

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 19–cv–02742–CMA–SKC

BETTY JEAN JOHNSTON,  
on behalf of herself and all others similarly situated,

Plaintiff,

v.

CAMINO NATURAL RESOURCES, LLC,  
a Delaware limited liability company,

Defendant.

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**MOTION FOR APPROVAL OF PLAINTIFF’S ATTORNEYS’ FEES, LITIGATION EXPENSES, ADMINISTRATION, NOTICE, AND DISTRIBUTION COSTS, AND CASE CONTRIBUTION AWARD**

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Having obtained a **Gross Settlement Value<sup>1</sup> of \$9.1 million** for the Settlement Class, which is comprised of \$2.1 million in up-front cash and future benefits valued at \$7 million, Class Representative Betty Jean Johnston (“Class Representative”) respectfully moves the Court for an award of Plaintiff’s Attorneys’ Fees in the amount of forty percent of the cash settlement value, for Litigation Expenses to date of approximately \$64,294.88, Administration, Notice, and Distribution Costs of approximately \$36,045.11 to date, and for a Case Contribution Award of two percent of the cash settlement value for service of the Class Representative in prosecuting this Litigation. In addition, Class Representative

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<sup>1</sup> Capitalized terms not otherwise defined shall have the meaning ascribed to them in the Settlement Agreement (“SA,” Doc. 53-1) unless otherwise indicated.

seeks a reserve of an additional \$50,000 for anticipated future Litigation Expenses and Notice, Administration, and Distribution Costs for costs incurred between the filing of this Motion and the complete administration of the Settlement. Class Counsel will apply to the Court for approval of the payment of any such future expenses.

The requests for Plaintiff's Attorneys' Fees and a Case Contribution Award are based on the going rates for such fees in prior class action litigation of this type. The requests for Litigation Expenses and Administration, Notice, and Distribution Costs are based on the actual amounts incurred by Class Counsel in prosecuting the action and incurred or expected to be incurred by Class Counsel and the Settlement Administrator in administering the Settlement. As set forth in the Notice and the SA, the requested awards will be paid from the cash settlement value. For the reasons set forth in this Motion, the requested awards are fair and reasonable, and therefore should be approved.

### **BACKGROUND**

In the interest of brevity, Class Representative will not recite the entire background of this Litigation. Rather, Class Representative refers the Court to the Motion for Preliminary Approval (Doc. 53), the Joint Declaration of Class Counsel ("Joint Counsel Decl.") (**Ex. 1**), the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are incorporated as if fully set out in this Motion.

### **ARGUMENT & AUTHORITY**

Each of the requests are warranted considering the work done and results achieved. They're also strongly supported by authority and are in line with similar requests granted by federal courts in many Oklahoma related oil-and-gas class actions.

**1. Federal Common Law Controls the Right to and Reasonableness of the Requests in this Motion**

The Parties contractually agreed that federal common law governs the awards requested in this Motion:

11.7. To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and its nationwide application, this Settlement Agreement shall be governed solely by federal law, both substantive and procedural, as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, case contribution award, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions.

Doc. 53-1 at 37, ¶ 11.7. This choice of law provision has previously been enforced by federal courts in many Oklahoma related oil-and-gas class actions. *See, e.g., Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc.*, No. 17-CV-336-KEW, 2020 WL 8339215, \*2 (E.D. Okla. Mar. 3, 2020) (“This choice of law provision should be and is hereby enforced.”); *McClintock v. Continuum Producer Services, L.L.C.*, No. 17-CV-259-JAG, 2020 WL 3022967, \*2 (E.D. Okla. June 4, 2020) (same).

**2. The Request for Plaintiff’s Attorneys’ Fees is Reasonable Under Federal Common Law**

The market rate for these types of class actions is forty percent, as reflected in myriad federal and state court oil-and-gas class actions<sup>2</sup> and as reflected in the contingent fee agreement in this case, executed before Class Representative and Plaintiff’s Counsel

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<sup>2</sup> *Chieftain*, 2020 WL 8339215, \*7 (“I find a 40% fee is consistent with the market rate for high quality legal services in [late payment] class actions like this.”) (collecting cases).

knew how the litigation would progress and whether any recovery would be obtained. See **Ex. 1**, Joint Counsel Decl. ¶ 20.

Under Rule 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). 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 v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988). Such an award will only be reversed for abuse of discretion. *Id.*; *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). Here, the agreement with Class Counsel expressly authorizes the requested fee of forty percent of the cash value of the Settlement.

***a. Attorneys’ Fees are Calculated as a Percentage of the Fund under Tenth Circuit Law***

“The court’s authority for . . . attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts.” 7B Wright & Miller § 1803. Under federal equitable law, the Tenth Circuit expressly prefers the percentage of the fund method in determining the award of attorneys’ fees in common-fund cases. See *Gottlieb*, 43 F.3d at 483; *Brown*, 838 F.2d at 454; *Useton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993). This method calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. See *Brown*, 838 F.2d at 454.

This Court has acknowledged the Tenth Circuit’s preference for the percentage method. See *Peck v. Encana Oil & Gas, Inc.*, No. 15-CV-1800-CMA-KHR, 2018 WL

1010944, \*2 (D.Colo. Feb. 22, 2018) (“In common fund cases, it is standard to use a percentage method when calculating attorneys’ fees.”); see also **Ex. 2**, Fitzpatrick Decl. ¶ 10 (“The percentage approach has the advantages of being efficient in its process of calculation, and, more importantly, of aligning the interests of class counsel with the interests of the class.”).<sup>3</sup>

***b. Attorneys’ Fees are Calculated as a Percentage of the Fund under Tenth Circuit Law***

When determining attorneys’ fees under the preferred percentage-of-the-fund method, the Tenth Circuit evaluates the reasonableness of the requested fee by analyzing the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *Peck*, 2018 WL 1010944, \*2. “[R]arely are all of the *Johnson* factors applicable.” *Uselton*, 9 F.3d at 854.

The twelve *Johnson* factors are: “(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by a 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.” *Peck*, 2018 WL 1010944, \*2.

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<sup>3</sup> Professor Fitzpatrick recently provided an opinion for Class Counsel in a separate class action settlement, but his analysis of the applicable law may be of benefit to the Court.

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

Here, the result is exceptional—\$2.1 million in cash and \$7 million in future benefits for a Gross Settlement Value of \$9.1 million. See **Ex. 3**, Ley Decl. ¶¶ 5–6; see also **Ex. 1**, Joint Counsel Decl. ¶ 4. When valuing this total economic benefit, the fee request represents ~9.23% percent of the Gross Settlement Value.<sup>4</sup> And these benefits are **guaranteed** and automatically bestowed upon the Settlement Class. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members must do is remain in the Settlement Class, *i.e.*, not opt out, and wait for distribution of funds after the Court grants, if it does grant, final approval of the Settlement. Accordingly, the “results obtained” factor strongly supports a fee award of forty percent of the cash value of the settlement (*i.e.*, \$840,000).

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<sup>4</sup> “[I]t is well-established that the fee award should be based on the total economic benefit bestowed on the class.” *Chieftain*, 2020 WL 8339215, \*4; see also *Fager v. Centurylink Comm’cns*, No. 14-cv-00870 JCH/KK, 2015 WL 13357867, at \*3–4, (D.N.M. June 25, 2015) (collecting cases), *aff’d* by 854 F.3d 1167 (10th Cir. 2016).

The other *Johnson* factors also support approval of the fee request. Although these factors do not merit as much weight as the results-obtained factor, the Joint Counsel Decl. (**Ex. 1**) address them all. To summarize:

**Time and Labor.** The Joint Counsel Decl. shows Class Counsel invested substantial time in researching, investigating, prosecuting, and resolving the Litigation. See **Ex. 1**, Joint Counsel Decl. ¶¶ 5–14.

**Novelty and Difficulty.** “Class actions are known to be complex and vigorously contested.” *Chieftain*, 2020 WL 8339215, \*5. “The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums.” *Id.* (analyzing identical late payment class claims). Class Counsel litigated these difficult issues against the vigorous opposition of highly skilled defense counsel. Moreover, Defendant asserted numerous defenses to the claims that would have to be overcome if the litigation continued to a contested class certification hearing and trial. “Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, weighs in favor of the [40%] Fee Request.” *Id.*; see also **Ex. 1**, Joint Counsel Decl. ¶ 24.

**Skill required.** Only a few firms handle oil-and-gas class litigation because of the nuanced intersection of class action and oil-and-gas law and the expense of funding such a large and potentially long-lasting endeavor. See **Ex. 1**, Joint Counsel Decl. ¶ 25. Defendant is also represented by experienced attorneys who can expend significant effort and expense in the defense of their client. These factors support the request for fees.

**Preclusion of Other Cases.** Class Counsel has only a finite number of hours and money to invest in class action cases. Often, they must decline opportunities to pursue other cases because they have committed time and expense to cases, such as this one, where they have already accepted representation. *Id.* ¶ 26.

**Customary Fee.** Class Representative negotiated a contract to prosecute this case on a fully contingent basis, with a fee arrangement of 40% of any recovery obtained for the putative class after the filing of the litigation. *Id.* ¶ 27. This fee represents the market rate. See *Chieftain*, 2020 WL 8339215, \*7 (“I find a 40% fee is consistent with the market rate for high quality legal services in [late payment] class actions like this.”) (collecting cases). This factor supports the fee request.

**Fixed Hourly or Contingent Fee.** As set forth above, Class Counsel undertook this Class Lawsuit on a purely contingent fee basis (with the amount of any fee being subject to Court approval) and assumed a substantial risk that the lawsuit would yield no recovery, leaving them uncompensated and without the ability to recover expenses. See **Ex. 1**, Joint Counsel Decl. ¶ 28. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys’ fees. See, e.g., *Chieftain*, 2020 WL 8339215, \*7 (“If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses).”). Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates. Accordingly, this factor strongly supports the fee request.

**Time Limitations.** This was not a factor in this case and should not influence the Court one way or the other. See **Ex. 1**, Joint Counsel Decl. ¶ 29.

**Amount in Controversy and Result Obtained.** The \$2.1 million cash component exceeds the damages calculated by Camino (by nearly 25%) and is nearly 75% of Class Counsel's most aggressive model. *Id.* ¶ 30. The Settlement also includes future benefits valued at \$7 million, for a Gross Settlement Value of \$9.1 million. *Id.* ¶ 4. The result obtained in a contingent fee case is by far the most important factor in determining the fee to award, as noted above. Many class actions have settled for a lower proportionate recovery of actual damages, and in Oklahoma royalty class actions, some actions have failed altogether. *Id.* ¶ 30. This factor supports the fee request.

**Experience, Reputation, and Ability of Counsel.** Class Counsel has extensive experience and demonstrated ability in these types of class actions. *Id.* ¶¶ 2, 31; see also **Ex. 2**, Fitzpatrick Decl. ¶ 21 (“I can say that class counsel count among their number some of the most experienced oil and gas attorneys in the United States.”).

**Undesirability.** Defendant and its counsel are worthy adversaries that proved they were willing to litigate zealously. There was no doubt from the beginning that this lawsuit would be a lengthy, expensive, time-consuming, and arduous undertaking. Very few attorneys have the desire to take on the risk involved in class actions, much less a class action against a well-defended oil-and-gas company such as Defendant. See, e.g., *Chieftain*, 2020 WL 8339215, \*8 (“Compared to most civil litigation, this Litigation [identical to this one] clearly fits the ‘undesirable’ test and no other firms or plaintiffs have asserted these claims against Newfield . . . Few law firms would be willing to risk investing the time,

trouble and expenses necessary to prosecute this Litigation[.]”). Nevertheless, Class Counsel did so and achieved an excellent recovery. This factor supports the fee request.

**Nature and Length of Professional Relationship with Client.** Although of little relevance in a case where the client does not engage regularly in litigation to warrant a discounted hourly rate, this factor supports the requested fee. Class Counsel worked extensively with Class Representative throughout the Litigation to prosecute the claims. See Ex. 1, Joint Counsel Decl. ¶¶ 33. This factor supports the fee request.

**Awards in Similar Cases.** Forty percent is a customary fee award in royalty underpayment class action litigation and supports the Fee Request in this case. See *supra* at 3, n. 2.

The analysis of the *Johnson* factors under federal common law strongly demonstrates approval of the fee request is warranted.

**3. The Request for Reimbursement of Litigation Expenses and Administration, Notice, and Distribution Costs is Reasonable under Federal Common Law**

In connection with approval of the Settlement of the Litigation, and in accord with the Notice to the Class, Class Representative respectfully moves the Court for reimbursement of expenses incurred in successfully prosecuting, resolving this Litigation, and administering the Settlement. As described above, Class Counsel has obtained an excellent recovery for the benefit of Class Members, which necessitated incurring expenses that Class Counsel paid or will be obligated to pay. To date, Class Counsel have advanced or incurred approximately \$64,294.88 in Litigation Expenses prosecuting and resolving this case. See **Ex. 1**, Joint Counsel Decl. ¶¶ 37. All the expenses incurred have been reasonable and necessary to the prosecution of the Class Lawsuit. *Id.*

Class Counsel expects to incur an estimated \$26,816.11 in additional Litigation Expenses, bringing the total of Litigation Expenses to be approximately \$91,110.99. *Id.* ¶ 38. As such, at the Final Fairness Hearing, Class Counsel will seek reimbursement for expenses actually incurred after the date of this filing and anticipated in implementing the Settlement to its conclusion. Class Counsel will seek the Court's approval on all expenses before their payment from the Settlement. In addition, the SA directs payment of the Administration, Notice, and Distribution Costs from the Gross Settlement Fund. Doc. 53-1 at 4. The Settlement Administrator estimates the Administration Expenses to be approximately \$36,045.11 as of the date of this Motion and anticipates an additional \$23,183.89 in such costs to complete the settlement process, for an overall total cost of \$59,229 by the Settlement Administrator. See **Ex. 1**, Joint Counsel Decl. ¶¶ 39–40.

Together, Class Counsel seeks a reserve of \$50,000 for anticipated future Litigation Expenses and Administration, Notice, and Distribution Costs. Because these requests are fair and reasonable, and for the reasons set forth below, the requests should be granted.

***a. The Litigation Expense and Administration, Notice, and Distribution Cost Requests are Reasonable Under Federal Common Law***

“As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 WL 1268824, at \*4 (D. Colo. Mar. 9, 2000); Fed. R. Civ. P. 23(h) (authorizing the Court to reimburse counsel for “non-taxable costs that are authorized by

law.”). All such expenses were reasonably and necessarily incurred and are directly related to the prosecution and resolution of this Litigation. The costs include routine expenses related to court fees, postage and shipping, legal research, and travel and transportation, as well as expenses for experts and document production and review, which are typical in complex class actions such as this. As such, the Litigation Expense request is fair and reasonable, and should be approved. So too for the Administration, Notice, and Distribution Costs, which are necessary to effectuate the Settlement.

#### **4. The Case Contribution Award is Reasonable Under Federal Common Law**

Class Representative also requests a \$42,000 Case Contribution Award, which is 2% of the \$2.1 million cash payment and only ~0.46% of the cash recovery and future benefits combined (\$9.1 million). See **Ex. 1**, Joint Counsel Decl. ¶ 42. The requested Case Contribution Award was included in the Notice provided to Class Members (Doc. 53-1 at 73) and is reasonable under the case law. Federal courts regularly give incentive awards to compensate named plaintiffs. See, e.g., *Harris v. Chevron U.S.A., Inc., et al.*, No. 19-CV-355-SPS, 2020 WL 8187464, \*8 (E.D. Okla. Feb. 27, 2020) (The class representative’s “request for an award of two percent is consistent with awards entered by Oklahoma state and federal courts, as well as federal courts across the country.”). Evidence supporting an award request may be provided through “affidavits submitted by

class counsel . . . through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.” Newberg § 17:12.

Having worked with Class Representative in the investigation, filing, prosecution, and settlement of this litigation, Class Counsel fully supports the request. See **Ex. 1**, Joint Counsel Decl. ¶ 42.

### **CONCLUSION**

For the reasons set forth in this Motion, Class Representative and Class Counsel move the Court to grant this Motion and to enter an Order approving the following, in accordance with the SA and the Notice, to be deducted from the Gross Settlement Fund before Distribution Checks are mailed to the Settlement Class from the remaining Net Settlement Fund: 1) Plaintiff’s Attorneys’ Fees in the amount of forty percent of the cash value of the Settlement (i.e., \$840,000); 2) a Case Contribution Award in the amount of \$42,000; 3) Litigation Expenses in the amount of \$64,294.88 to date; 4) Administration, Notice, and Distribution Costs to date of \$36,045.11; and 5) a reserve of up to \$50,000 for future Litigation Expenses and Administration, Notice, and Distribution Costs through the Final Fairness Hearing and full implementation of the Settlement. Class Representative will submit a proposed order to the Court for the relief requested in this Motion prior to the Final Fairness Hearing.<sup>5</sup>

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<sup>5</sup> Because this Motion is due prior to the opt out and objection deadlines (April 28, 2021), Class Representative will submit the proposed order following that deadline, but well in advance of the Final Fairness Hearing, so that potential objections may be addressed.

Respectfully Submitted,

/s/ Reagan E. Bradford

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**CLASS COUNSEL**

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 14, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record at the following email addresses:

David Holman  
dave@crishamholman.com

/s/ Reagan E. Bradford

Reagan E. Bradford