas-processing fees where it receives NGL value and to seek better gas marketing terms from midstream

companies to maximize value to royalty owners. *Id.* at ¶2.2(a). Also, QEP will seek better gas marketing terms from midstream companies to maximize value to royalty owners. *Id.* at ¶ 2.2(a). And, QEP's royalty check stubs will now show in detail the true prices, gross value before deduction, and deductions. *Id.* at ¶ 2.3. Finally, the Binding Benefits apply to all leases and force pooling orders in each "royalty pot" for each Class Well—even if such leases specifically or arguably allow deductions for some or all midstream service fees. *Id.* at ¶2.2

Again, according to QEP's Vice President of Commercial and Technical Services, Scott Gutberlet, the Binding Benefits will earn the Class a minimum present value of at least $40 million more than they would have been paid under QEP's pre-Settlement royalty payment methodology. QEP Affidavit at ¶13. This calculation "shows an estimated net present value of over $40 million after 16 years of production." *Id.* at ¶12. When these same calculations are carried out to 30 years, which, according to Mr. Gutberlet, "is a conservative period to estimate the life of production," the net present value of the additional amount of principal to be paid to the Class will likely exceed $138 million. *See id.* at ¶11, Exhibit A. These calculations have been verified by Class Representatives' experts. *See* Ley Declaration at ¶5. Importantly, Class Counsel are only basing their fee request on the most conservative value of $40 million, even though QEP and Class Counsel's experts completely agree the actual benefit will be more than 3 times this amount.

The Binding Benefits of the Settlement will instantly increase the value of every Class Lease and Class Force Pooled Royalty Interest (collectively, the "Class Leases") to

the Class Members. *See* McGovern Declaration at ¶11; Burrage Declaration at ¶6; Miller Declaration at ¶41; Ley Declaration at ¶5. These changes began in March 2013, and will continue without limitation for the life of each well (and any future wells), regardless of transfer or assignment from QEP to other oil companies. Stipulation at ¶2.2. That is, these Binding Benefits are transferable: if a Class Lease is sold, assigned, devised or transferred, the Binding Benefits run with the lease or interest. *Id.* And, the requirement to provide these benefits will apply to any successor, assignee, or transferee of QEP. *Id.* Moreover, Class Representatives and Class Counsel were able to secure an agreement that Chieftain can conduct a bi-annual audit, at QEP's expense, to ensure that these Binding Benefits are being provided to the Class. *Id.* at ¶2.2(f); Abernathy Declaration at ¶13. And the Settlement also includes an arbitration provision under which any failure of QEP to provide such Binding Benefits can be resolved by arbitration, at QEP's expense, in lieu of additional litigation—a benefit that will save the Class and the Court considerable time and resources. *Id.* at ¶2.2(g); Class Counsel Declaration at ¶42.

These Binding Benefits are real, substantial and concrete. *See* QEP Declaration at ¶13; Ley Declaration at ¶5; Miller Declaration at ¶41; Gensler Declaration at ¶28. They comprise a material part of the overall consideration provided in exchange for the release of the Class' Claims

Given the concrete nature of the Settlement, including the Binding Benefits, Class Counsel is entitled to a fee on the entire Settlement Amount. *See* Miller Declaration at ¶41; Gensler Declaration at ¶28. That is, "these changes in royalty payment methodology in this Settlement are a material part of the economic benefit to Class Members and

therefore, should be included as part of the common fund in determining attorneys' fees." Miller Declaration at ¶41. "Given that we can fairly and reliably estimate today what those extra royalties will be, there is no reason not to include them when calculated the percentage fee now." Gensler Declaration at ¶28. Therefore, Class Counsel respectfully requests an attorneys' fee of one-third of the most conservative net present value—$155 million—of the Settlement to be paid out of the Settlement Cash Amount.

Given the amount involved in this Action and the substantial $155 million Settlement that was achieved, which includes substantial Binding Benefits, this *Johnson* factor supports the Fee Request.

b. The Time and Labor Involved Supports the Requested Fee

The time and labor Class Counsel has expended in the research, investigation, prosecution and resolution of this Action support the Fee Request. As a threshold matter, Class Counsel researched and drafted the Complaint in late 2010, and filed this Action against QEP on January 20, 2011. *See* Class Counsel Declaration at ¶76. The parties have litigated this matter for over two years, engaging in extensive motion practice (including class certification), filing hundreds of docket entries, taking or defending numerous depositions, exchanging comprehensive fact and expert discovery, and participating in a thorough mediation process before reaching a settlement. *Id.* at ¶¶77-79. Indeed, Class Counsel produced or analyzed approximately 12 gigabytes, 30,300 files, and 782,000 pages of digital data and took or defended multiple fact, expert and corporate depositions. *Id.* at ¶77. In addition, Class Counsel consulted with oil and gas

experts and accounting experts, reviewed and analyzed accounting and financial statements, examined and analyzed royalty owners' lands and leases, and prepared proprietary, detailed damages models. *Id.* at ¶12. After the Settlement was reached, Class Counsel launched an extensive campaign to send Notice to the Class, which required countless hours of negotiating with third-party well operators to obtain contact information for various Class Members. *Id.* at ¶¶44-52. Moreover, Class Counsel will continue to dedicate its time and effort on behalf of the Class by assisting Chieftain Royalty Company with its responsibility to audit QEP for compliance with the Binding Benefits. *Id.* at ¶87.

As described below, Class Counsel worked consistently and diligently for the Class from the very beginning of this Action.[20] Therefore, this *Johnson* factor supports the Fee Request.

i. Pleading and Motion Practice

As the Court is aware, Class Counsel engaged in extensive pleading and substantive motion practice in this litigation. Class Counsel Declaration at ¶78. Starting with its Original Petition, Chieftain alleged that QEP used it position as an operator or working interest owner in Oklahoma oil and gas wells to secretly underpay royalty owed to Class Representatives and Class Members on the production of gas and its constituents. *Id.* at ¶9. Based on these allegations, the Original Petition alleged a number of causes of action, including breach of contract, unjust enrichment, breach of fiduciary

[20]Again, a more detailed description of the efforts undertaken by Class Counsel in the prosecution of this Action may be found in the Class Counsel Declaration.

or quasi-fiduciary duty, conversion, conspiracy, and fraud and deceit. *Id*. On February 18, 2011, QEP filed its answer in Dewey County, Oklahoma. *Id.* at ¶11. Thereafter, on February 28, 2011, QEP, a Texas corporation with its principle place of business in Colorado, filed its Notice of Removal in this Court based on diversity jurisdiction. *See* Docket No. 1.

On November 1, 2011, after completing extensive fact discovery (described in more detail below), Chieftain filed its Motion for Class Certification and Brief in Support thereof. Docket Nos. 43-44. QEP filed its response on December 1, 2011, Docket No. 54, and Chieftain filed its reply on December 9, 2011. Docket No. 61. While the parties were briefing Plaintiff's Motion for Class Certification, QEP also filed a Motion and Brief for Judgment on the Pleadings. Docket No. 53. In its motion, QEP advanced a number of arguments against some of the Class' claims. *See* Motion for Judgment on the Pleadings, Docket No. 53. Specifically, QEP requested judgment on the Class' claims for breach of fiduciary duty, unjust enrichment, tortious breach of contract, and conversion. *See id*. Chieftain responded to QEP's Motion on January 9, 2012, Docket No. 70, and QEP filed its reply on January 17, 2012. Docket No. 71. On January 27, 2012, the Court denied QEP's Motion for Judgment on the Pleadings as to the Class' breach of fiduciary duty and unjust enrichment claims. *See* Order dated January 27, 2012, Docket No. 4, at 5-6. However, the Court granted QEP's Motion for Judgment on the Pleadings as to the Class' claims for tortious breach of contract and conversion. *Id.* at 6-8.

The Court then returned to the merits of class certification. On January 30, 2012, the Court heard argument from Counsel concerning certification. *See* Class Counsel Declaration at ¶19. On March 16, 2012, the Court issued an Order certifying Plaintiff's breach of contract and breach of fiduciary duty Claims and denying certification of the remaining claims. *See* Docket No. 87 ("Certification Order"). Obtaining class certification in a large royalty owner class action such as this one comes with many challenges and obstacles, all of which Class Counsel overcame in this Action. *See* Class Counsel Declaration at ¶¶19-20. Specifically, QEP argued—as have many other defendants in similar actions—that certification was improper due to differences in the language (and, thus, the interpretation) of Class Member's particular leases. *Id.* However, after Class Counsel's extensive research, briefing, and argument on the issues surrounding certification, the Court held that class treatment of certain claims in this Action would be appropriate with the creation of subclasses. *Id.* at ¶20. Thus, the Court ordered Chieftain to submit a revised class definition to reflect the Court's finding that the Class should be divided into appropriate subclasses. Certification Order at 15. Pursuant to this directive, Chieftain filed a Proposed Agreed Amended Class Definition, Docket No. 90, which the Court approved on April 5, 2012. Docket No. 91.

In granting certification, the Court also appointed Chieftain and Jack Lancet, an individual royalty owner and Class Member, as Class Representatives. *Id.* at 11. Chieftain then amended its original state court Petition to include Jack Lancet as a named plaintiff and to add the newly created subclasses to the class definition. *See* First Amended Complaint ("FAC"), Docket No. 96. However, to fully respond to the Court's

Orders granting in part and denying in part QEP's Motion for Judgment on the Pleadings and Plaintiff's Motion for Certification, Class Representatives amended the complaint again. *See* Class Counsel Declaration at ¶25. With the Court's leave, on July 16, 2012, Class Representatives filed their Second Amended Complaint ("Complaint"), which is the operative complaint in this Action. Docket No. 109.

After the mediation process (described in more detail below), the Settling Parties eventually settled this Action, and Class Counsel began preparing the necessary documents for preliminary approval of the Settlement, including Class Representatives' Memorandum of Law in Support of the Settling Parties Joint Motion to Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Fairness Hearing ("Preliminary Approval Motion"). *See* Docket No. 119. On February 20, 2013, the Court held a hearing on the Settling Parties' Preliminary Approval Motion, which the Court granted in the Preliminary Approval Order of the same date. Docket No. 123. After preliminary approval, Class Counsel and the Settling Parties continued to work diligently to carry out the terms of the Settlement as the Settling Parties moved toward seeking final approval.

Class Counsel dedicated considerable time and labor to pleading, motion practice, and briefing in this Action. This fact supports the Fee Request.

ii. Depositions and Document Production and Review

Class Counsel also engaged in comprehensive fact discovery and took a number of depositions and 30(b)(6) depositions. *See* Class Counsel Declaration at ¶14. Prior to removal, on January 27, 2011, Chieftain served QEP with Plaintiff's First Request for

Production of Documents, First Set of Interrogatories and First Request for Admissions. *Id.* at ¶13. On April 18, 2011, Chieftain served its Second Request for Production of Documents and Second set of Interrogatories on QEP in state court. *Id.* After removal, the parties resumed discovery, with Plaintiffs serving QEP with additional requests for production and interrogatories on March 13, 2011, January 31, 2012, and April 19, 2012. *Id.* Again, the result of the document discovery in this Action was approximately 12 gigabytes, 30,300 files, and 782,000 pages of digital data, all of which was reviewed and/or analyzed by the Settlings Parties' Counsel and their experts. *Id.* at ¶12.

Class Counsel also took multiple depositions, beginning with Plaintiff's Notice to Take Video Deposition of QEP Designated Representative(s). *See* Docket No. 12. Thereafter, Class Counsel took the depositions of four QEP corporate representatives: (1) Michael Hall, Supervisor of QEP's Production Administration and Contracts Group; (2) Carson Long, a Senior Contract Negotiation Specialist for QEP; (3) John Ruskauff, General Manager of Marketing for QEP; and (4) Keith Walker, an employee in the revenue section of QEP's accounting department. *See* Class Counsel Declaration at ¶14. On September 1, 2011, Class Counsel took the deposition of Thomas Jepperson, an officer of QEP, as well as second depositions of both Carson Long and Keith Walker. *Id.* From these depositions, Class Representatives and Class Counsel gained an understanding of QEP's royalty calculation and payment methodologies, which form the basis of the Class' claims. Class Counsel's efforts in this regard were extensive. *Id.*

Thus, Class Counsel dedicated substantial time and labor to the discovery process in this Action, which supports the Fee Request.

iii. Experts

Class Counsel also expended considerable time and resources consulting with and preparing key expert witnesses, including: (1) Alyce Hoge, an attorney and professional lease and title analyst and division order analyst; (2) Barbara Ley, a forensic accountant specializing in oil and gas matters; (3) Steve Reese, an oil and gas industry consultant specializing in gas marketing; and (4) Dan Reineke, a petroleum engineer with experience as a well operator, drilling engineer and production engineer. *Id.* at ¶81. Each of these experts reviewed and analyzed various components of the approximately 782,000 pages of digital data produced by QEP and prepared reports that were made available to QEP in September of 2011. *Id.* at ¶82. Also, Class Counsel, in conjunction with these experts, reviewed and analyzed over 7,700 leases, consisting of more than 18,400 pages, to determine Class Member's rights under their respective leases and to categorize the leases for the purpose of class treatment. *Id.*

Class Representative's experts also have filed declarations explaining their damages calculations and supporting the Settlement. *See e.g.*, Ley Declaration at ¶2. Additionally, Class Counsel has worked and continues to work with several consulting-only experts throughout this litigation. *See* Class Counsel Declaration at ¶83. Based upon their good faith estimate, Class Counsel estimates they have collectively spent over 10,000 hours of attorney and professional staff time prosecuting this Action. *Id.* at ¶93.

The time and labor Class Counsel has dedicated to consulting with and preparing key expert witnesses and consulting-only experts (which continues to this day) supports the Fee Request.

iv. Mediation

Class Counsel also dedicated a substantial amount of time and resources in mediating this Action to a satisfactory resolution for the Class. *Id.* at ¶¶26-35. In fact, after the Court certified the Class, the Parties conducted multiple mediation sessions over a span of several months. *See id.*; McGovern Declaration at ¶¶5-12. All mediation sessions were presided over by Special Master McGovern. *See id.*; Section III.A.4, *supra*. The mediation process was a complex, highly technical, and involved process, and Class Counsel worked diligently, with the help of experts, as the Settling Parties exchanged and studied considerable amounts of production and well data. *See* Class Counsel Declaration at ¶26; McGovern Declaration at ¶¶5-12. Below is a description of each mediation session and the related communications.

On September 19, 2012, Class Counsel and QEP's Counsel had a preliminary meeting in Oklahoma City to discuss the possibility of settlement. *See* Class Counsel Declaration at ¶28. Special Master McGovern presided over this initial meeting of the Settling Parties. *Id.* On October 22, the Settling Parties exchanged mediation briefs concerning many substantive issues that impacted both sides' views of the strengths and weaknesses of their respective positions on factual, legal, and damages arguments. *Id*. This briefing process required substantial time and labor as Class Counsel researched the

issues in dispute, consulted with experts, and analyzed thousands of documents relevant to both liability and damages. *Id.*

On November 1, 2012, the Settling Parties met for a first mediation session in Denver, Colorado, which Special Master McGovern also conducted. *Id.* at ¶29. As negotiations continued, experts for the Settling Parties' met with Special Master McGovern in Oklahoma City and via telephone on December 6, 2012. *See* McGovern Declaration at ¶6. Class Counsel and QEP's Counsel agreed to allow the experts to meet with Professor McGovern without lawyers present in order to promote a full exchange of information and to help each side (1) determine what additional information was needed to conduct their damage calculations and (2) challenge the other side's experts' methodology and calculations. *See* Class Counsel Declaration at ¶30. Creating these models with the help of experts required substantial time and labor on the part of Class Counsel. *Id.*

On December 14, 2012, the Settling Parties met again in Denver for a mediation session. *Id.* at ¶31. Throughout this period of time, Special Master McGovern consistently communicated with the lawyers and experts for both parties by phone and email. *Id.* at ¶32. Further, throughout this entire period of time, Class Counsel engaged in extensive discussions with QEP's Counsel and exchanged numerous position statements and briefs on the legal, factual, and damages issues relevant to each side's position for trial and appeal. *Id.*

On January 9 and 10, 2013, the Settling Parties met in Oklahoma City for a final mediation session with Special Master McGovern, during which the Parties, their experts,

and the Special Master engaged in extensive negotiations, analysis of damages and legal issues, and arguments regarding the strengths and weaknesses of the Parties' respective claims and defenses. *Id.* at ¶33. This mediation session was attended by a large contingent from QEP, including engineers, accounting personnel and QEP's CEO, Charles B. Stanley, who was directly involved in the negotiations. *Id.* The Parties were able to reach an agreement on major terms of settlement on January 10, 2013. *Id.*

Due to the extensive changes in QEP's royalty payment methodology, finalizing the terms of the Settlement was an extremely technical and cumbersome process that took an additional month to complete. *Id.* at ¶34. However, with additional assistance from Special Master McGovern, the Parties finalized the Settlement via the Stipulation and Agreement of Settlement on February 13, 2013. *Id.* The time and labor Class Counsel expended in mediating this Action, which resulted in an outstanding Settlement for the Class, support the Fee Request.

v. Notice Campaign

After preliminary approval, Class Counsel, in conjunction with Counsel for QEP, conducted an extensive campaign to distribute the Notice to the Class. *See* Class Counsel Declaration at ¶¶44-52. This campaign was necessary because there are numerous Class Members in each Class Well, and many Class Wells are operated by energy companies other than QEP. *Id.* at ¶45. In order to send notice to the Class—and eventually distribute the Net Settlement Proceeds—the Settling Parties needed the name, address, royalty decimal interest, and tax identification number of each Class Member. *Id*. at ¶46. Well operators maintain this information in the form of "pay decks," which are used to

send monthly royalty payments to royalty owners. *Id.* QEP maintains pay decks for the producing Class Wells that it currently operates. *Id.* However, because QEP often markets gas as a non-operating working interest owner, third-party operators maintain the pay decks for a great number of Class Wells. *Id.* Also, many Class Wells were sold or plugged during the Claim Period. *See id.* If no pay deck is available for a particular Well, then the county records must be searched to obtain the names and contact information of the current royalty owners in that Well. *Id.* Thus, the Settling Parties were saddled with the task of tracking down all of the Class Member information needed to disseminate the Notice.

Of the 2,129 Class Wells in this case, approximately 45% of the wells are operated by QEP and 55% are operated by third parties. *See* Ley Declaration at ¶3. Specifically, there are 221 separate operators in the QEP non-operated Class Wells. *See* Class Counsel Declaration at ¶47. In order to obtain current pay decks from the operators of these Class Wells, Class Counsel, in conjunction with landmen, staff members, and QEP's Counsel, conducted an extensive campaign to contact the 221 operators to ensure that the Notice was properly sent to the Class members in a timely manner. *Id.*

Over the course of approximately six weeks, this team, working under Class Counsel's supervision, spent hundreds of hours, including evenings, weekends, and the Easter holiday weekend, working on this project. *Id.* Class Counsel went to great lengths to obtain updated and accurate information relating to these QEP non-operated Class Wells. *Id.* Class Counsel and its team searched the records of the Oklahoma Corporation Commission to determine the operator of many of the Wells. *Id.* And on many

occasions, it was necessary to contact operators of more than once as they failed to provide all of the data needed. *Id.*

The operators were asked to provide the data in a searchable Microsoft Excel spreadsheet. *Id.* at ¶48. Very rarely did any operator provide the data in this format. *Id.* Therefore, once the information was obtained, persons under Class Counsel's supervision spent many weeks converting the data into a useable format so that the data could be used by the Settlement Administrator to send the Notice to Class Members. *Id.* This same data will be used later to distribute the Net Settlement Fund to Class Members according to the Court-approved Plan of Allocation and Distribution. *Id.*

The Notice was sent in waves: 18,669 Notices were mailed on March 22, 2013; 21,320 were mailed on April 8, 2013; 1,935 were mailed on April 12, 2013; and 2,445 were mailed on April 15, 2013. *See* Rust Affidavit at ¶13. Through this effort, Class Counsel was able to mail Notices to Class Members whose claims represent approximately 97% of the Net Settlement Fund. *See* Class Counsel Declaration at ¶48. In the event any Class Member's mailed Notice was returned, the Settlement Administrator used all reasonable secondary efforts to deliver the Notice to such Class Members. *See* Rust Affidavit at ¶14. In addition, to ensure that of the Class receives notice, the Summary Notice was published on April 5, 2013 in the *Tulsa World* and *Daily Oklahoman*. *Id.* at ¶¶19-20. Class Counsel also is continuing to contact the remaining operators to obtain pay decks for distribution purposes and oversee efforts to run title on some of the Wells where there is no available pay deck. *See* Class Counsel Declaration at ¶48.

Referring to the efforts described above, Class Representatives' expert, Professor Miller, states, "it is apparent the parties not only utilized their best efforts to distribute Notice…in a reasonable manner, but went well above and beyond the norm." Miller Declaration at ¶77. Class Counsel is unaware of any other class action in which such extensive efforts were undertaken to ensure that notice was properly disseminated to the class. *See* Class Counsel Declaration at ¶52. The notice campaign overseen by Class Counsel required much time, talent, and labor and, therefore, supports the Fee Request.

vi. Summary

Class Counsel dedicated substantial time, labor, and resources to the prosecution of this Action on behalf of the Class. Indeed, Class Counsel successfully represented the Class in extensive motion practice—including overcoming a Motion for Judgment on the Pleadings and successfully obtaining class certification—all of which required considerable research, briefing and argument. Class Counsel also engaged in comprehensive discovery, exchanging and analyzing thousands of documents and taking or defending numerous depositions. Class Counsel has consulted with and prepared a number of expert witnesses and consulting-only experts, and continues to do so to this day. Additionally, Class Counsel dedicated significant time and labor to the intense mediation of this Action, which resulted in the outstanding Settlement now before the Court.

Further, in addition to the work Class Counsel has dedicated to this Action, Class Counsel has also actively advocated for the rights of royalty owners in other cases and forums on issues that may have impacted this case. *See* Class Counsel Declaration at

¶80. For example, Class Counsel briefed and argued against several energy companies' request to the Oklahoma Corporation Commission to determine whether operators in a drilling and spacing unit owe a fiduciary duty to royalty owners in that unit—an issue raised in this case. *Id.* The Commission granted Class Counsel's Motion to dismiss the energy companies' application. *See* OCC Report Granting Motion to Dismiss Applications of Cimarex Energy Co., Unit Petroleum Co., New Dominion LLC, & Range Prod. Co. (Aug. 23, 2012). Class Counsel also has contributed their time, expertise and resources to other royalty underpayment class actions without receiving any compensation for their efforts and have been involved behind the scenes in many other cases in an effort to ensure that the rights of the Class, and other royalty owners, were protected. *See* Class Counsel Declaration at ¶80; Miller Declaration at ¶61. For example, Class Counsel provided substantial assistance on legal briefs and offered strategic input on several important issues in *Naylor Farms, Inc. v. Anadarko OGC Co., et al.*, CIV-08-668-R (W.D. Okla.), a related royalty owner class action pending before this Court. *See* Class Counsel Declaration at ¶80.

The above description of Class Counsel's dedication of extensive time and labor to this litigation is sufficient for the Court to determine the reasonableness of the Fee Request in light of Class Counsel's efforts. *See* Miller Declaration at ¶31. A lodestar analysis would be an unnecessary waste of time and resources at this juncture. *Id.* "While 'time and labor' is a factor to be considered, the court need not conduct a lodestar analysis to assess it." Gensler Declaration at ¶14, citing *Brown*, 838 F.2d at 456 & n.3. Indeed, as noted above, "[a] majority of circuits recognize that trial courts. . . are not

required to conduct a lodestar analysis in common fund class actions." *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *23. In fact, "[l]odestar creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation." *See Torres v. Bank of America*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011). As such, "[t]he loadstar approach should not be imposed through the back door via a 'cross check.'" *Id.*; Gensler Declaration at ¶¶13; 37. This first *Johnson* factor allows the Court to sufficiently evaluate the reasonableness of the Fee Request in light of Class Counsel's "time and labor." And, as described in detail above, Class Counsel's time and labor undoubtedly support the Fee Request of one-third of the Settlement.

c. The Novelty and Difficulty of the Questions At Issue Support the Requested Fee

The Fee Request also is reasonable in light of the complexity of the issues raised in this royalty underpayment class action. As the Court knows, this Action involved a number of complex and disputed questions of law and fact that placed the ultimate outcome of the litigation in doubt. *See* McGovern Declaration at ¶9; Miller Declaration at ¶62. For example, when the case was filed, Class Counsel had no way of knowing the amount of royalty that had been underpaid by QEP—that was a closely guarded secret. *See* Class Counsel Declaration at ¶71. And, QEP has maintained throughout this Action that its former royalty calculation methodology satisfied the implied duty to market, while Class Representatives argued QEP consistently violated the implied duty to market. *Id.* at ¶85. However, after Class Counsel's extensive mediation briefing and settlement negotiations, QEP has agreed to change its royalty calculation methodology to

substantially comply with Class Representative's interpretation of the implied duty to market.

Also, prior to the Settlement of this Action, Class Counsel, with the help of experts, analyzed thousands of oil and gas leases to determine whether particular leases contained or negated the implied duty to market. *Id.* at ¶82. This pain-staking question of fact was central to the claims asserted by the Class. However, because the Settlement that Class Counsel obtained applies to every Class Member's lease or force-pool royalty interest, Class Counsel has successfully resolved this difficult issue on terms favorable to all Class Members, no matter what differences might exist in individual lease language. *See id.*

As with any litigated case, Plaintiffs would face an uncertain outcome as to liability and damages if this Action were to continue to trial. And, QEP asserted a number of defenses to the Class' claims that would have to be overcome at trial. As such, the immediacy and certainty of the substantial recovery considered against the very real risks of continuing to a difficult trial and appeal, clearly weigh in favor of the Settlement and, consequently, in favor of the Fee Request. *See* Miller Declaration at ¶62.

Stated simply, this case was complex, risky, and onerous, and it presented difficult issues of law and fact. But for the work of Class Counsel, the Class would not have achieved this excellent recovery. As another Oklahoma federal court put it, "complex cases justify higher fees, and simple cases lower fees." *Been*, 2011 U.S. Dist. LEXIS 115151, at *21. The complexity of this Action supports Class Counsel's Fee Request of one-third of the Settlement.

d. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys Support the Requested Fee

As exhibited by Class Counsel's qualifications and experience as oil and gas class action attorneys, the skill this Action required supports the Fee Request. "Class Counsel's ability to handle this class litigation properly, as well as Class Counsel's experience, reputation and abilities, are additional *Johnson* factors that should be considered in the determination of an attorneys' fee award." *Anderson*, 2009 U.S. Dist. LEXIS 100681, at *9. This litigation called for considerable skill and experience in oil and gas litigation. *See* Miller Declaration at ¶63-64. Specifically, this Action required investigation and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. *See* Class Counsel Declaration at ¶90. To properly perform the legal services this Action called for, Class Counsel developed extensive knowledge of gas marketing, engineering, lease and title analysis, damages modeling and royalty payment practices through these lawsuits. *Id*.

Class Counsel also relied on its experience as oil and gas class action attorneys in Oklahoma. Class Counsel 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 ¶90-91. Class Counsel employed this prior experience and knowledge in successfully litigation and resolving this Action against QEP.

Moreover, the quality of representation by counsel on *both* sides of this Action

was high. McGovern Declaration at ¶¶14-15. Indeed, Defendants' Counsel lived up to their reputations as skilled oil and gas class action attorneys. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976) (also considering the reputations of defense counsel in determining the fee, as defense counsel's stature reflects the challenge faced by the plaintiffs' attorneys). The skill and experience of QEP's Counsel necessitated the quality representation that the Class received in this Action. *See* Class Counsel Declaration at ¶91.

Simply put, without the experience, skill, and determination displayed by Class Counsel, the $155 million Settlement simply would not have been obtained. *See* Gensler Declaration at ¶36; Miller Declaration at ¶63-64. Therefore, this *Johnson* factor also supports the Fee Request.

e. The Preclusion of other Employment and Time Limitations Imposed by the Client or the Circumstances Support the Fee Request

The Fee Request is further supported by the fact that the time and effort required to properly prosecute this Action precluded Class Counsel from other employment opportunities. "Class litigation of this magnitude inherently entails significant opportunity costs." *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9. Moreover, the size and magnitude of large class actions such as this Action can impose serious time limitations on the law firms representing the class. *Id.* at *10. These factors also account for the personal sacrifices made by counsel to prosecute the case. *Been*, 2011 U.S. Dist. 115151, at *26.

Here, Class Counsel has devoted over two years of hard work to this Action,

expending thousands of hours of attorney and professional time and nearly $1 million in out of pocket expenses. *See* Class Counsel Declaration at ¶95. During that lengthy period, Class Counsel was necessarily precluded from working on many other cases and pursuing otherwise available opportunities. *Id.* Indeed, for much of the period between late 2010 and April 2013, the lead attorneys for Class Counsel were required to dedicate substantial time and resources to this litigation. *Id.* As a result, they were not able to take on several new matters.

Moreover, Class Counsel's work during this time was entirely contingent. Thus, Class Counsel worked on this case without deriving any revenue from it for over two years. *Id.* Geoffrey Miller, expert for Class Representatives, stated, "Class Counsel's willingness to prosecute this action on a contingent fee basis and willingness to advance costs necessarily diverted attorney time and resources expended on this action from other cases." Miller Declaration at ¶65. And, Special Master McGovern states in his declaration:

> Further, Class Counsel litigated this matter on an entirely contingent basis and advanced all reasonable litigation costs for over two years with no recovery and no revenue from their work. Despite these risks, they continued to push for the best possible settlement for the Class, even though they could have settled this case for less money. And, Class Counsel was willing to try this case, and face the risk of losing with no chance to recover their expenses or for their labor, if they were not able to achieve a fair and reasonable result for the Class.

McGovern Declaration at ¶16. Therefore, this fourth *Johnson* factor also supports the Fee Request.

f. The Fee is in Line with Customary Fees in Similar Cases

As discussed more fully in Section III.A.3 above, the Fee Request of one-third of the Settlement comports with customary fee awards in similar cases. In *Brown,* the Tenth Circuit recognized that a typical range is up to 37%. 838 F.2d at 455 n.2. However, in Oklahoma royalty actions, the normal fee is 40%. *See* Section III.A.3, *supra*, Miller Report at ¶66. Here, given the outstanding $155 million Settlement Class Counsel achieved for the Class and the fact that the Fee Request of one-third of the Settlement Amount is less than the fee routinely approved in similar oil and gas class actions, this factor supports the approval of the Fee Request. *See* Miller Declaration at ¶66.

g. The Fact that the Fee Represents a Prearranged Fee Negotiated by Sophisticated Clients Supports the Requested Fee

As discussed above, because Class Representatives in this Action negotiated and agreed to a fee of up to 40%, this factor also supports the Fee Request. *See* Section III.A.2., *supra*; Gensler Declaration at ¶37l; Abernathy Declaration at ¶7; Lancet Declaration at ¶5. This agreed-upon fee reflects the value of this Action as measured when the risks and uncertainties of litigation still lay ahead. *See CompSource*, 2012 U.S. Dist. LEXIS 185061, at *14-15. The Settlement that Class Counsel obtained for the Class replaces these risks and uncertainties with a substantial and immediate recovery.

Additionally, "[c]ourts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been*, 2011 U.S. Dist. LEXIS 115151, at *25. Class Counsel agreed to pursue this case based purely on a contingent fee basis. *See* Class Counsel Declaration at ¶95. If Plaintiffs had not been successful,

Class Counsel would have received zero compensation (not to mention no reimbursement for expenses). *Id.* Nonetheless, Class Counsel agreed to assume the risks associated with pursuing this case and has zealously represented the Class to obtain a substantial recovery. This *Johnson* factor also supports the Fee Request of one-third of the Settlement. *See Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *10.

h. The Undesirability of the Case Supports the Requested Fee

The Fee Request is further supported by the fact that taking on this Action was undesirable. "Courts have recognized that, in order to ensure that people who have been wronged have access to counsel, special consideration should be made in setting fees for class counsel who accepted a case viewed as undesirable." *Been*, 2011 U.S. Dist. LEXIS 115151, at *27. Also, "[a]ttorneys must have incentive to take undesirable cases in order to assure access to the courts for all people…." *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *41.

Here, the prospect of long, expensive litigation was clear from the beginning, and the risk of no recovery that comes with contingent fee representation only added to the case's undesirability. *See* Class Counsel Declaration at ¶95. And, as noted above, this Action involved a number of uncertain legal and factual issues. *See* Section III.A.6.c., *supra.* When the case was filed Class Counsel had no way of knowing the amount of royalty that had been underpaid by QEP. *See* Class Counsel Declaration at ¶71. There was no way to know if QEP witnesses would make damning admissions in depositions or that "smoking gun" documents would be found among the thousands of documents

reviewed. *Id.* Additionally, Class Counsel could not have known which court this case would be removed or transferred to, if any, or whether future decisions in the Tenth Circuit would affect the outcome of the case. Also, the Oklahoma legislative changes enacted at the behest of large oil and gas companies in May, 2012 were unknowable when this litigation began. *Id.*

Also, other courts have denied certification of similar royalty underpayment class actions in the past. *Id.* at ¶19. For example, in *Foster v. Merit Energy Company*, Judge Friot denied certification. *See* Case No.CIV-10-758-F, Docket No. 77 (W.D. Okla. 2012). And in *Foster v. Apache Corporation*, Judge Heaton denied certification. *See* Case No. CIV-10-0573-HE, Docket No. 190, at *13 (W.D. Okla. Aug. 20 2012.). Here, however, Class Counsel zealously prosecuted this Action for over two years, overcame the obstacles facing certification, and obtained an excellent recovery for the Class. *See* Class Counsel Declaration at ¶20.

Simply put, the Class would not have achieved this excellent recovery—or any recovery at all—but for Class Counsel's willingness to take on the Class' case. Therefore, this *Johnson* factor supports the Fee Request. *See* Miller Declaration at ¶68; Gensler Declaration at ¶36.

i. The Nature and Length of Class Counsel's Relationship with Class Representative Support the Fee Request

The nature and length of Class Counsel's relationship with Class Representative, Chieftain, also support the Fee Request. B&L and Chieftain's corporate representative, Robert Abernathy, have a long-standing professional relationship lasting over several

years. *See* Class Counsel Declaration at ¶104. In addition to this Action, Class Counsel is currently representing Chieftain in several other royalty underpayment actions pending in Oklahoma State and federal courts. Mr. Abernathy, who also is an attorney, has been intimately involved in the litigation of these actions, and he fully supports the Fee Request here. *See* Abernathy Declaration at ¶¶8-11. Therefore, this *Johnson* factor also supports the Fee Request. *See* Miller Declaration at ¶69.

In sum, the Fee Request of one-third of the Settlement represents the market rate for the quality representation the Class received and is well within the range of reasonable fees commonly awarded in the Tenth Circuit and in Oklahoma State courts. In addition, Special Master McGovern, a number of qualified experts, Class Representatives, and other absent Class Members, support the Fee Request, as stated in the numerous declarations on file with the Court. Moreover, the relevant *Johnson* factors support the Fee Request by shedding light on such things as the time, labor, skill, and resources Class Counsel dedicated to this Action; the risks involved; and the excellent, concrete results realized for the Class. For these reasons, the Court should approve the Fee Request as fair and reasonable.

B. Class Counsel's Out-of-Pocket Litigation Expenses Should be Reimbursed

Rule 23(h) also allows courts to reimburse Class Counsel for "non-taxable costs that are authorized by law." FED. R. CIV. P. 23(h). "As with attorneys 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*, 2000 U.S. Dist. LEXIS 21140, at *11.

Class Counsel respectfully requests reimbursement of Litigation Expenses that have been or will be advanced or incurred by Class Counsel in prosecuting this Action.[21] *See* Class Counsel Declaration at ¶98. Class Counsel set forth in the Notice that they would seek up to $1,350,000 in reimbursement for expenses. *Id.* at ¶97. To date, Class Counsel's out-of-pocket expenses are $903,502.79.[22] *See* Class Counsel Declaration at ¶99. All of these expenses were reasonable, necessary, and directly related to the prosecution of this Action. *Id.* at ¶96. 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 and document production and review typical of large, complex class actions such as this one. *Id.* All of these expenses were reasonable and critical to Class Counsel's success in achieving the Settlement and, therefore, the Expense Request should be granted. *Id.*; *see* Miller Declaration at ¶75.

In addition to the Litigation Expenses incurred to date, Class Counsel seeks reimbursement for any future expenses incurred after the filing of this Memorandum,

[21] The actual amount of Class Counsel's expenses to date is $954,019.55. At this time, Class Counsel only seeks to recover $903,502.79, which is less than their actual expenses. However, because additional expenses may continue to be incurred through the remainder of the litigation, including additional expenses for administration, expert work and possible appeal, Class Counsel specifically requests reimbursement of $903,502.79 in expenses *plus* the ability to recover additional expenses up to $1,350,000.00, the noticed amount, without further motion or order, if such expenses are actually incurred. At the Final Fairness Hearing, Class Counsel will provide the Court with updated charts of Class Counsel's actual expenses incurred to date.

[22] Again, Class Counsel actually incurred $954,019.55; however, Class Counsel has chosen to forego reimbursement of over $50,000 of these expenses on behalf of the Class.

including costs of administration, expert work, and appeal. *See* Class Counsel Declaration ¶98. Class Counsel already anticipates at least $200,000 in future expenses. *Id.* at ¶99. However, Class Counsel will only seek reimbursement for future expenses that are actually incurred. *Id.* And, in no event will Class Counsel's total Expenses Request exceed the $1,350,000 stated in the Notice. *Id.*

For the Court's convenience, the Class Counsel Declaration includes charts summarizing and categorizing the Class Counsel's expenses. *See id.* at ¶99. Class Counsel will provide updated charts to the Court at the Final Fairness Hearing. Class Counsel respectfully requests that the Court award the Expense Request in full and award any additional amount Class Counsel may incur in the future not to exceed $1,350,000.

C. The Class Representatives are Entitled to Case Contribution Awards

Finally, Class Counsel seeks an aggregate contribution award of 0.5% of the Settlement Amount for Class Representative in recognition of the time and expense that each incurred in order to produce such a significant result for the Class. Case contribution awards are meant to "compensate[e] class representatives for their work on behalf of the class, which has benefited from their representation." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010). The purpose of case contribution awards is to compensate class representative for the work they performed on behalf of the class and from which the class members' benefited. *See Been*, 2011 U.S. Dist. LEXIS 115151, at *33 ("Courts routinely approve incentive awards 'to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action.'").

Here, the requested Case Contribution award is less than that typically request in large actions. *See* McGovern Declaration at ¶17 ("Based upon my understanding of case contribution awards in other royalty class actions in Oklahoma courts, this range is on the low end of such awards, which usually are 1.0 percent or greater."); Miller Declaration at ¶72; s*ee, e.g., Eatinger v. BP Am. Prod. Co.,* No. 07-1266-EFM-KMH, Dkt. No. 375 at ¶29 (D. Kan. 2012) (awarding incentive award of one-half of 1% of the settlement fund); *Velma-Alama 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.").

Moreover, this is not a case where the Class Representatives merely signed the Complaint and then had little or no involvement. *See* Class Counsel Declaration at ¶104. Rather, each Class Representative actively and effectively fulfilled its obligations as a representative of the Class, complying with all reasonable demands placed upon them during the prosecution and settlement of this Action, and provided invaluable assistance to Class Counsel. *See id.* at ¶¶104-06. Indeed, Robert Abernathy, the President of Chieftain, has worked with Class Counsel since the inception of this litigation, and his experience, knowledge and skill in the oil and gas field, and as an attorney, contributed significantly to the prosecution of this case. *See* Abernathy Declaration at ¶¶8-11; Class

Counsel Declaration at ¶¶104-05. In addition, Mr. Abernathy reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, responded to document requests and interrogatories, searched for and produced documents, and attended mediation sessions and hearings. *Id.* Perhaps most importantly, Chieftain has accepted the responsibility of auditing QEP's practices to make sure QEP is complying with the future royalty calculation methodology and the other Binding Benefits. *See* Abernathy Declaration at ¶13. This auditing burden, which may occur twice a year for the foreseeable future, will require Chieftain to dedicate its valuable time and resources on behalf of the class to ensure that Class Members' rights as royalty members are not being violated. Because Chieftain has already dedicated its time, attention, and resources to this Action—and will continue to do so in the future—Chieftain is entitled to the requested Case Contribution Award.

For his part, Mr. Lancet provided certain Class Members with additional representation when the Court required the Class to be divided into sub-classes. Lancet Declaration at ¶6-10; Miller Declaration at ¶73. Mr. Lancet also made himself available and communicated regularly with Class Counsel during the six-month period of settlement negotiations. Lancet Declaration at ¶7-10. In his declaration, Mr. Lancet states, "I also actively supervised and monitored Class Counsel's work in this case and participated in all significant decisions since joining the Action, including the decision to enter into the Settlement." *Id.* at ¶7. Clearly, both Class Representatives contributed greatly to the prosecution and settlement of this Action, and neither has been compensated for their efforts. *See* Class Counsel Declaration at ¶107.

As such, Class Representatives request a Case Contribution award of 0.5% in the aggregate. Even after this Case Contribution award is paid out of the Settlement Cash Amount, the Class will still receive 100% of its past royalty underpayment damages. *See* Class Counsel Declaration at ¶108. Class Counsel and Class Representatives respectfully requests that the Court award this Case Contribution Award to reflect the important role that Class Representatives played in representing the interests of the Class and in achieving the substantial result reflected in the Settlement.

IV. CONCLUSION

For all the foregoing reasons, Class Representatives and Class Counsel respectfully request that the Court enter an order granting approval of Attorney's Fees, Litigation Expenses, and Case Contribution Awards.

Dated: May 7, 2013

Respectfully submitted,

/s/ *Bradley E. Beckworth*

Bradley E. Beckworth, OBA #19982
Jeffrey J. Angelovich, OBA #19981
Brad E. Seidel, TX Bar No. 24008008
Michael Angelovich, TX Bar No. 00785666
Susan Whatley, OBA #30960
Lisa Baldwin, TX Bar No. 24069334
NIX PATTERSON & ROACH, LLP
205 Linda Drive
Daingerfield, TX 75638
(903) 645-7333
(903) 645-4415 (facsimile)

Robert N. Barnes, OBA #537
Patranell Britten Lewis, OBA #12279
BARNES & LEWIS, LLP
720 NW 50th Street, Suite 200 B
Oklahoma City, OK 73118
Telephone: (405) 843-0363

Facsimile: (405) 843-0790
E-mail: rbarnes@barneslewis.com;
plewis@barneslewis.com

CLASS COUNSEL AND
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2013, I electronically transmitted the attached document to the Clerk of 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:

Barry C Bartel; bcbartel@hollandhart.com
Brad E Seidel; bseidel@npraustin.com
Bradley Earl Beckworth; bbeckworth@nixlawfirm.com
David N Smith; dneilsmith@mac.com
Jeffrey J Angelovich; jangelovich@npraustin.com
John F Shepherd; jshepherd@hollandhart.com
Lisa P Baldwin; lbaldwin@npraustin.com
Max C Tuepker; mtuepker@tuepker.com
Michael B Angelovich, Sr; mangelovich@npraustin.com
Patranell Britten Lewis; plewis@barneslewis.com
Robert N Barnes; rbarnes@barneslewis.com
Susan R Whatley; susanwhatley@nixlawfirm.com

Dated: May 7, 2013 /s/ *Bradley E. Beckworth*

Other Documents

5:11-cv-00212-R Chieftain Royalty Company v. QEP Energy Company

U.S. District Court

Western District of Oklahoma[LIVE]

Notice of Electronic Filing

The following transaction was entered by Beckworth, Bradley on 5/7/2013 at 3:02 PM CDT and filed on 5/7/2013

Case Name:	Chieftain Royalty Company v. QEP Energy Company
Case Number:	5:11-cv-00212-R
Filer:	Chieftain Royalty Company Jack Lancet
Document Number:	162

Docket Text:

BRIEF IN SUPPORT re [161] MOTION for Attorney Fees *Motion for Approval of Attorneys' Fees, Litigation Expenses and Case Contribution Award Memorandum of Law in Support of Motion for Approval of Attorneys' Fees, Litigation Expenses and Case Contribution Award* by All Plaintiffs. (Beckworth, Bradley)

5:11-cv-00212-R Notice has been electronically mailed to:

Barry C Bartel bcbartel@hollandhart.com, intaketeam@hollandhart.com, jacrosslingtsang@hollandhart.com

Brad E Seidel bseidel@npraustin.com, monatucker@nixlawfirm.com

Bradley Earl Beckworth bbeckworth@nixlawfirm.com, dwhatley@nixlawfirm.com, shannon@nixlawfirm.com, shelley@nixlawfirm.com, susanwhatley@nixlawfirm.com

David N Smith dneilsmith@mac.com, tracyrector.nixlaw@me.com

Jeffrey J Angelovich jangelovich@npraustin.com, bethgoodman@nixlawfirm.com, ncameron@npraustin.com

John F Shepherd jshepherd@hollandhart.com, intaketeam@hollandhart.com, jacrosslingtsang@hollandhart.com

Lisa P Baldwin lbaldwin@npraustin.com, ncameron@npraustin.com

Max C Tuepker mtuepker@tuepker.com, tuepkeroffice@tuepker.com

Michael B Angelovich , Sr mangelovich@npraustin.com, ncameron@npraustin.com, tdean@npraustin.com

Patranell Britten Lewis plewis@barneslewis.com, jrabon@barneslewis.com, lbeebe@barneslewis.com, lrosales@barneslewis.com

Robert N Barnes rbarnes@barneslewis.com, jrabon@barneslewis.com, lbeebe@barneslewis.com, lrosales@barneslewis.com

Susan R Whatley susanwhatley@nixlawfirm.com, shannon@nixlawfirm.com

5:11-cv-00212-R Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1041971380 [Date=5/7/2013] [FileNumber=2512391-0]
[1528ff8be61eb4842ff0835d616f3b13f6897cfa0cd5dd52b8117b909b80159a0057
354242c604b4e5eea055b3ed099f5e7028a8d94732ca36c4feb6427e47ef]]