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

CHIEFTAIN ROYALTY COMPANY and CASTLEROCK RESOURCES, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 18-cv-00054-JFH-JFJ
BP AMERICA PRODUCTION COMPANY,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES, PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT, APPROVE FORM AND MANNER OF NOTICE AND SET DATE FOR FINAL APPROVAL HEARING

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I. INTRODUCTION

Plaintiffs and Plaintiffs' Counsel have achieved an outstanding recovery for the Settlement Class as a result of their vigorous prosecution of this Litigation.[1] Specifically, Plaintiffs have reached a settlement with Defendant providing for a cash payment of $15,000,000.00 (the "Gross Settlement Fund") to compensate the Settlement Class for past damages. Plaintiffs submit this Memorandum in support of their Motion to Certify the Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (the "Preliminary Approval Motion") and respectfully request the Court enter the Proposed Order Certifying the Class for Settlement Purposes, Preliminarily Approving the Settlement and Form and Manner of Notice, and Setting Date for Final Fairness Hearing (the "Preliminary Approval Order").

The Preliminary Approval Order will, *inter alia*: (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiffs as Class Representatives for the Settlement Class; (4) appoint Nix Patterson, LLP, Ryan Whaley Coldiron Jantzen Peters & Webber PLLC ("Ryan Whaley"), and Barnes & Lewis LLP as Class Counsel for the Settlement Class, and Whitten Burrage as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notice; (6) appoint a Settlement Administrator; and (7) set a hearing date for final approval of the Settlement and application for an award of Attorneys' Fees, Litigation Expenses, and Case Contribution Award to Plaintiffs.

[1] All capitalized terms not otherwise defined herein shall have the meaning given to them in the August 16, 2021 Stipulation and Agreement of Settlement ("Settlement Agreement"), a copy of which is attached hereto as Exhibit 1.

II. SUMMARY OF THE LITIGATION

This action was initiated on December 27, 2017 with the filing of Plaintiff Chieftain Royalty Company's ("Chieftain") Original Petition against Defendant in the District Court of Nowata County, State of Oklahoma, Case No. CJ-17-65 (the "Petition"). On January 23, 2018, Defendant removed the Litigation to the United States District Court for the Northern District of Oklahoma pursuant to the Class Action Fairness Act of 2005 ("CAFA"), claiming diversity jurisdiction under 28 U.S.C. § 1332(d) and the amount in controversy exceeded $5,000,000.00, exclusive of interest and costs. *See* Notice of Removal at 3 (Dkt. No. 2).

In the Petition, Chieftain alleged Defendant ignored its obligation under Oklahoma law to pay statutory interest to owners entitled to receive oil and gas proceeds through a uniform policy and practice by which it did not pay statutory interest to any owner unless they specifically requested Defendant do so. *See, e.g.,* Petition, ¶¶1, 6-7, 44. Based on these allegations, Chieftain brought claims for breach of statutory obligation to pay oil and gas proceeds and interest, breach of duty to investigate and pay, fraud, accounting and disgorgement, and injunctive relief. *Id*. ¶¶41-74. On September 10, 2018, Chieftain filed a First Amended Complaint ("FAC") adding Castlerock Resources, Inc. as a plaintiff and a claim for constructive fraud. *See* Dkt. No. 39. On October 8, 2018, Defendant filed a Motion to Dismiss (Dkt. No. 46), seeking dismissal of a distinct subset of putative class members on the basis Defendant was unable to locate them and paid their oil and gas proceeds to the State. *Id*. at 1.

Plaintiffs responded to the Motion to Dismiss and concurrently moved to file an amended complaint to include in the class definition those unlocated Owners for whom Defendant did not include earned statutory interest along with oil and gas proceeds when Defendant paid the Owners' monies over to the State Corporation Commission or to the State Treasurer's Unclaimed Property

Fund. *See* Dkt. Nos. 51, 53. The Court granted Plaintiffs leave to amend (Dkt. No. 54) and denied the Motion. Dkt. No. 74.[2]

On March 20, 2019, Defendant filed a Motion for Partial Summary Judgment seeking a ruling that Plaintiffs' claims as royalty owners entitled to proceeds from gas production were precluded by a judgment entered in another case, *Cecil v. BP America Production Co.*, No. 16-CV-410-KEW (E.D. Okla.). *See* Dkt. No. 72. Due to an exclusionary clause in the *Cecil* settlement, Defendant did not move for summary judgment as to Castlerock's claims as a working interest owner or overriding royalty interest owner. Dkt. No. 72 at 1. The Court granted Defendant's Motion in part and denied it in part, *see* Dkt. No. 122, holding that Plaintiffs' claims for Untimely Payments for oil production were not precluded. *Id*. at 14.

On August 27, 2020, the Parties moved the Court to stay the case to allow the Parties time to, *inter alia*, explore settlement possibilities. Dkt. No. 140. The Court granted the stay with the proviso that the Parties file a joint status report as to discovery and settlement on December 1, 2020, February 1, 2021 and on April 1, 2021. Dkt. No. 141. Accordingly, the Parties provided the Court with periodic status reports regarding the status of discovery and said settlement negotiations. *See* Dkt. Nos. 142, 144, and 146. On March 3, 2021, the Parties participated in an all-day mediation during which they tentatively agreed upon an amount for the settlement subject to further negotiations to attempt to reach an agreement on the remaining material terms of settlement. Dkt. No. 146. Accordingly, per joint request by the Parties, the Court granted additional stays to allow resolution of the remaining terms. *See* Dkt. Nos. 148-157. Thereafter, the Parties

[2] Since the proposed amendment was identical to the FAC filed on September 10, 2018 (Dkt. No. 39), the amended complaint was accepted and deemed filed with retroactive leave of court. Dkt. No. 74. Defendant subsequently filed an Answer to the FAC and asserted a counterclaim against Castlerock for breach of contract and money had and received, which was later dismissed. *See* Dkt. Nos. 111-112, and 117.

engaged in an extensive negotiation process over several months. After reaching an agreement on all material terms, the Parties executed the attached Settlement Agreement. The Settlement would not have been possible without the extensive discovery campaign, document review, depositions, motion practice, and proceeds payment analysis conducted by Plaintiffs' Counsel and their experts.

Plaintiffs and Plaintiffs' Counsel prosecuted this Litigation for nearly three years, which included Plaintiffs engaging in discovery related to the merits and class certification. Plaintiffs' litigation efforts also included key depositions of Defendant's corporate representatives, research, accounting review and analysis, consultation by and with experts, settlement negotiations among counsel, damage modeling, and other investigations and preparation. Plaintiffs and Plaintiffs' Counsel each attest that the information, documents, materials, and testimony elicited during discovery—which was the result of extensive preparation, document review, legal research and expert analysis on class certification, liability and damages—undoubtedly contributed to the outstanding Settlement now before the Court.

III. ARGUMENT

A. The Court Should Certify the Settlement Class for Settlement Purposes

One of the Court's functions in reviewing a proposed settlement before the putative class has been certified is to determine whether the action may be maintained as a class action under Federal Rule of Civil Procedure 23 ("Rule 23"). *See, e.g.*, *Tennille v. Western Union Co*., 785 F.3d 422, 430 n.4 (10th Cir. 2015); *In re Motor Fuel Temperature Sales Practices Litig*., 271 F.R.D. 263, 278 (D. Kan. 2010); *Lucas v. Kmart Corp*., No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 21521, at *5 (D. Colo. Mar. 22, 2006). Trial courts have "considerable discretion" in making class certification decisions. *DG v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010); *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 790 (10th Cir. 2019) (review of court's class

certification decision is "highly deferential"). The Tenth Circuit defers to a trial court's certification ruling "if it applies the proper Rule 23 standard and its 'decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand.'" *Devaughn, supra* (citation omitted); *Naylor Farms*, 923 F.3d at 791. However, in the settlement context, courts need not inquire into trial manageability under Rule 23(b)(3)(D). *Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. at 269.

Here, the Parties have stipulated to: (i) the certification, for settlement purposes only, of the Settlement Class (as defined below), pursuant to Rules 23(a) and (b)(3); (ii) the appointment of Plaintiffs as class representatives; and (iii) the appointment of Nix Patterson, LLP, Ryan Whaley and Barnes & Lewis LLP as Class Counsel and Whitten Burrage as liaison local counsel. *See* Settlement Agreement, ¶1.33, Exhibit 1. Accordingly, Plaintiffs move the Court to certify a Settlement Class consisting of:

> All non-excluded persons or entities:
>
> (1) who received during the Claim Period a Late Payment from Defendant (or Defendant's designee) of Oklahoma Proceeds and whose payments did not also include the statutory interest prescribed by the PRSA;
>
> (2) whose Oklahoma Proceeds were, during the Claim Period, paid over by Defendant (or Defendant's designee) to various state agencies as unclaimed or abandoned property without the payment of statutory interest prescribed by the PRSA; or
>
> (3) who, during the Claim Period, were legally entitled to Oklahoma Proceeds held by Defendant (or Defendant's designee) in suspense accounts for more than the applicable time periods prescribed in the PRSA without the payment by Defendant (or Defendant's designee) or earning/accruing of statutory interest prescribed by the PRSA for the benefit of such owners.
>
> The persons or entities excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America; (2) Commissioners of the Land Office of the State of Oklahoma (CLO); (3) publicly traded oil and gas companies and their affiliates; (4) persons or entities (and their affiliates) who are the Oklahoma Corporation Commission (OCC) designated operator of more than fifty

> (50) Oklahoma wells in September 2018; (5) persons or entities that Plaintiffs' counsel ethically are prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct, which Plaintiffs affirmatively represent includes, but is not limited to, Charles David Nutley, Danny George, Dan McClure, Kelly McClure Callant, William L. Galbreath, Verdeen L. Slatten, Jack A. Slatten, Verdeen L. Slatten Family Limited Partnership, Neva M. Dorman, Ann Ellis Boles, Fischer-Jones, LLC, B.N. Taliaferro, Jr. individually and as Trustee of the B.N. Taliaferro Management Trust, Jack B. Searle, Tamara D. Searle, OGI, Inc., and their relatives; (6) officers of the Court; and (7) owners in regard to whom Defendant is required by the PRSA to pay proceeds annually for the 12 month accumulation of proceeds totaling less than $100.00, provided however, this exclusion of so-called "minimum pay" owners does not apply to interest claims for other 12 month period accumulations of proceeds when the same owner was entitled to $100 or more and thus not in a "minimum pay" status.

Settlement Agreement, ¶1.46.

Certification of the Settlement Class for settlement purposes will further the interests of Settlement Class Members and Defendant by allowing this Litigation to be settled on a class-wide basis. Moreover, as demonstrated below, the relevant requirements of Rule 23 are satisfied. Therefore, the Court should certify the Settlement Class for settlement purposes.

1. Numerosity

Rule 23(a)(1) requires "the class [be] so numerous that joinder of all members is impracticable." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 n.1 (10th Cir. 2010); *Oregon Laborers Emplrs. Pension Trust Fund v. Maxar Techs*., No. 19-cv-0124-WJM-SKC, 2021 U.S. Dist. LEXIS 132621, at *5 (D. Colo. July 16, 2021) (in analyzing numerosity, " 'the exact number of potential members need not be shown,' and a court may make 'common sense assumptions' to support a finding that joinder would be impracticable") (citations omitted). Here, the Settlement Class consists of thousands of owners dispersed throughout Oklahoma, making joinder of all Class Members impracticable. *See* FAC, ¶17; *Horn v. Associated Wholesale Grocers, Inc*., 555 F.2d 270, 275 (10th Cir. 1977) (holding a class as small as 46 sufficient); *Harris v. Chevron U.S.A., Inc*., No. CIV-15-94-PRW, 2019 U.S. Dist. LEXIS 195263, at *12 (W.D. Okla.

July 29, 2019) (Purcell, J.) (noting settlement class of 100 to 150 members was "within the range that generally satisfies the numerosity requirement" and that "where class comprises over 1,100 persons, suggestion that joinder is not impractical is 'frivolous.'") (citations omitted). Moreover, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1, Exhibit 1. Accordingly, the numerosity factor is met.

2. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." A "common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Of course, "'[f]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist.'" *Beer v. XTO Energy, Inc*., No. CIV-07-798-L, 2009 U.S. Dist. LEXIS 23096, at *10 (W.D. Okla. Mar. 20, 2009) (citation omitted); *Heartland Commc'ns, Inc. v. Sprint Corp*., 161 F.R.D. 111, 116 (D. Kan. 1995). Plaintiffs need only show a single issue common to all members of the class. *See Devaughn*, 594 F.3d at 1195; 1 Herbert B. Newberg *et al*., NEWBERG ON CLASS ACTIONS § 3:10, at 272-73 (5th ed. 2011).

Many Oklahoma federal courts (including this Court) have certified similar class actions, finding common issues existed, both in the settlement context and in the litigation context. *See, e.g.*, *Harrel's LLC v. Chaparral Energy, LLC*, 923 F.3d 779 (10th Cir. 2019) (affirming class certification in royalty class action); *Hay Creek Royalties, LLC v. Roan Resources, LLC,* No. 19-CV-177-CVE-JFJ (N.D. Okla. Jan. 25, 2021), Dkt. No. 61 (granting preliminary approval of class settlement and certifying class for settlement purposes); *Miller v. DCP Operating Co. LP*, No. 6:18-cv-00199-JH (E.D. Okla. Apr. 12, 2021), Dkt. No. 80 (granting preliminary approval of class

settlement and certifying class for settlement purposes); *McClintock v. Enterprise Crude Oil LLC*, No. CIV-16-136-KEW (E.D. Okla. Dec. 16, 2020), Dkt. No. 104 (granting preliminary approval of class settlement and certifying class for settlement purposes); *Cline v. Sunoco, Inc.*, 333 F.R.D. 676 (E.D. Okla. 2019) (granting contested class certification motion in PRSA interest class action); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019), Dkt. No. 122 (Order and Judgment Granting Final Approval of Class Action Settlement); *Rhea v. Apache Corp.*, No. CIV-14-0433-JH, 2019 U.S. Dist. LEXIS 65381 (E.D. Okla., Feb. 15, 2019) (granting contested class certification motion for royalty class action); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018), Dkt. No. 102 (Order and Judgment Granting Final Approval of Class Action Settlement); *Reirdon v. XTO Energy Inc*., Case No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Dkt. No. 122 (Order Granting Final Approval) (certifying class for settlement purposes); *Chieftain v. XTO Energy Inc*., Case No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Dkt. No. 229 (Order Granting Final Approval) (certifying class for settlement purposes); *Chieftain Royalty Co. v. SM Energy Co., et al*., No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015), Dkt. No. 154 (Order of Judgment Granting Final Approval of Class Action Settlement) (certifying class for settlement purposes); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., No. CIV-12-1319-D, 2015 U.S. Dist. LEXIS 62450 (W.D. Okla. May 13, 2015) (same); *Chieftain Royalty Co. v. QEP Energy Co*., No. CIV-11-212-R, 2012 U.S. Dist. LEXIS 35842 (W.D. Okla. March 12, 2012); *Fankhouser v. XTO Energy, Inc*., No. CIV-07-798-L, 2010 U.S. Dist. LEXIS 133345 (W.D. Okla. Dec. 16, 2010); *Hill v. Kaiser-Francis Oil Co*., No. CIV-09-07-R, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. June 9, 2010); *Hill v. Marathon Oil Co*., No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. June 9, 2010); *Naylor Farms v.*

Anadarko OGC Co., No. CIV-08-668-R, 2009 U.S. Dist. LEXIS 127516 (W.D. Okla. Aug. 26, 2009).

Here, many questions of law and fact exist that could be answered uniformly for the Settlement Class using common evidence. Indeed, all of the common issues in this case stem from a single underlying tenet of Oklahoma law: the obligation of payors of oil and gas proceeds to pay statutory interest as set forth in the Production Revenue Standards Act ("PRSA") without awaiting a request for that interest from owners entitled to receive it. *See* 52 O.S. § 570.10; FAC, ¶20. Plaintiffs allege Defendant followed a uniform practice of not paying statutory interest until an owner requests it and that this practice presents numerous common questions of fact and law. FAC, ¶18. Such common questions include, among others: (1) whether Defendant's alleged uniform practice violates the PRSA; and (2) whether Defendant defrauded Plaintiffs and the Settlement Class by allegedly failing to pay statutory interest without a request and allegedly failing to disclose entitlement to statutory interest. *Id*.

Clearly, there are questions of law and fact common to members of the Settlement Class. Moreover, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1, Exhibit 1. Accordingly, the commonality requirement is satisfied.

3. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." However, "'[e]very member of the class need not be in a situation identical to that of the named plaintiff'" to meet the typicality requirement. *Devaughn*, 594 F.3d at 1195 (citation omitted). Rather, "[p]rovided the claims of Named Plaintiffs and class

members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." *Id*. at 1198-99.

Here, Plaintiffs' claims are typical of the Settlement Class' because Defendant allegedly treated all owners in the same manner for purposes of paying statutory interest. That is, the same legal theories and fact issues underlie the Settlement Class' claims because Plaintiffs allege Defendant engaged in a common course of conduct to deprive the Settlement Class of statutory interest and misrepresented and/or omitted the amount of statutory interest owed to the Settlement Class. *See, e.g.,* FAC, ¶¶6, 16-20. As a result, all Class Members who received a late payment under the PRSA, or failed to receive the interest owed under the PRSA, suffered the same injury arising out of the same facts and all Class Members will benefit from the Settlement Agreement, and the same evidence could be used to establish Defendant's liability.

Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1, Exhibit 1. Thus, Plaintiffs' claims are typical of the claims of every Class Member.

4. Adequacy of Representation

Rule 23(a)(4) requires Plaintiffs to show they "will fairly and adequately protect the interests of the class." In the Tenth Circuit, the adequacy requirement is satisfied when (i) neither plaintiff nor its counsel has interests that conflict with the interests of other class members and (ii) plaintiff will prosecute the action vigorously through qualified counsel. *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1188-89 (10th Cir. 2002). First, to defeat certification, a conflict must be fundamental and go to specific issues in controversy; minor conflicts will not suffice. *See Tennille*, 785 F.3d at 430-31; *see also Fankhouser*, 2010 U.S. Dist. LEXIS 133345, at *14-15. Here, there are no conflicts—minor or otherwise—between Plaintiffs and other members of the

Settlement Class. To the contrary, Plaintiffs have had every incentive to vigorously prosecute this Litigation on behalf of the Settlement Class.

Second, Plaintiffs have prosecuted this Litigation vigorously through qualified counsel. Plaintiffs have demonstrated their dedication to this matter through participation in all aspects of the Litigation. Such dedicated conduct demonstrates that Plaintiffs understand their duties and obligations to the Settlement Class and accept them willingly.

Further, there is no dispute that Plaintiffs' Counsel is adequate and has successfully prosecuted numerous class actions and other complicated litigation in federal courts throughout the country. The Court can take judicial notice that counsel is qualified and experienced to conduct this Litigation. FED. R. EVID. 201. Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1, Exhibit 1. Accordingly, adequacy is met.

5. Predominance

Rule 23(b)(3) requires "questions of law or fact common to class members predominate over any questions affecting only individual members." "'The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation'" by asking "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (citation omitted); *see also, e.g.*, *CGC Holding Co., LLC v. Hutchens*, 773 F.3d 1076, 1087 (10th Cir. 2014) (same); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014) ("Class-wide proof is not required for all issues. Instead, Rule 23(b)(3) simply requires a showing that the questions common to the class predominate over individualized questions."). Thus, when "one or more of the central issues in the action are common to the class and can be said to predominate,

the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S.Ct. at 1045 (citation omitted); *see also In re Syngenta AG Mir 162 Corn Litig*., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, at *1369-70 (D. Kan. Sept. 26, 2016) (same). And, where, as here, Plaintiffs' claims stem from a "'common nucleus of operative facts,'" common issues predominate, and certification is appropriate. *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002).

Defendant allegedly engaged in a common course of conduct to deprive Class Members of statutory interest by improperly withholding statutory interest on payments made outside the time periods set forth in the PRSA, and money held in suspense beyond the time frames set forth in the PRSA, until an owner specifically requested the statutory interest and concealing the amount of statutory interest an owner was entitled to. FAC, ¶¶16-47. This allegedly common conduct gave rise to each Class Member's claims, resulting in a sufficiently cohesive Settlement Class to warrant adjudication by representation.[3]

[3] Numerous Oklahoma federal courts have certified classes in broader and much more complex royalty litigation. *See, e.g.*, *Chieftain Royalty Co. v. SM Energy Co.*, No. 5:18-cv-01225-J (W.D. Okla. Apr. 27, 2021) (Dkt. No. 114) (certifying class for settlement purposes only); *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, *et al.,* No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015) (Dkt. No. 154) (certifying class for settlement purposes only); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., No. CIV-12-1319-D, 2015 U.S. Dist. LEXIS 177692, at *5-7 (W.D. Okla. Dec. 29, 2014) (certifying class (for settlement purposes only) of over 5,000 royalty owners involving various lease forms); *QEP*, 2012 U.S. Dist. LEXIS 35842, at *7-9 (same); *Fankhouser*, 2012 U.S. Dist. LEXIS 133345, at *10-11, 18 (certifying class of more than 2,000 royalty owners with interests in 290 different wells); *Hill v. Kaiser-Francis Oil Co*., No. CIV-09-07-R, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. June 9, 2010) (certifying a class of 29,000-44,000 royalty owners with interests in over 1,000 different wells); *Hill v. Marathon Oil Co*., No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. June 9, 2010) (certifying a class of 11,000 royalty owners involving various lease forms); *Naylor Farms*, 2009 U.S. Dist. LEXIS 127516, at *13-14, 24 (certifying class action involving 15 categories of lease royalty provisions).

Because every Class Member's claims arise from Defendant's alleged systematic and uniform statutory interest calculation and payment methodology, common questions predominate over any individual issues. FAC, ¶¶18-20. Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1, Exhibit 1. Accordingly, predominance is met.

6. Superiority

Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. The matters pertinent to a finding of superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3). However, "[i]n deciding whether to certify a settlement class, the Court need not inquire whether the case, if tried, would present difficult management problems under Rule 23(b)(3)(D)." *Motor Fuel*, 271 F.R.D. at 269; *see also Lucas*, 2006 U.S. Dist. LEXIS 21521, at *15.

The superiority requirement is easily met. No Class Member has filed an individual action to Class Counsel's knowledge. Further, because this case has been litigated in this Court, concentrating the Litigation in this forum is desirable. There are no anticipated difficulties in managing this case as a class action for settlement purposes only. Moreover, Defendant agrees the Settlement Class should be certified for settlement purposes. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

B. The Court Should Grant Preliminary Approval of the Proposed Settlement

Courts strongly favor settlement as a method for resolving disputes. *Sears v. Atchison, Topeka & Santa Fe Ry., Co*., 749 F.2d 1451, 1455 (10th Cir. 1984); *see also Trujillo v. Colo*., 649 F.2d 823, 826 (10th Cir. 1981) (citing "important public policy concerns that support voluntary settlements"); *Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354 (10th Cir. 1972). Indeed, settlements are strongly favored in complex class actions such as this one. *See Tuten v. United Airlines, Inc*., 41 F. Supp. 3d 1003, 1007 (D. Colo. 2014)(noting "strong presumption" in favor of settlements "is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. ... Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts.") (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010)); *see also Big O Tires, Inc. v. Bigfoot 4x4, Inc*., 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001).

Under Federal Rule of Civil Procedure 23(e), the trial court must approve a class action settlement. FED. R. CIV. P. 23(e). The procedure for review of a proposed class action settlement is a well-established two-step process. *Pliego v. Los Arcos Mexican Restaurants, Inc*., 313 F.R.D. 117, 128 (D. Colo. 2016); *In re Motor Fuel Temperature Sales Practices Litig*., 258 F.R.D. 671, 675 (D. Kan. 2009); *see also* MANUAL FOR COMPLEX LITIGATION § 13.14 (4th ed. 2004). First, the court conducts a preliminary approval analysis to determine if there is any reason not to notify the class or proceed with the proposed settlement. *Lucas v. Kmart Corp*., 234 F.R.D. 688, 693 (D. Colo. 2006). Second, after the court preliminarily approves the settlement, the class is notified and provided an opportunity to be heard at a final fairness hearing where the court considers the merits

of the settlement to determine if it should be finally approved. *In re Motor Fuel*, 258 F.R.D. at 675; *accord* 4 NEWBERG ON CLASS ACTIONS § 13.12 (5th ed. 2011).

Plaintiffs request that the Court take the first step in this two-step process—preliminary approval. "The Court will ordinarily grant preliminary approval where the proposed settlement 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" *In re Motor Fuel*, 258 F.R.D. at 675 (quoting *Am. Med. Ass'n v. United Healthcare Corp.*, No. Civ. 2800 (LMM), 2009 U.S. Dist. LEXIS 45610, at *17 (S.D.N.Y. May 19, 2009)). While "[t]he standards for preliminary approval are not as stringent as those applied for final approval," courts frequently refer to the final approval factors to determine whether a proposed settlement should be preliminarily approved. *Id*. at 675-76, 680 ("While the Court will consider these factors in depth at the final approval hearing, they are a useful guide at the preliminary approval stage as well.").

The Tenth Circuit has identified four factors to consider when deciding whether to finally approve a class action settlement:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the Parties that the settlement is fair and reasonable.

Rutter, 314 F.3d at 1188; *see also, e.g.*, *Fager v. CenturyLink Commc'ns, LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016) (reciting *Rutter* factors for consideration of whether to finally approve class

settlement as fair, reasonable and adequate); *Tennille*, 785 F.3d at 434 (same).[4] As demonstrated below, each of these factors supports preliminary approval of the Settlement.

1. The Proposed Settlement Is the Product of Extensive Arm's-Length Negotiations Between Experienced Counsel

The first prong weighs in favor of preliminary approval because the Settlement was fairly and honestly negotiated. *See, e.g.*, *Reed v. Gen. Motors Corp*., 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid."). Here, prior to reaching the Settlement, Plaintiffs, through counsel, conducted extensive investigation, discovery, and research into the claims asserted, reviewed extensive data and consulted with experts. Further, the Settlement is the product of arm's-length negotiations between Plaintiffs and Defendant and their experienced counsel at a point when Plaintiffs and Defendant possessed more than sufficient evidence and knowledge to allow them to make informed decisions about the strengths and weaknesses of their respective cases. Plaintiffs, Defendant, and their respective lawyers were well prepared for the serious and intelligent negotiations that led to the Settlement. *In re Motor Fuel*, 258 F.R.D. at 675-76.

[4] Amendments to Rule 23(e), effective December 1, 2018, provide a list of certain factors courts should consider when determining whether a settlement is fair, reasonable, and adequate. Due to the obvious and significant overlap between the new statutory factors and the *Rutter* factors listed above, and because the Tenth Circuit has yet to address what effect, if any, the amendments have on the application of the *Rutter* factors, only the *Rutter* factors are addressed herein. *See In re Samsung Top-load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig*., No. 17-ML-2792-D, 2020 U.S. Dist. LEXIS 90759, at *46 n.11 (W.D. Okla. May 22, 2020) (DeGiusti, C.J.) ("Although the *Rutter* factors predate the 2018 amendments to Rule 23, the considerations largely overlap, and the amended rule does not displace the earlier guidance."), *aff'd sub nom. In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig*., 997 F.3d 1077 (10th Cir. 2021); *see also Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 807 F. App'x 752, 757-62 (10th Cir. 2020)(affirming approval of class action settlement under *Tennille*), *cert. denied sub nom. Gonzalez v. Elna Sefcovic, LLC*, 141 S. Ct. 851, 208 L. Ed. 2d 425 (2020).

The Settlement is the product of serious, and informed negotiations among experienced counsel. Therefore, the first factor—that the Settlement be fairly and honestly negotiated—supports preliminary approval.

2. Serious Questions of Law and Fact Exist

Additionally, serious questions of law and fact exist, placing the ultimate outcome of this Litigation in doubt. "Although it is not the role of the Court at this stage of the litigation to evaluate the merits…it is clear that the Parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact the case if it were litigated." *Lucas*, 234 F.D.R. at 693-94 (citation omitted). The presence of questions of law and fact "tips the balance in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 U.S. Dist. LEXIS 86741, at *31-41 (W.D. Okla. Oct. 27, 2008); *see also, e.g.*, *Tennille*, 785 F.3d at 435 (affirming final approval of class settlement where "serious disputed legal issues" rendered "the outcome of th[e] litigation...uncertain and further litigation would have been costly").

Here, there are numerous factual and legal issues on which Plaintiffs and Defendant still disagree. Had the Parties not settled this Litigation, the Court or a jury would ultimately be required to decide these issues, placing the ultimate outcome of this Litigation in doubt. To this day, Defendant denies it committed any acts or omissions giving rise to any liability or violation of law. *See* Settlement Agreement, ¶11.1, Exhibit 1. Indeed, Defendant has always maintained its statutory interest policies—which form the basis of Plaintiffs' and the Settlement Class's claims—comply with Oklahoma law. Thus, Defendant has entered this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *See id*. While Plaintiffs are optimistic about their

chances of success at trial, there are several significant obstacles they would still have to overcome to achieve success on behalf of the Settlement Class. Put simply, serious questions of law and fact are still in dispute. Importantly, however, the meaningful Settlement of $15,000,000.00 in cash, renders the resolution of these questions unnecessary and provides a guaranteed recovery in the face of uncertainty.

Because serious issues of law and fact remain in dispute, the second factor supports preliminary approval of the Settlement.

3. The Value of the Immediate Recovery Outweighs the Mere Possibility of Future Relief After Long and Expensive Litigation

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also support approval of the proposed Settlement. This third factor is based on the premise that the Settlement Class "is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37. Here, the $15,000,000.00 Settlement is a significant and meaningful recovery that eliminates the risk and additional expense of further litigation. *See, e.g.*, *Tennille*, 785 F.3d at 435 (finding the fact that "without this class action, [the defendant] would have had no incentive to change its business practices" supported final approval of class settlement). Moreover, the immediate $15,000,000.00 Settlement must be compared to the risk the Settlement Class may recover nothing after hard-fought class certification, summary judgment, a grueling trial, and inevitable appeals likely extending years into the future. *See, e.g.*, *id.* at 434-36 (affirming final approval of settlement where district court balanced and "considered the serious legal questions that placed the litigation's outcome in doubt and the value of the immediate recovery provided by this settlement with only the possibility of a more favorable outcome after further litigation").

Although Plaintiffs are confident in their ability to achieve certification of the Class and succeed at trial, class certification and liability are never certain, and the potential obstacles to obtaining a final, favorable verdict are daunting. In addition, even assuming Plaintiffs succeeded in establishing liability at trial, the amount of damages would be hotly disputed, and Defendant would likely argue the Settlement Class is entitled to far less than the $15,000,000.00 provided by the Settlement. Moreover, after any final, favorable judgment is obtained, additional appeals would likely follow. When these uncertainties are compared to the immediate and substantial recovery of $15,000,000.00 in cash, it is clear the Settlement is in the best interest of Plaintiffs and the Settlement Class.

Accordingly, this third factor—the value of the immediate recovery compared to the mere possibility of future relief after long and expensive litigation—also supports preliminary approval of the Settlement.

4. Plaintiffs, Defendant and Their Counsel Believe the Proposed Settlement is Fair, Reasonable, and Adequate

Finally, Plaintiffs, Defendant and their Counsel agree the Settlement is fair, reasonable, and adequate. "Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Lucas*, 234 F.R.D. at 295 (quoting *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002)). "[T]he Court should . . . 'defer to the judgment of experienced counsel who has competently evaluated the strength of his proof.'" *Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 U.S. Dist. LEXIS 26379, *39 (N.D. Okla. May 13, 2003) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983)). In fact, "[w]hen a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus*, 209 F. Supp. 2d at 1182 (citing *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993)) ("[A]bsent evidence of fraud or

overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.").

Here, Plaintiffs' Counsel—which consists of law firms with considerable experience in Oklahoma class actions—only agreed to settle this action after extensive investigation, discovery, deposition testimony, data analyses, and rigorous arm's-length negotiations. Additionally, as noted above, Plaintiffs and Plaintiffs' Counsel have compared the substantial recovery the Settlement Class will receive from the resolution of this Litigation against the risks, delays, and uncertainties of continued litigation and appeals. Plaintiffs were involved in and stayed apprised of the Litigation and contributed to settlement negotiations. Plaintiffs and Plaintiffs' Counsel believe the Settlement is fair, adequate, and reasonable and should be approved. Defendant likewise believes the Settlement should be approved. As such, the fourth factor—that counsel believes the settlement is fair, adequate, and reasonable—supports preliminary approval.

Because all four factors weigh in favor of the Settlement, Plaintiffs respectfully request the Court grant preliminary approval of the Settlement.

C. The Court Should Preliminarily Approve the Proposed Notice of the Settlement to the Settlement Class

Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id*. Additionally, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." *Id*. In terms of content, a settlement notice need only be "reasonably calculated, under all of the circumstances, to apprise [the] interested Parties of the pendency of the [settlement proposed] and [to] afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950); *see also, e.g.*, *Fager*, 854 F.3d at 1170 (same); *Tennille*, 785 F.3d at 436 (same).

"'The hallmark of the notice inquiry . . . is reasonableness.'" *Lucas*, 234 F.R.D. at 696 (quoting *Sollenbarger v. Mountain States Tel. & Tel. Co*., 121 F.R.D. 417, 436 (D.N.M. 1988)).

Plaintiffs have submitted to the Court for approval the Notice of Proposed Settlement, Motion for Attorneys' Fees and Fairness Hearing (the "Notice") that will be distributed to the Settlement Class, as well as a summary Notice (the "Summary Notice") that will be published in various newspapers, and the Long Form Notice that will be available on the website and by direct mailing upon request (the "Long Form Notice"). The Notice of Settlement for mailing, Notice of Settlement for publication, and Long Form Notice (collectively, the "Notices") are attached to the Settlement Agreement as Exhibits 3, 4, and 5, respectively. As set forth in the Settlement Agreement, Plaintiffs and Defendant have agreed that, within thirty (30) days after entry of the Preliminary Approval Order, or at such time as is ordered by the Court, the Court-appointed Settlement Administrator shall begin disseminating the Notice by sending a copy of the Notice *via* first-class mail to the last known mailing address of each Class Member who can be identified with reasonable effort. Settlement Agreement, ¶3.5. Plaintiffs and Defendant further agreed that, within ten (10) days after mailing the first Notice of Settlement, or at such time as is ordered by the Court, the Settlement Administrator also shall publish (or cause to be published) the Summary Notice one time in each of the following newspapers: (a) *The Oklahoman*, a paper of general circulation in Oklahoma; (b) the *Tulsa World*, a paper of general circulation in Oklahoma; (c) *The Daily Ardmoreite*, a paper of local circulation; (d) the *Fairview Republican*, a paper of local circulation; (e) the *McAlester News-Capital*, a paper of local circulation; and (f) the *Holdenville Tribune*, a paper of local circulation. *Id.* Within ten (10) days after mailing the first Notice of Settlement and continuing through the date of the Final Fairness Hearing, the Settlement Administrator also will display (or cause to be displayed) on an Internet website dedicated to this

Settlement the following documents: (a) the Notice of Settlement, (b) the Long Form Notice (in substantially the same form as Exhibit 5), (c) the Complaint and Answer, (d) the Settlement Agreement, and (e) the Preliminary Approval Order. Settlement Agreement, ¶3.5. The Notices direct Class Members to this website for additional information including the Long Form Notice. It is not economically feasible to send the Long Form Notice to all Class Members. However, in addition to being available to view and download from the website, the Long Form Notice will be directly mailed to any Class Members who request it by contacting the Settlement Administrator. *Id*. And, of course, these documents will also be available on the Court's docket.

In accordance with Rule 23(c)(2)(B), the proposed Notice will inform Class Members about the Litigation, the proposed Settlement, and the facts they need to make informed decisions about their rights and options in connection with the Settlement and direct them to additional detailed information. Specifically, the Notices clearly describe: (i) the nature of the action; (ii) definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may have to enter an appearance through an attorney if the member so desires; (v) the court will exclude from the class any member who requests exclusion; (vi) the date, time, and place of the Final Fairness Hearing; (vii) ways to receive additional information about this Litigation and the proposed Settlement; and (viii) the binding effect of a class judgment. The Notices also provide Class Members with a toll-free number and email address for Settlement-related inquiries and a URL address for the dedicated Settlement website where Class Members may obtain additional information. Thus, the Notices are reasonably calculated to apprise the interested Parties of the pendency of the Settlement and afford them an opportunity to opt out or to object. As such, the form and manner of the proposed Notice meets the requirements of both Rule 23 and due process.

The Court should approve the Notices and the manner through which they will be delivered and communicated to the Settlement Class.

D. Appointment of JND Legal Administration as Settlement Administrator Is Proper

To accomplish the processing of requests for exclusion and the distribution of the Net Settlement Fund in accordance with a Court-approved plan of allocation and distribution, Plaintiffs respectfully request the Court appoint JND Legal Administration ("JND") as the Settlement Administrator. JND is a leading class action administration company that has handled many complex class action settlements. *See* www.jndla.com. Further, under the terms of the Settlement Agreement, Plaintiffs, Defendant and their Counsel will work directly with the Settlement Administrator for much of the notice, administration, and distribution processes. Thus, Plaintiffs respectfully request the Court appoint JND as the Settlement Administrator.

IV. CONCLUSION

Accordingly, for the foregoing reasons, Plaintiffs respectfully request the Court enter the agreed proposed Preliminary Approval Order, attached to the Preliminary Approval Motion as Exhibit 1, which will, *inter alia*, (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiffs as Class Representatives for the Settlement Class; (4) appoint Nix Patterson, LLP, Ryan Whaley and Barnes & Lewis LLP as Class Counsel for the Settlement Class, and Whitten Burrage as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notice; (6) appoint JND Legal Administration as Settlement Administrator; and (7) set a hearing date for final approval of the Settlement and application for an award of Attorneys' Fees, Litigation Expenses, and Case Contribution Award to Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2021, a true and correct copy of the above and foregoing document was served in accordance with the Local Rules on all counsel of record through the Court's CM/ECF filing system.

s/Bradley E. Beckworth
Bradley E. Beckworth