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

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| **CHIEFTAIN ROYALTY COMPANY,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **CIV-11-212-R** |
| | ) | |
| **QEP ENERGY COMPANY (including affiliated predecessors and successors)** | ) | |
| | ) | |
| **Defendant.** | ) | |

**ORDER**

This matter comes before the Court on the Motion for Reconsideration, filed by Garry Crain, a class member in this action. Therein Mr. Crain requests that the Court vacate its prior orders, entered May 31, 2013, wherein it approved the parties' settlement [Doc. No. 183] and awarded fees to class counsel [Doc. No. 182]. Mr. Crain seeks an opportunity to present witnesses and evidence to the Court in support of the objection he lodged with the Court. Both Defendant and the class representatives responded in opposition to the motion. Having considered the parties submissions, the Court finds as follows.

Mr. Crain relies on Rule 60(b) of the Federal Rules of Civil Procedure in support of his motion.

> [R]elief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1153 (10th Cir.2007); *see also Cummings v. General Motors Corp.*, 365 F.3d 944, 955 (10th Cir.2004) ("Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal."), *abrogated on unrelated grounds*, *Unitherm Food Sys., Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). Rule 60(b) is not available to allow a party merely to rehash

> previously-presented arguments already rejected by the court, nor is it properly used to present new arguments based upon law or facts that existed at the time of the original argument. *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir.1998); *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991).

*In re Imergent Securities Litigation*, 2010 WL 1331651, *1 (D.Utah April 5, 2010). As noted by the Class, Rule 59(e) is the more appropriate vehicle to consider Mr. Crain's motion. "Grounds for granting a motion to reconsider pursuant to Rule 59(e) include: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000).

With that standard in mind, the Court turns to the merits of Mr. Crain's motion with regard to the fairness hearing.

> The court notes at the outset that the purpose of a fairness hearing is to provide the court with sufficient evidence for it to make an informed decision relating to the fairness of the proposed settlement. The court has the discretion to require any live testimony or documentation it believes would serve the court in its determination and may exclude all unnecessary information. Indeed, in *Tenn. Ass'n of Health Maint. Orgs., Inc.*, our Circuit specifically held that:
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> > [W]e reject intervenors' suggestion at oral argument that the fairness hearing must entail the entire panoply of protections afforded by a full-blown trial on the merits. The principles articulated above belie such an approach. The fairness hearing is a forum for the intervenors to voice their objections; however, the district court has the discretion to limit the fairness hearing, and the consideration of those objections, so long as such limitations are consistent with the ultimate goal of determining whether the proposed settlement is fair, adequate and reasonable.
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> *Tenn. Ass'n of Health Maint. Orgs., Inc.*, 262 F.3d at 567; *see also Handschu v. Special Serv. Div.*, 787 F.2d 828, 834 (2d Cir.1986) ("The district court correctly concluded that it would be inconsistent with the salutary purposes of

settlement to conduct a full trial in order to avoid one.")

*UAW v. General Motors Corp.*, 235 F.R.D. 383, 386 (E.D.Mich. 2006). In light of this standard, the Court finds that the instant motion is not well taken.

Mr. Crain[1] filed a timely objection to the settlement in this case, specifically arguing that (1) the Settlement Amount cannot include speculative "future" damages; (2) the attorneys' fee sought was improperly based on the speculative future damages that have not occurred and might not[2] occur; (3) the expenses sought were exorbitant, and were charged as if incurred by third parties, when in reality those parties are on staff at class counsel's law firm; (4) the notice does not apprise class members of how damages were calculated or how money is to be allocated; (5) the agreed upon methodology for future payment under the leases benefits QEP and not the class members; (6) the settlement actually impairs the legal rights of Class Members in part by impairing their right to sell or transfer their mineral rights, by changing their bargained-for rights under their individual leases, and by settling potential future claims. Mr. Crain complained "[a]ll the Class has obtained with regard to that 40 million is an agreement from QEP not to charge for expenses that QEP had already agreed under the leases not to charge, i.e. promising not to do what it already promised not to do." The objection listed 15 witnesses Mr. Crain "may wish" to call at the fairness hearing in

[1] Mr. Crain is the sole objector who filed a timely objection with the Court and appeared at the hearing from a class of nearly 45,000 members. Mr. Doug Burns appeared at the hearing and sought to intervene on behalf of DEWN, a royalty owner, but his request was denied because it was untimely. From evidence submitted by Mr. Burns in support of a Notice filed on June 4, 2013, it is apparent that DEWN, Mr. Burns' company, received notice of the settlement on or before April 11, 2013.

[2] The motion in support of the request for fees referenced future benefits, not future damages.

support of his objection and purported to summarize their testimony, although the summaries merely reflected topics about which the witnesses would testify, many of which were identical.

Mr. Crain and counsel appeared at the fairness hearing, and although counsel was given the opportunity to proffer evidence in support of his contentions, he was unable to describe the anticipated testimony of any of the witnesses and he did not offer any affidavits or other evidence in support of his objection.[3] The Court permitted Mr. Garland, on behalf of Mr. Crain, to cross-examine the witnesses offered in support of the fairness of the settlement. When the Court inquired whether the objector had "any evidence or any of your witnesses who would say that $40 million is not a reasonable present day value of future benefits?" Tr. 98. Mr. Crain's counsel responded:

> Your Honor, we do not. And that – you know, we've gone back and forth in this matter concerning certain witnesses bringing documents to court today, which I don't – I contend that was not discovery, that was for the purpose of being able to give you more information concerning this case, and apparently you – I know you've been actively involved in it, but this settlement agreement as to the class, when you throw in $40 million future benefits, result in a class only receiving 55 percent of the cash payments, and every bit of the $40 million future benefits is what they should have done from day one.

Tr. 99. When asked about the substance of what his witnesses would offer, Mr. Garland indicated that Brett Sanger would testify "concerning part of the expense claims that counsel

[3] Mr. Crain's counsel indicated at the hearing that Doug Burns would be or had submitted an affidavit for the Court's consideration, but Mr. Crain never offered Mr. Burns' affidavit. An affidavit was first submitted by Mr. Burns on June 4, 2013, as part of a Notice to the Court [Doc. No. 185].

is asking for reimbursement.[4]" Tr. 91. The testimony of Allan DeVore, Doug Burns, Bob Gum and Terry Stowers was "going to revolve around the $40 million future benefits and whether this class or proposed class settlement actually benefits the class." Tr. 91. Mr. Garland thereafter indicated Mr. Burns would file his affidavit, which would indicate that "the stipulation for future interest - future payment of royalty in Paragraph 2.2 is not for the best interest of the class." Tr. 92. When the Court inquired why, Mr. Garland indicated that the "the 30-cent MCF, I believe is exorbitant and above the actual cost for that. . . . We also have no way of knowing how much of this $40 million is for future benefits that's saying they're going to comply with Oklahoma law for check stub reporting. . . . He has some concerns concerning the operation of the wells, the fact the stipulation will create a title examiner's nightmare. It begins March 2013 and continues without limitation." Tr. 92. Mr. Garland was unable to detail the anticipated testimony of Mr. Gum. Tr. 92.

Mr. Crain now requests that the Court reconsider its prior order accepting the settlement as fair and reopen the process to permit him to call witnesses contending he was denied his due process rights. He argues the deprivation resulted from the Court's rulings at

[4] In the instant motion Mr. Crain asserts that "[t]he inability to recite the testimony of Crain's witnesses . . . should not prejudice Crain's right to present his Objection, just as the proponents of the settlement and fee/expense requests were permitted to present witnesses to support their position." Motion, p. 7. The Court, however, is not required to permit an Objector to put on witnesses when counsel is unable to establish for the Court what the nature or substance of their testimony will be, nor was he able to assure the Court that their testimony would not be repetitive. The Court had access in advance to Class Counsel's submissions, and throughout the hearing informed the proponents of the settlement that it expected the proceedings to move expeditiously and without repetition.

the hearing.[5] Mr. Crain contends that he followed the required steps with regard to the presentation of witnesses as set forth in the Notice of Proposed Settlement and should have been permitted to call such persons.

Despite Mr. Crain's contentions to the contrary, the Court did act as a fiduciary for the absent Class members at the hearing. The Court devoted considerable time to this case and other similar litigation regarding the alleged underpayment of royalty and is well versed in both the state of the law in Oklahoma and the current controversies. Specifically with regard to this case, the Court considered volumes of evidence submitted in support of the settlement, the testimony and Mr. Garland's cross-examination of the witnesses who appeared live. The Court did not tell Mr. Crain that he could not call any witnesses or present evidence. Despite referencing Mr. Burns' affidavit, Crain's attorney did not proffer it as evidence to the Court. The Court of course, cannot consider evidence not proffered. With regard to Mr. Garland's contention that the Court asked him to summarize the testimony of his witnesses, this is certainly not beyond the pale, as the Court is not required to listen to repetitive evidence. Indeed, the Court informed Class Counsel that it had heard more than sufficient evidence on the issue of fees.

Turning to the merits of the objection, to the extent Mr. Crain objects to the future benefits, the go-forward provisions, the Court finds now, as it did previously, that the

[5] At the hearing the Court accepted the Plaintiff's proposition that these witnesses were being offered as experts and that reports were required pursuant to Rule 26 of the Federal Rules of Civil Procedure. In retrospect the Court hereby vacates the determination that expert reports were required, but this error does not impact the Court's determination with regard to Mr. Crain's request for reconsideration.

settlement in this action was fair to the class members. With regard to payment for NGLs and the processing thereof, from work in other similar litigation the Court notes that the obligations of the operator or non-operator selling gas with regard to NGLs is not clear. The settlement provides some guarantee to royalty owners that they will receive payment for NGLs, it does not merely shifts costs to the royalty owners. Although Mr. Crain now proffers evidence that the settlement is not fair, the fact that he was the sole objector to appear indicates that tens of thousands of royalty owners disagree with his contentions.

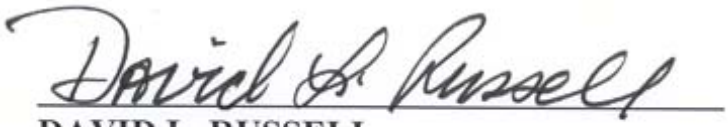
To the extent Mr. Crain is objecting to the attorneys' fees having been calculated on the value of the entire settlement, the Court notes that the 30% attorneys' fees awarded by the Court amounts to approximately 40% of the cash portion of the settlement, which is by no means an extraordinary amount of fees. Furthermore, the Court denied the request for interest on the fees and ordered that expenses be deducted prior to calculation of the fee. There has been no argument made that a fee of 40% of the cash portion of the settlement is improper, and the Court declines to reconsider its award of fees on the basis advocated by Mr. Crain.

Finally, the Court notes that Mr. Crain was, of course, eligible to opt out of the class in the event he believed the settlement unfair or unreasonable, or for no reason at all. In this class of approximately 44,000 members, however, there were only 2 objections,[6] Mr. Crain and one other. The other simply requested that the Court make careful consideration of class counsel's request for attorneys' fees, which the Court did.

[6] The Court notes that DEWN Royalty, LLC, would likely consider itself an objector, however, despite receiving notice of the settlement not later than April 11, 2013, DEWN did not file a timely objection thereto.

Due process requires notice and an opportunity to be heard, both of which were provided to Mr. Crain. The Court finds no basis for reconsideration of its prior orders with regard to approval of the settlement in this action, and accordingly, the motion is DENIED.[7]

IT IS SO ORDERED this 15th day of July, 2013.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

[7] The Court notes that counsel for both sides present conflicting reports of threats allegedly made by Class Counsel against attorneys who were listed as witnesses for Mr. Crain and allegations of unprofessional behavior. Those allegations are not properly before the Court as part of this motion.