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

PERRY CLINE, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 17-cv-313-JAG**
SUNOCO, INC. (R&M) and SUNOCO PARTNERS MARKETING & TERMINALS, L.P.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S
MOTION FOR APPROVAL OF ATTORNEYS' FEES

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I. INTRODUCTION[1]

Class Counsel respectfully move the Court for an award of attorneys' fees equal to 40% of the Judgment Common Fund[2] recovered for the Class. The requested fee is within the range of fees allowed in Oklahoma oil-and-gas class actions by state and federal courts assessing a reasonable fee. This request is fair, reasonable and, therefore, should be approved.

Class Counsel have obtained an excellent recovery for the Class. The Final Judgment amounts to almost ***200%*** of the Class's actual damages. Class Counsel resisted Defendants' attempts to settle this case for a tiny fraction of the Final Judgment, protected the Final Judgment through an onslaught of appeals, and enforced it through a complex and contentious collections process. Class Counsel's efforts are ongoing and likely will be for years. The requested fee is fair and reasonable under the facts and circumstances of this case. It should be approved.

II. BACKGROUND

In the interest of brevity, Class Counsel will not recite the background of this litigation again. Instead, Class Counsel respectfully refer the Court to Ex. 1 at ¶¶ 56-73, the trial transcript, the documents on file in the case, and any other matters of which the Court may take judicial notice, all of which are incorporated fully herein. *See Hutchinson v. Hahn*, 402 F. App'x 391, 394–95 (10th Cir. 2010) (unpublished); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

Pursuant to the Court's Order (Dkt. No. 610), Class Counsel caused the "Notice of Motion for Attorney's Fees From Judgment Fund Pursuant to Rule 23(h)" to be issued on January 13,

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[1] References to "Ex. __" are to the exhibits attached to Class Counsel's Motion for Approval of Attorneys' Fees filed contemporaneously herewith.

[2] The "Judgment Common Fund" as used in this brief consists of the $155,691,486.00 damage award plus all interest accrued on such amounts until the date Class Counsel's fees are withdrawn.

2023. Ex. 21 at ¶5. Class Counsel also caused the publication notice to be published on January 19, 2023 in six newspapers. *Id.* at ¶8. The Notices stated that Class Counsel would seek attorneys' fees up to 40% of the Judgment Common Fund. *See id.* at Exs. A, B.

III. ARGUMENT

The Court should award Class Counsel a fee equal to 40% of the Judgment Common Fund recovered for the class, to be paid first from the amount paid by Defendants in stipulated fees and the remainder from the common-fund recovery. The following outlines the law governing Class Counsel's right to a such a fee, the method for calculating it, and the reasons why a 40% award is justified here—a case in which Class Counsel went all the way to judgment, protected that Final Judgment through a series of appeals, continue to fight Defendants to this day, will work on distribution for at least another year, and recovered nearly 200% of the Class's actual damages.

A. The Law Governing Class Counsel's Fee

In certified class actions, the procedure for awarding reasonable attorneys' fees is governed by Federal Rule of Civil Procedure 23(h). That rule allows the court to award attorneys' fees that are "authorized by law." Fed. R. Civ. P. 23(h). In this diversity action, state law—namely Oklahoma law—governs the substantive right to attorneys' fees. *See Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 460-63 (10th Cir. 2017). Oklahoma law authorizes attorney's fees to be paid by the Class as beneficiaries of the Judgment Common Fund under Oklahoma's common fund doctrine. *See Strack v. Continental Res.*, 507 P.3d 609, 612, 614-15 (Okla. 2021).

The goal under Oklahoma law is always the same: to arrive at a reasonable fee in light of the facts and circumstances of the particular case. *Strack*, 507 P.3d at 616; *accord Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). Oklahoma common-fund, attorney-fee law mirrors that

of the Tenth Circuit in that it (1) recognizes the "common fund" doctrine that allows attorneys who create a common fund for a group of beneficiaries to seek a fee from that fund and (2) gives trial courts the discretion to utilize the percentage-of-the-fund method to determine a reasonable fee. *See Strack*, 507 P.3d at 614-15; *Gottlieb*, 43 F.3d at 483.

Here, Class Counsel's right to an attorney fee from the Class's Judgment Common Fund comes from the equitable "common fund doctrine." *See Strack*, 507 P.3d 609 at 614–15 ("When an action creates a common fund recovery, all the beneficiaries of the fund contribute to paying the attorneys who worked on their behalf by allowing counsel to take a percentage of the common fund."). This equitable concept is consistent with decades of state and federal law regarding the equitable powers of courts to ensure that beneficiaries of common-fund recoveries help bear the costs incurred in generating those recoveries. As the U.S. Supreme Court explained:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (internal citations omitted)). There is no dispute that Class Counsel's efforts generated a common fund for the benefit of the Class here. As such, Class Counsel's fee request is authorized by law, and Class Counsel are entitled to a reasonable fee from the common fund.

Further, under Oklahoma law, Class Counsel's right to recover fees from the common fund is separate from any possible fee shifting award under a prevailing-party, fee-shifting statute. *See Okla. ex rel. Okla. Bar Ass'n v. Weeks*, 969 P.2d 347, 356 (Okla. 1998). Under Oklahoma law, any

right to statutory fees belongs to the plaintiff, not the attorney. *Id*. at 358. The plaintiff thus may win a fee award or negotiate for an amount of statutory fees to be paid to the plaintiff as the prevailing party, and *may* use an award to offset (reduce) the amount the plaintiff owes under the contingent-fee arrangement. *Id*. at 356, 358Oklahoma's approach follows the rule set forth by the U.S. Supreme Court in *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990), where the Court held that the statutory fee-shifting provision "does not interfere with the enforceability of a contingent-fee contract." *See also Straton v. Boeing Co.*, 327 F.3d 938, 968–69, 972 (9th Cir. 2003); *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1189, 1196–97, 1199–1201, 1210–12, 1217, 1239–40 (S.D. Fla. 2006).

Oklahoma common-fund law is in accord with federal common law (and the vast majority of other jurisdictions) when it comes to fee calculation methodology. Oklahoma law, just like the law in this Circuit, allows courts to calculate common-fund, class-action fee awards under the percentage-of-the-fund or the lodestar approach. *See Strack*, 507 P.3d 609 at 612, 615; *compare with Gottlieb*, 43 F.3d at 483; *see also Strack*, 507 P.3d at 615, n.6 ("We recognize that courts in nearly every circuit either mandate or allow the percentage approach in class action common fund cases." (collecting cases)). Oklahoma law, like several circuits, also encourages—but does not mandate—that courts compare the results under both methodologies to confirm the reasonableness of their awards, a process often referred to as a "cross-check." *See Strack*, 507 F.3d at 617 (holding that courts using the percentage model "*should"* conduct a cross-check (citing 1 Alba Conte, *Attorney Fee Awards* § 2:6, at 69, 78 (3d ed. 2004)); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 13:80, at 496-97 (4th ed. 2002); *see also* 5 *Newberg and Rubenstein on Class Actions* § 15:86 (6th ed.) ("[C]ourts in nearly every circuit have held that, for the purposes of a cross-check, they need not scrutinize each individual billed hour, but may instead focus on the

general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys."). Accordingly, as the Oklahoma Supreme Court made clear in *Strack*, Oklahoma common-fund fee law is like nearly every other jurisdiction.

Under either method, Oklahoma law mandates that the court analyze 13 factors. *See Strack*, 507 P.3d at 615-16; 12 OKLA. STAT. § 2023(G)(4)(e). The statutory factors under Oklahoma law are identical to the 12 *Johnson* factors used by federal courts, with the addition of a thirteenth factor. *See id*. *compare with Gottlieb*, 43 F.3d at 482, n.4. The Oklahoma factors are: (1) time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal service properly, (4) the preclusion of other 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 the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorney, (10) whether or not the case is an undesirable case, (11) the nature and length of the professional relationship with the client, (12) awards in similar causes, and (13) the risk of recovery in the litigation. 12 OKLA. STAT. § 2023(G)(4)(e).

"The goal in every attorney fee case is not to select a methodology but to arrive at a reasonable fee." *Strack*, 507 P.3d at 616; *compare with Gotlieb*, 43 F.3d at 482 ("Under either methodology, the fee awarded must be reasonable."). And what is reasonable is a fact-intensive, case-by-case inquiry that is committed to the sound discretion of the trial court. *See Strack*, 507 P.3d at 614; *Brown v. Phillips Petrol. Co*, 838 F.2d 451, 453 (10th Cir. 1988) ("An award of attorneys' fees is a matter uniquely within the discretion of the trial judge who has intimate knowledge of the efforts expended and the value of the services rendered.") (cleaned up). The court must set forth its findings supporting the award with specificity. *See Strack*, 507 P.3d at 619

("[A] district court must examine the evidentiary support for the[statutory factors] beyond a cursory glance. … Merely referring to the enhancement factors to be considered under § 2023(G)(4)(e) will not sustain a fee that is not established by evidence."). As demonstrated below, Class Counsel's requested fee is fair, reasonable, and appropriate under Oklahoma substantive law and Rule 23(h).

B. Class Counsel's Requested Fee is Reasonable Under Oklahoma Law

Class Counsel have done what few, if any, have ever done in a class action like this: litigated the case to Final Judgment; defended the Class's rights through not one, not two … but ***nine*** attempts by Defendants to derail this case on appeal; carried out ***fifteen*** garnishment proceedings to enforce the Final Judgment and collect the amounts owed to the Class; and ultimately recovered an amount that—even after all fees, costs, expenses, and awards have been paid—will guarantee the Class ***more*** than 100% of their actual damages. That is remarkable.

The following analysis walks through each of Oklahoma's statutory reasonableness factors and the reasons why those factors support Class Counsel's requested fee under the percentage method. This section then concludes by evaluating the fee under a lodestar cross-check, which further confirms the reasonableness of Class Counsel's request.

1. 2023 Factor Analysis

i. The Amount in Controversy and Results Obtained

The most important factor in this common fund case is the eighth factor—the amount in controversy in the case and the results obtained. *See Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.,* 77 P.3d 1042, 1049-50 (Okla. 2003); *see also Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and … the efforts of counsel were instrumental in realizing recovery on behalf of the class."); Fed. R. Civ. P. 23(h), adv. comm.

note (explaining that, for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point."). The results here are extraordinary.

The total awarded to the Class of $155,691,486.00 (an amount that is growing with interest) represents approximately ***200%*** of the Class's actual damages in the case.

Moreover, the recovery here is a result of significant legal victories regarding how statutory interest under the PRSA is calculated and paid—victories that will continue to benefit Class Members going forward. There were two possible interest rates applicable in this case: 12% and 6%. And there was a dispute about whether and how the interest compounded. Class Counsel won on both issues, ensuring that 12% compound interest was the default rate and securing more than double the amount that would have been recovered had a 6% rate applied. Class Counsel also fought and won to confirm that it is Defendants' burden to prove the lower interest rate applies in future cases, and to reaffirm that Defendants—and others like them—have a duty to pay interest *without* owners having to demand it. Thus, not only did Class Counsel recover all of the Class's actual damages; they did so in a way that ensured the highest amount possible for the Class—***and then they doubled it*** with an award of punitive damages.

The Final Judgment provides considerable, concrete monetary benefits. And, unlike cases in which a class member's recovery is contingent upon a complicated claims-submission process, the benefits here are ***guaranteed*** and ***automatically bestowed*** upon the Class as a result of the Final Judgment and Plan of Allocation. Moreover, because the amount recovered doubled the Class's maximum possible actual damages, the Class will still recoup more than 100% of their actual damages even ***after*** all fees, costs, expenses, and awards have been paid. Given the amount involved in this litigation and that the Final Judgment achieved total success for the Class, this highly significant factor strongly supports Class Counsel's fee request.

ii. The Customary Fee and Awards in Similar Causes

The fifth and twelfth factors—the customary fee and awards in similar cases—further support the fee request. Class Counsel and Class Representative negotiated and agreed to prosecute this case on a 40% contingent fee. *See* Ex. 1 at ¶35; Ex. 2 at ¶13. Mr. Cline is a sophisticated farmer, business man, and long-time royalty owner who negotiated this fee at arm's length. Ex. 1 at ¶34. As the Court knows, Mr. Cline was not and is not a puppet for Class Counsel; he is the real McCoy, and was involved in negotiating this fee and holding Class Counsel accountable throughout this case. *Id.* Mr. Cline believes that 40% was and is the market rate. Ex. 2 at ¶13.

And many absent Class members agree. To date, eleven absent Class members have filed declarations in support of Class Counsel's requested fee, and all of them—including two oil-and-gas attorneys—agree that 40% is the market rate for an oil-and-gas class action like this. *See* Exs.8-18. Moreover, all of them agree that they would not have been able to prosecute this case on their own in the absence of contingent-fee contract like the one Mr. Cline agreed to. *Id.* This is the testimony of *actual* Class Members, and it is strong evidence of what the market is for Class Counsel's services and the reasonableness of the requested fee.

Moreover, numerous Oklahoma federal courts have held that a 40% fee represents the market rate and is customary in oil-and-gas class actions. *See* Ex. 1 at ¶45 and at Ex. B (collecting cases and attaching a chart from the Coalition of Oklahoma Surface and Mineral Owners that summarizes Oklahoma oil-and-gas class action fee awards from 1998-2018 and shows that the weighted average fee award for the vast majority of such cases was 40.53%); Ex. 7 at ¶61; Ex. 3 at ¶¶7, 10, 18; Ex. 4 at ¶¶7, 10, 12; Ex. 5 at ¶¶13, 16, 18; Ex. 6 at ¶4;[3] *Chieftain Royalty Co. v. SM*

[3] Under Oklahoma law, attorneys are allowed to testify by affidavit or declaration as experts on attorney-fee issues. *See, e.g.*, *Whittington, D.O. v. Durant H.M.A., LLC*, 521 P.3d 1281, 1283 (Okla. 2022); *Unterkircher v. Adams*, 714 P.2d 193, 194–95, 197 (Okla. 1985); *Root v. Kamo Elec.*

Energy Co., No. 18-cv-1225-J, Dkt. No. 102 (Gensler Decl.) at ¶45 (W.D. Okla. Mar. 29, 2021) (collecting cases); *see, e.g.*, *Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.,* No. CJ-2010-38, 2015 WL 2015 WL 5794008, at *3 (Okla. Dist. Ct. Beaver Cty. July 2, 2015). Moreover, courts—including in this District—routinely hold that a contingency fee negotiated at arm's length at the outset of the litigation "reflect[s] the value the Class Representatives placed on the future success of [the a]ction." *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2012 WL 6864701, at *23 (E.D. Okla. Oct. 25, 2012); *accord Chieftain Royalty Co. v. Laredo Petro., Inc.*, NO. CIV-12-1319-D, Dkt. No. 52 at 8 (W.D. Okla. May 13, 2015).

Federal and state courts in Oklahoma also have repeatedly approved similar fee awards in other statutory-interest cases, making a 40% fee award the *de facto* norm—regardless of whether Oklahoma or federal law applies, regardless of whether the case was decided pre or post *Strack*, and regardless of how large (or small) the common fund was. *See, e.g.*, *Kernen v. Casillas Op., LLC*, No. CIV-18-107-JD, Dkt. No. 125 at 17, n.3 (W.D. Okla. Jan. 4, 2023) (approving 40% fee award under federal common law and finding that such an award also would be "fair, reasonable, and approved under Oklahoma law"); *Allen v. Apache Corp.*, Case No. 6:22-cv-00063-JAR, Dkt. No. 37 (E.D. Okla. Nov. 16, 2022) (same); *Chieftain Royalty Co. v. BP America Production Co*., Case No. CIV-18-54-JFH-JFJ, Dkt. No. 180 (N.D. Okla. Mar. 2, 2022); *Hay Creek Royalties, LLC v. Roan Resources LLC*, Case No. 19-cv-177-CVE-JFJ, Dkt. No. 74 (N.D. Okla. April 28, 2021); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS, Dkt. No. 120 (E.D. Okla. Mar. 8, 2019); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-113-KEW, Dkt. No. 105 (E.D. Okla. Dec. 18, 2018); *Reirdon v. XTO Energy Inc*., No. 16-cv-00087-KEW, Dkt. No. 124 (E.D. Okla. Jan. 29,

Co-op, 699 P.2d 1083, 1093 (Okla. 1985); *Abel v. Tisdale*, 673 P.2d 836, 837-38 (Okla. 1983); *Hamilton v. Telex Corp.*, 625 P.2d 106, 109–10 (Okla. 1981).

2018); *see also* Ex.1 at ¶45 and at Ex. B; *Chieftain Royalty Co. v. SM Energy Co*., No. 18-cv-1225-J, Dkt. No. 102 (Gensler Decl.) at ¶45 (W.D. Okla. Mar. 29, 2021) (collecting cases). The same is true in other Oklahoma oil-and-gas class actions. *See, e.g.*, *Rhea v. Apache Corp.*, Case No. 6:14-cv-00433-JH, Dkt. No. 505 (E.D. Okla. June 23, 2022); *White Family Minerals, LLC v. EOG Resources, Inc.*, Case No. 19-cv-409-RAW, Dkt. No. 59 (E.D. Okla. Nov. 12, 2021); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J, Dkt. No. 115 (W.D. Okla. Apr. 27, 2021); *McClintock v. Enterprise Crude Oil, LLC,* No. CIV-16-136-KEW, Dkt. No. 120 (E.D. Okla. Mar. 26, 2021); *McClintock v. Continuum Producer Services, LLC,* No. CIV-17-259-JAG, Dkt. No. 61 (E.D. Okla. June 4, 2020); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW, Dkt. No. 231 (E.D. Okla. Mar. 27, 2018); *Chieftain Royalty Co. v. Laredo Petro., Inc.*, NO. CIV-12-1319-D, Dkt. No. 52 (W.D. Okla. May 13, 2015); *Chieftain Royalty Co. v. QEP Energy Co.*, No. CIV-11-212-R, Dkt. No. 182 at 6 (W.D. Okla. May 31, 2013) (awarding a fee of $46.5 million, which represented approximately 39% of the cash portion of a $155 million settlement); *see also* Ex. 1 at ¶45 and at Ex. B (collecting cases); *Chieftain Royalty Co. v. SM Energy Co*., No. 18-cv-1225-J, Dkt. No. 102 (Gensler Decl.) at ¶45 (W.D. Okla. Mar. 29, 2021) (collecting cases). Moreover, these awards were in the settlement context. Given the outstanding recovery here—and the fact that Class Counsel secured that recovery after a full trial on the merits, multiple appeals, and an extensive post-judgment collection effort—the fee request is well within the typical fee award granted in similar cases. This factor strongly supports the fee request.

iii. The Time and Labor Required

The time and labor involved supports the requested fee. This factor does not look simply at the amount of time required. It looks at the work we did and the incredible post-trial events that occurred—and are still occurring—all of which prove that the labor in this case was extraordinary.

It is rare for a class action to be tried to verdict. It is rarer still for a class action to involve ***eight*** post-judgment appeals, including appeals ***after*** a failed *certiorari* attempt. And it is even more rare for a judgment creditor like Cline to have to resort to full-blown garnishment efforts to enforce the judgment. But that is what Cline and Class Counsel had to do here.

In this case, Class Counsel:

- engaged in substantial written discovery, including exchanging dozens of interrogatories and reviewing thousands of pages of electronically produced data comprised of emails, manuals, organizational documents, check stubs, royalty owner communications, internal logs of communications with royalty owners, statutory interest payments previously made, historical royalty payments, and suspended accounts for Oklahoma royalty owners;

- took 14 depositions of Defendants' employees, corporate representatives, and experts, through which Plaintiff uncovered important evidence regarding Defendants' familiarity and lack of compliance with the PRSA, their practices and policies for paying (or not paying) statutory interest, and the data and information Defendants utilized for identifying late royalty payments;

- reviewed every statutory interest payment previously made by Defendants for the relevant time period and analyzed every proceeds payment made by Defendant in Oklahoma for the relevant time period in preparation for class certification, summary judgment, expert reports, settlement negotiations, and trial—an analysis that this Court found critical in calculating damages and determining how such damages were to be allocated;

- successfully moved to certify the case as a class action and then defended that certification on appeal;

- overcame multiple strategies by Defendants to derail this case from proceeding to trial and to unfairly cut the Class' damages, including by trying to "pick off" Mr. Cline, trying to stay the case pending the 23(f) appeal, withholding substantial data until the eve of trial, and asking to "clarify" the class definition to exclude two-thirds of the Class' damages;

- successfully moved for partial summary judgment on the issue of whether Defendants are required to pay statutory interest on late revenue payments *without* a prior demand;

- put all this evidence and effort on display at trial, which lasted four days and during which Class Counsel put on seven witnesses and introduced forty-one exhibits, including a database created by its expert Barbara Ley that identified over 1.5 million late payments;

- won and secured a judgment that recovered not only 100% of the Class's actual damages, but an additional $75,000,000.00 in punitive damages after proving clearly and convincingly that Defendants knowingly and willfully withheld the Class's money, and did so with reckless disregard for the Class's rights;

- defended that Final Judgment through a slew of post-judgment motions and ***eight*** post-judgment appeals, including a petition for *certiorari* at the United States Supreme Court;
- engaged in an extensive post-judgment enforcement and collection campaign that itself included, among other things:
    - filing a motion for Defendants to appear and answer concerning their assets;
    - responding to Defendants' objection to such post-judgment discovery;
    - conducting a five-and-a-half hour asset hearing;
    - submitting a proposed report and recommendation and two briefs in support of it;
    - filing 16 garnishment affidavits and 16 requests to issue garnishment summons;
    - serving 15 garnishment summonses;
    - responding to Defendants' emergency motion for leave to deposit funds;
    - a hearing on Defendants' emergency motion;
    - filing a motion for notice of default in the garnishment proceedings;
    - responding to 15 motions to dismiss the garnishment proceedings;
    - responding to and moving to strike Defendants' motion to enjoin the garnishment proceedings;
    - issuing and serving a subpoena to Energy Transfer LP Vice President, Robert Ricciuti, to appear and testify at a hearing regarding Defendants' efforts to avoid and enjoin the ongoing garnishment efforts; and
    - attending a third post-judgment hearing to resolve the garnishment disputes.
- oversaw the creation of the Judgment Fund Account; and
- collected a check for $161,121,721.98.

See Ex. 1 at ¶¶55-73. And we are not done yet. In fact, Class Counsel is set to argue Defendants' remaining appeal on March 21, 2023. And Defendants have made no sign of giving up after that.

The time and labor it took to do all this—and do it right—has been tremendous. Overall, Class Counsel have dedicated over 12,702 hours of attorney and professional time to this Litigation and reasonably estimate spending 675 more hours. *See* Ex. 1 at ¶81; Ex. 3 at ¶21; Ex. 4 at ¶15; Ex.

5 at ¶20; Ex. 6 at ¶11; *see also* Ex. 7 at 57. Those figures are conservative. A case like this is a major part of Class Counsel's portfolio and a constant topic of thought and conversation. The amount of time and energy devoted to this case—all the impromptu meetings, phone calls, office pop-ins, and all the time at the gym, the aisles of the grocery store, and in the church pews spent thinking about what Defendants are doing and what they're going to try next—could never be fully calculated. This case was and remains a substantial case by any measure. Class Counsel's commitment to it has been equally substantial.

When expressed as nothing more than a lodestar figure, based on the total combined time and the applicable hourly rates, Class Counsel's total combined lodestar (including past and anticipated future hours) is $9,379,078.00. But, as explained above, that figure comes nowhere near to illustrating Class Counsel's total time *and* labor commitment to this litigation. Just as the result obtained here is historic, so too were Class Counsel's efforts to obtain those results.

iv. The Contingent Nature of the Fee and the Risk of Recovery

The sixth and thirteenth 2023 Factors—the contingent nature of the fee and the risk of recovery in the litigation—also strongly support the fee request. Class Counsel undertook this litigation on a purely contingent basis, assuming a substantial risk that the litigation would yield no recovery and leave them entirely uncompensated and in the negative after incurring the substantial costs associated with taking this case to Final Judgment and defending that Final Judgment through numerous appeals. *See* Ex. 1 at ¶¶85-86. The fact that Class Counsel worked on a contingent fee and turned down multiple settlement offers before and after trial further supports the fee. *See id*. at ¶52. Indeed, many lawyers who had expended so much time, effort, and expenses on a case would have taken the sure money and run more than once in a case involving nine appeals. But we stayed the course and continue to do so.

Further, the recovery here has been at risk the entire time. Defendants engaged in a scorched-earth strategy at every turn. In addition to their voracious attacks on Mr. Cline and the Class prior to and during trial, Defendants continue to attack the Final Judgment after trial. Indeed, even after the Supreme Court refused to hear Defendants' appeal, Defendants still are continuing with additional appeals. And, even after Defendants deposited the funds into the Judgment Fund Account, they have vowed to not only continue their assault on the Final Judgment but, if they win, to also track down Mr. Cline, Class Counsel, and any other absent Class Member who receives a distribution from the Court and take that money back with interest. Defendants are still fighting and will seek relief at the Supreme Court again. To say that Class Counsel's representation of the Class was "contingent" or with came with a "risk" would be a drastic understatement.

Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See* Ex. 7 at ¶80; *accord Reirdon v. Cimarex Energy Co.*, No. 16-CV-113-KEW (E.D. Okla.) (Dkt. No. 64 at ¶55); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla.) (Dkt. No. 115 at ¶60); *see also* Ex. 1 at ¶¶25, 85-86; *Fitzgerald Farms*, 2015 WL 5794008, at *5 & n.7. The risk of no recovery was particularly acute in this case in light of Defendants' defiant litigation position, which showed that they would not pay what the Class was owed unless and until a Court forced them to do so—and ***even then***, not until Class Counsel enforced that Final Judgment through garnishment.

Simply put, it would not have been economically prudent or feasible for Class Counsel to pursue this case under any prospect that the Court would award a fee on the basis of normal hourly rates alone. Nor could Mr. Cline or most absent Class Members have paid Class Counsel to prosecute this case on such a basis. *See* Ex. 2 at ¶13; Ex. 8 at ¶16; Ex. 9 at ¶7; *see also* Exs. 10-18. Class Counsel have expended thousands of hours litigating similar royalty actions where the courts

denied class certification and, thus, Class Counsel received no remuneration at all despite their diligence and expertise.[4] Class Counsel took on that same risk here, and continued to do so as that risk mounted with every procedural step in the case. The more Class Counsel pushed, through summary judgment, trial, and appeal, the more cost (both economic and opportunity) Class Counsel incurred, and the more risk Class Counsel endured that such efforts would all be for naught. Class Counsel's significant risk, which they bore entirely on behalf of the Class, warrants an equally significant fee—one that "cannot fairly be awarded on the basis of time alone." *Oliver's Sports Center, Inc. v. Nat'l Std. Ins. Co.*, 615 P.2d 291, 294 (Okla. 1980). Accordingly, this factor strongly supports the fee request.

v. The Novelty and Difficulty of the Questions Presented

The difficulty of the questions presented in this action supports the fee request. Class actions are known to be complex and vigorously contested, and this case proved that stereotype to be true. Indeed, the complexity of this case and recalcitrance with which Defendants have resisted it were exceptional, even for class actions. *See generally* Dkt. Nos. 298; *see also* Dkt. Nos. 306, 309, 340, 351, 408, 409 & 422.

The claims involved difficult and highly contested issues of Oklahoma oil and gas law that are currently being litigated in multiple forums. The successful prosecution and resolution of the Class's claims required Class Counsel to work with experts to analyze complex data to support their legal theories and evaluate the amount of damages. Moreover, Defendant asserted a number of significant defenses and legal theories that Class Counsel had to overcome in order to succeed at trial and protect the Final Judgment on appeal. Class Counsel also had to navigate a highly

[4] *See*, *e.g.*, *Foster v. Apache*, 285 F.R.D. 632 (W.D. Okla. 2012); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012); *Morrison v. Anadarko Petroleum Co.*, 280 F.R.D. 621 (W.D. Okla. 2012); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646 (W.D. Okla. 2011).

complex post-judgment collection process. And even when Defendants finally paid the judgment, the act doing so was contentious and bitterly litigated. And now, even after paying, Defendant vows to appeal until Kingdom come. The fact that Class Counsel litigated—and continues to litigate—such difficult issues against the *vigorous* opposition of highly skilled defense counsel and obtained, protected, collected, and continues to fight to protect a significant recovery for the Class further supports the fee request in this case.

vi. The Skill Required to Perform the Legal Service Properly and the Experience, Reputation, and Ability of the Attorneys

The third and ninth 2023 Factors—the skill required to perform the legal services and the experience, reputation, and ability of the attorneys—also supports the Fee request. Our team relied upon our considerable collective skill and experience in oil-and-gas and complex class-action litigation to bring this case to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop and prevail against creative legal theories, the expertise to try a case of this magnitude, the knowledge and wherewithal to navigate and withstand repeated post-judgment appeals, and the creativity and courage to stand up for the Class's rights and this Court's authority when Defendants refused to pay the Final Judgment. *See* Ex. 1 at ¶74; Ex. 7 at ¶84; Ex. 19 at ¶10.

Class Counsel and Liaison Local Counsel include some of the most successful attorneys in Oklahoma history, including, among others, a former federal judge—and chief judge of this District; a former United States Attorney; the preeminent oil-and-gas lawyer in Oklahoma; and one of the nation's top class action trial lawyers. *See* Ex. 1 at ¶74. Class Counsel are highly experienced in class-action, commercial, *qui tam*, mass-tort, securities, and other complex litigation, and have successfully prosecuted and settled numerous class actions, including oil-and-gas class actions like this one. *Id.* at ¶¶ 11, 20-21, 74; Exs. 3-5. Class Counsel have taken on some

of the world's largest corporations in contingent-fee litigation, including members of the tobacco industry, the pharmaceutical industry, and the energy industry. Ex. 1 at Ex. A; Ex. 3 at Ex. A; Ex. 4 at ¶11; Ex. 5 at Ex. 1. Class Counsel consist of some of the most experienced complex-litigation attorneys in the country. Utilizing creativity and zealous advocacy, the attorneys that make up Class Counsel have achieved huge results for their clients—including the historic results in this case. *Id.*

Class Counsel have years of experience litigating royalty-underpayment and statutory-interest class actions in Oklahoma state and federal courts. This case—and, specifically, those issues that dealt with whether a demand is required before a defendant must pay interest owed—involved strategies deployed and work done by Nix Patterson and Barnes & Lewis for the benefit of all Oklahoma royalty owners, including Class Members here, in a declaratory-judgment action that declared these rights under Oklahoma law and for which neither firm ever sought payment. *See Pummill v. Hancock Exploration LLC,* 419 P.3d 1268 (Okla. Civ. App. 2018); Ex. 1 at ¶¶15, 87. Incredibly, even though Class Counsel tried and won that case, Defendants tried to rewrite and distort its outcome here, thus further proving the skill required to win the case.

Nix Patterson ("NP") regularly represents plaintiffs in royalty, working-interest-owner, and overriding-working-interest-owner class actions, as well as other complex commercial and consumer class-action litigation. *See* Ex. 1 at Ex. A. NP has recovered billions for its clients, including $17.2 billion on behalf of Texas in the Texas Tobacco Litigation, over $3 billion for the State of Florida and other clients in litigation resulting from the Deepwater Horizon oil spill, and over a billion dollars for the State of Oklahoma and Indian Nations in their litigation against opioid companies, in which NP along with Whitten Burrage were named Trial Team of the Year by the National Trial Lawyers Association for their work in the nationally publicized trial against Johnson

& Johnson. Ex. 1 at ¶¶7, 53, 74 and at Ex. A. Over the past twenty years, NP has worked alongside a bi-partisan list of state attorneys general, including three different Oklahoma administrations, and the attorneys general of Alaska, Arkansas, Washington, Mississippi, Utah, and Montana. *Id.* at ¶10. NP also has extensive experience representing Oklahoma clients in complex commercial cases, including, for example, representing CompSource Oklahoma, the Oklahoma Teacher Retirement System, and the Oklahoma Law Enforcement Retirement System in litigation that resulted in combined settlements totaling over $680 million. *Id.* at ¶9.

The law firm of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC ("Ryan Whaley") is a litigation, energy, and environmental law firm based in Oklahoma City with national, regional, and state clients. *See* Ex. 3 at ¶15 and Ex. A. Ryan Whaley has litigated class actions and complex commercial cases in courts across the country. *Id*. With more than 53 years of experience in Oklahoma state and federal courts, Pat Ryan is best known for successful high-profile cases, including his work as U.S. Attorney in the prosecution and conviction of Oklahoma City bombing defendants Timothy McVeigh and Terry Nichols in Denver, Colorado, and securing the acquittal of a founder/CEO in one of the largest corporate fraud cases prosecuted by the U.S. Department of Justice. *Id*.

The law firm of Barnes & Lewis has been lead counsel in at least fourteen Oklahoma oil-and-gas class-action cases that have resulted in combined common funds exceeding $700 million. Ex. 4 at ¶11. Barnes & Lewis holds the distinction of having been lead counsel in the first oil-and-gas class action nationwide to have been successfully tried to a jury. *Id*. That jury verdict was upheld on appeal and resulted in a total common fund of approximately $110 million. *Id.*

The quality of representation by counsel on *both* sides of this litigation was high. Defendants are represented by skilled class-action defense attorneys who spared no effort in the

defense of their client. *See, e.g., In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976) (competence of defense counsel was significant factor in awarding attorney's fee). These factors strongly support the fee request.

vii. The Preclusion of Other Employment By the Attorneys and the Time Limitations Imposed by the Client or the Circumstances

The fourth and seventh 2023 Factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—support the fee request. Because the law firms comprising Class Counsel are relatively small, Class Counsel necessarily were limited in their ability to work on other cases and pursue otherwise available opportunities due to their dedication of time and effort to this litigation. *See, e.g.,* Ex. 1 at ¶84. This case was filed in state court in July of 2017, and it has required significant time, manpower, and resources from Class Counsel over that period. *Id.* at ¶56. Indeed, it is the ***rare*** class-action case that must be tried to a final judgment. It is rarer still for such a case to involve ***nine*** appeals (and counting). And it is perhaps the rarest of all that a final judgment must be enforced against fully solvent Defendants through recording the Final Judgment in state courts, issuing and serving garnishment summonses on more than a dozen highly sophisticated businesses, and moving for default in those garnishment proceedings just to get the Final Judgment paid. This case has required more work and risk than any other royalty class action Class Counsel have ever been involved in, and the post-trial work is unparalleled. *Id.* at ¶84. This case seems to be unending and the work required to end it is still preclusive of other endeavors.

Class Counsel have spent substantial time and effort in litigating this case through trial, numerous appeals, a complex collection process, and overseeing other post-judgment procedures. *Id*. ¶¶ 55-73; *see also* Ex. 3 at ¶¶5-6, 8, 21; Ex. 4 at ¶¶5-6, 15 . Significant time limitations have been imposed on Class Counsel throughout the course of this litigation. A case as large and

complex as this one requires the commitment of a significant percentage of the total time and resources of firms the size of those comprising Class Counsel. *Id*. Accordingly, these factors support the fee request.

viii. The Undesirability of the Case

The tenth 2023 Factor—the undesirability of the case—also supports the fee request. Compared to most civil litigation, *even most statutory interest cases*, this litigation clearly fits the "undesirable" test. *See* Ex. 1 at ¶¶84-87. Few law firms would be willing or able to risk investing the time, trouble, and expenses necessary to prosecute this litigation for five-and-a-half years, through trial, nine appeals, and an extensive post-judgment collection campaign. *Id*. ¶¶ 55-73. There was no doubt from the beginning that this case would be a lengthy undertaking. And the investment by Class Counsel of their time, money, and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most firms from taking a case like this at all.

Moreover, this Litigation involved a number of uncertain legal and factual issues, many of which Class Counsel were required to litigate to judgment and through numerous appeals. *Id*. at ¶86. And Defendants are ***still*** attempting to re-raise these issues in any forum that will hear them. In another complex royalty class action, one Oklahoma state court explained:

> Few law firms are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels.

Fitzgerald Farms, 2015 WL 5794008, at *8. That sentiment applies here with equal force.

ix. The Nature and Length of the Professional Relationship with the Client

The eleventh 2023 Factor—the nature and length of the professional relationship with the client—also supports the fee request. Perry Cline was and remains very active in this litigation. *See* Ex. 2 at ¶¶17-18, 20-21. Unlike most class cases, the Court here got to see Perry Cline first hand and observed him and his relationship with Class Counsel. It was self-evident that Mr. Cline is a real ***Representative*** who knows how to stand up for himself and other people. He is no pawn. *See* Ex. 1 at ¶¶33-36, 41. The fact that someone like Mr. Cline negotiated a 40% fee when he agreed to serve as Class Representative, did all that he did (and continues to do in this case), and still supports the fee request is strong evidence that the fee is fair and reasonable through the lens of an Oklahoma royalty owner. *See* Ex. 2 at ¶7; Ex. 1 at ¶41. And, as discussed above, so do other Class Members, including two highly respected oil-and-gas attorneys who have served as class representatives. *See, e.g.*, Ex.1 at ¶41; Ex. 8 at ¶16; Ex. 9 at ¶7; Ex. 13 at ¶9. This factor supports Class Counsel's fee request.

In sum, the 2023 Factors analysis demonstrates the 40% fee request is reasonable.

2. Lodestar Cross-Check

In *Strack*, although the Court held that trial courts may use *either* the percentage of the recovery or lodestar approach, the Court stated that courts using one method *should* compare the results of both methods. 507 P.3d at 616. If the Court chooses to conduct a lodestar cross check here, under Oklahoma law, the lodestar method has two steps: (1) determine counsel's base "lodestar" by multiplying the number of hours spent by the applicable hourly rate(s), and (2) determine an appropriate multiplier through consideration of the 2023 Factors. *See Strack*, 507 P.3d at 614. The second step—the multiplier analysis—is mandatory. *See id.* at 616 (["Section 2023] sets out factors that courts ***shall*** consider to assess the reasonableness of attorney's fees."

(emphasis in original)). Essentially, the Court would look again at the time-and-labor factor, and each of the factors analyzed above, to ensure that the requested fee is reasonable. And when used as a cross-check, "courts in nearly every circuit have held that … they need not scrutinize each individual billed hour, but may instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." 5 *Newberg and Rubenstein on Class Actions* § 15:86 (6th ed.); *see also Report of the Third Circuit Task Force on Court Awarded Attorney Fees*, 108 F.R.D. 237, 246 (1986) (detailing the problems with the lodestar approach, including chiefly that it "increases the workload of an already overtaxed judicial system"). As discussed in detail above, the record here clearly demonstrates that the fee award appropriately reflects the degree of time and effort expended by Class Counsel.

Class Counsel and Liaison Local Counsel have collectively spent over 12,702 hours of attorney and paraprofessional time prosecuting this litigation behalf of the Class. *See* Ex. 1 at ¶81; Ex. 3 at ¶21; Ex. 4 at ¶15; Ex. 5 at ¶20; Ex. 6 at ¶9. (Class Counsel have also submitted detailed time records, *see* Ex. 20). Moreover, Class Counsel and Liaison Local Counsel anticipate spending hundreds of hours resolving Defendants' pending appeal and distributing the Judgment Fund.

Class Counsel's hourly rates range from $250 per hour for paralegals to $1,075 per hour for the most senior attorneys. *See See* Ex. 1 at ¶81; Ex. 3 at ¶21; Ex. 4 at ¶15; Ex. 5 at ¶20; Ex. 6 at ¶9. These rates are in line with those approved by the Oklahoma Supreme Court in *Strack* as commensurate with the "highly specialized legal services" required in oil-and-gas class actions like this. *See* 507 P.3d at 617, n.10. Class Counsel's rates are also in line with those approved in similar, complex litigation across the country. *See* Ex. 7 at ¶¶93-99 and at Ex. C (approving NP rates ranging from $600–$1000/hr); *see also Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW, Dkt. No. 124 at ¶6 (E.D. Okla. Jan. 29, 2018). If anything, the data shows Counsel's rates

are undervalued, as many attorneys in counsel's league charge upward of $2,000 per hour for similar representation. Ex. 7 at ¶98. Based on the total combined time and the applicable hourly rates, Class Counsel's total combined lodestar (including past and anticipated future hours) is $9,379,078.00. *See* Ex. 1 at ¶¶81, 83; Ex. 3 at ¶21; Ex. 4 at ¶15; Ex. 5 at ¶20; Ex. 6 at ¶11; *see also* Ex. 7 at 57.

When conducting a cross-check to assess the reasonableness of the lodestar compared to the percentage requested, the court should look at the same statutory factors discussed in detail above. *See supra* § III.B.1 (analyzing each of the factors set forth in 12 OKLA. STAT. § 2023(G)(4)(e)). Class Counsel incorporate that analysis by reference here. That analysis demonstrates that the lodestar cross-check supports the percentage fee based on the facts and circumstances of this case. *See Newberg and Rubenstein on Class Actions* § 15:87 (6th ed.).

First, a 6.6 multiplier is within the range of multipliers approved in common-fund cases. *See* 1 Conte, *Attorney Fee Awards* § 2:6 (3d ed. June 2022 Update) § 2:6 ("some courts reach a reasonable fee determination based on large multiples of ***five or 10 times*** the lodestar. … multiples ranging from ***two to four*** are becoming ***standard*** in common-fund cases when the lodestar method is employed."); 4 Conte & Newberg, *Newberg on Class Actions* § 13:80 at 494, 497-98 (4th ed. 2002) ("Some courts will award fees pursuant to the percentage method even when the percentage fee exceeds the lodestar fee by ***three times or more***."); *see also Strack*, 507 P.3d at 616 (citing these sections of Conte and Conte & Newberg). The multiplier is within the range approved by Oklahoma district courts in oil-and-gas class actions. *See Fitzgerald Farms,* 2015 WL 5794008, at *8 ("In a large common fund case such as this one, the lodestar multiplier in Oklahoma ranges from 5.25 to 8.7." (collecting cases)); *see also Chieftain Royalty Co. v. SM Energy Co*., No. 18-

cv-1225-J Dkt., No. 102 (Gensler Decl.) at ¶45 (W.D. Okla. Mar. 29, 2021); Ex. 1 at Ex. B; *see also* Ex. 7 at ¶¶109-123.

Second, the multiplier is well deserved based on Class Counsel's work in this case, the contingent nature of the contract and case, and the results obtained. If the goal of a cross-check is to compare the results of one method to the results of the other in order to arrive at a reasonable fee, then the enhancement required under the lodestar cross-check here, while at the higher end of the range, would yield a result in line with the percentage-of-the-fund method. As discussed multiple times above, Class Counsel's efforts in this case have been truly remarkable. This case warrants a 40% fee, even if a lodestar cross-check would require a multiplier on the high end.

IV. CONCLUSION

Class Counsel respectfully request the Court enter an order granting approval of the fee request in the amount of 40% of the Judgment Comment Fund.

DATED: January 31, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023 I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Bradley E. Beckworth
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