



Court: Grant County District Court
Case Number: 2016-CV-000039
Case Title: Cooper Clark Foundation vs. OXY USA Inc.
Type: Order Awarding Class Counsel Fees, Expenses, and Case Contribution Awards

SO ORDERED.

A handwritten signature in blue ink, which appears to read "Bradley Ambrosier". The signature is written in a cursive style and is positioned above the typed name of the judge.

/s/ Honorable Bradley Ambrosier, District Court
Judge

IN THE DISTRICT COURT OF GRANT COUNTY, KANSAS

COOPER CLARK FOUNDATION and
PHILLIP FINK,
on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

Oxy USA Inc.,

Defendant.

Case No. 2016-CV-39
LEAD CASE

Consolidated with:
Case No. 2016-CV-17
(Haskell County)
and
Case No. 2016-CV-13
(Morton County)
and
Case No. 2017-CV-3
(Grant County)

(Pursuant to Chapter 60)

**ORDER AWARDING CLASS COUNSEL FEES, LITIGATION EXPENSES,
ADMINISTRATION EXPENSES, AND CASE CONTRIBUTION AWARDS**

Before the Court is Class Counsel’s Motion for Award of Attorneys Fees, Expenses, and Case Contribution Awards (the “Motion”), wherein Class Counsel seeks entry of an Order approving Class Counsel’s request for: (1) Class Counsel Fees in the amount of \$3,000,000; (2) Litigation Expenses in the amount of \$135,403.02; (3) Administration Expenses in the amount of \$48,000; and (4) Case contribution awards in the amount of \$75,000, to be paid as follows: \$56,250 to Cooper Clark Foundation and \$18,750 to Phillip Fink. The Court has considered the Motion, all matters and evidence submitted in connection with the Motion, and the proceedings at the Settlement Fairness Hearing. As set forth more fully below, the Court finds the Motion should be **GRANTED**.

IT IS THEREFORE ORDERED as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement (Exhibit 1 to the Motion for Preliminary Approval) and all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court has jurisdiction to enter this Order and over the subject matter of the Litigation and all parties to the Litigation, including all Settlement Class Members.

3. The Notice stated that Class Counsel would seek fees of no more than 40% of the Common Fund Settlement Proceeds, to be paid from the cash value of the Settlement. The Notice also stated that Class Counsel would seek reimbursement of Litigation Expenses and Administration Expenses. The Notice further stated that Class Representatives would seek a Case Contribution Award not to exceed 1% of the Common Fund Settlement Proceeds. Notice of the requests was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the requests is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of K.S.A. 60-223, the Kansas Rules of Civil Procedure, and due process.

4. Class Counsel is hereby awarded Attorneys' Fees of \$3,000,000.00, to be paid from the cash value of the Settlement. In making this award, the Court makes the following findings of fact and conclusions of law:

- a. The Settlement has created a fund of \$7,500,000.00 in cash for payment to the Settlement Class. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representatives and Class Counsel.

- b. K.S.A. 60-223(h) states “the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” An award of attorneys’ fees is a matter uniquely within the discretion of the trial judge, who has firsthand knowledge of the efforts of counsel and the services provided. *See Freebird, Inc. v. Cimarex Energy Co.*, 46 Kan. App. 2d 631, 640, 264 P.3d 500, 508 (2011).
- c. In assessing the reasonableness of the requested fee, the Court considers: (1) the time and labor required; (2) the novelty and difficulty of the questions presented by the litigation; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorneys 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 attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); accord *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 223, 223–24, 679 P.2d 1159 (1984), *aff’d in part, rev’d in part, and remanded* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Not all factors apply in every case, and some deserve more weight than others depending on the facts at issue. *Brown v. Phillips Petroleum Co.*, 838 F. 2d 451, 454–55 (10th Cir. 1988).

- d. The Court finds that the eighth factor—the amount involved in the case and the results obtained—weighs heavily in support of the requested fee. *See Brown*, 838 F.2d at 456 (holding this factor may be given greater weight when “the recovery [is] highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.”); Fed. R. Civ. P. 23(h), adv. comm. note (explaining for a “percentage” or contingency-based approach to class action fee awards, “results achieved is the basic starting point”).
- e. Here, the evidence shows that, under the results obtained factor, the fee request is fair and reasonable under the circumstances. The Settlement represents a significant, concrete monetary benefit to the Settlement Class of \$7,500,000.00. Unlike cases in which absent class members’ recovery is contingent upon their submission of information or some sort of complicated claims process, here, these benefits are guaranteed and automatically bestowed upon the Settlement Class as a result of the Settlement. Accordingly, the “results obtained” factor strongly supports a fee award of \$3,000,000.00 to be paid from the cash settlement of \$7,500,000.00.
- f. The Court further finds that the other factors also support and weigh strongly in favor of the fee request. The evidence of the time and labor involved weighs in favor of the fee request. The time and labor Class Counsel have expended in the research, investigation, prosecution, and resolution of this Litigation is set forth in detail in the Class Counsel Declaration submitted in support of the Motion for Final Approval of Class

Action Settlement. This evidence demonstrates that for 5 years, Class Counsel investigated and analyzed the Settlement Class' claims and conducted discovery, reviewing documents and a large amount of electronically produced data, including revenue payment history. Class Counsel spent significant time working with experts in the prosecution and evaluation of the Settlement Class' claims and engaged in a negotiation process to obtain this outstanding Settlement. The process necessary to achieve this Settlement required months of negotiations and extensive consultation with experts to evaluate and analyze damages.

- g. The Court further finds that the evidence regarding the novelty and difficulty of the questions presented in this action weighs in favor of the fee request. Class actions are known to be complex and vigorously contested. The legal and factual issues litigated in this case involved complex and highly technical issues. The claims involved difficult and highly contested issues of Kansas oil and gas law that are currently being litigated in multiple forums. The successful prosecution and resolution of the Settlement Class's claims required Class Counsel to work with experts to analyze complex data to support their legal theories and evaluate the amount of alleged damages. The fact that Class Counsel litigated such difficult issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case. Moreover, Defendants asserted a number of significant defenses to the Settlement Class's claims that would

have to be overcome if the Litigation continued to trial. Thus, the immediacy and certainty of this recovery, when considered against the very real risks of continuing to a difficult trial and possible appeal, weighs in favor of the fee request.

- h. The Court further finds that the third and ninth factors—the skill required to perform the legal services and the experience, reputation, and ability of the attorneys—supports the fee request. The Declarations and other evidence submitted prove that this Litigation called for Class Counsel’s considerable skill and experience in oil and gas and complex class action litigation to bring it to such a successful conclusion, requiring investigation and mastery of complex facts, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. This Court is familiar with the work of Class Counsel in other successful royalty class action cases, and these attorneys possess the type of experience, reputation, and ability that supports the fee request.
- i. The Court further finds that the evidence regarding the fourth and seventh factors—the preclusion of other employment by Class Counsel and time limitations imposed by the client or circumstances—weighs in favor of the fee request (preclusion of employment) or are neutral (time limitations imposed by the client). The Declarations and other evidence prove that Class Counsel necessarily were hindered in their work on other cases due to their dedication of time and effort to the prosecution of

this Litigation. This Litigation was filed 5 years ago and has required the devotion of significant time, energy, and resources from Class Counsel over that period.

- j. The Court further finds that the evidence regarding the fifth factor—the customary fee and awards in similar cases—weighs in favor of the fee request. Class Counsel and Class Representatives negotiated and agreed to prosecute this case based on a contingent fee up to 40%. This fee is consistent with the market rate and is in the range of the “customary fee” in class actions with increased complexity and risk, like this one. *See Nakamura v. Wells Fargo Bank, N.A.*, No. 17-4029-DDC-GEB, 2019 WL 2185081, at *2 – 3 (D. Kan. May 21, 2019) (citing fee awards in the Tenth Circuit based on 40% of the common fund); *see also, e.g., Harris v. Chevron U.S.A., Inc., et al.*, No. 19-CV-355-SPS (E.D. Okla. Feb. 27, 2020), Doc. 40 at 10 (“As this Court has previously recognized, the 40% contingency fee represents the market rate and is in the range of the ‘customary fee’ in oil and gas class actions in Oklahoma courts over the past 15 years.”). *See also* Decl. of Former Judge Michael Burrage, *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Dec. 27, 2017) at Doc. 96-4 at ¶ 4 (“I believe, and numerous state and federal courts in Oklahoma have determined that a 40% contingent fee is within the appropriate market range for cases of this nature.”).
- k. The Court further finds that the sixth factor—the contingent nature of the fee— supports the fee request. Class Counsel undertook this Litigation on a purely contingent fee basis (with the amount of any fee being subject to Court approval), assuming a risk that the Litigation would yield no recovery and leave them

uncompensated. Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of an hourly rate.

- l. The Court further finds that the evidence shows that the tenth factor—the undesirability of the case—weighs in favor of the fee request. Compared to most civil litigation, this Litigation fits the “undesirable” test and no other firms or plaintiffs have asserted these claims against Defendants. Few law firms risk investing the time, trouble, and expenses necessary to prosecute this Litigation for over two years. Further, Defendant has proven itself to be a worthy adversary. 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 law firms from taking a case of this nature.
- m. The Court further finds that the eleventh factor—the nature and length of the professional relationship with the client—supports the fee request. Class Representatives were actively involved in the Litigation throughout its course. Accordingly, this factor supports Class Counsel's fee request.
- n. In summary, upon consideration of the evidence, pleadings on file, arguments of the parties, and the applicable law, the Court concludes that the fee request is fair and reasonable and is hereby approved.

5. With respect to the request for reimbursement of Litigation Expenses and Administration Expenses, the Court awards Litigation Expenses in the amount of \$135,403.02 and Administration Expenses in the amount of \$48,000. In making these awards, the Court makes the following findings of fact and conclusions of law:

- a. The prior findings of fact and conclusions of law are incorporated herein by reference.
- b. Class Counsel provided the Court with evidence in support of the requests for reimbursement of Litigation Expenses and Administration Expenses.
- c. K.S.A. 60-223(h) authorizes the Court to reimburse counsel for “nontaxable costs authorized by law or by the parties’ agreement.” To this end, courts have noted, “[a]s with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 950B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000).
- d. The Court finds that the Litigation Expenses were reasonably and necessarily incurred by Class Counsel and are directly related to their prosecution and resolution of the Litigation.
- e. Therefore, Class Counsel is awarded Litigation Expenses in the amount of \$135,403.02.
- f. The Settlement Agreement also directs payment of the expenses of administering the notice and distribution to the Settlement Class. The Court

finds that the Administration Expenses were reasonably and necessarily incurred and directly related to the administration of the Settlement.

- g. Therefore, the Court approves the payment of Administration Expenses in the amount of \$48,000.

6. With respect to the request for a Case Contribution Award, the Court awards Class Representatives an award of 1% of the Common Fund Settlement Proceeds (\$75,000). In making this award, the Court makes the following findings of fact and conclusions of law:

- a. The prior findings of fact and conclusions of law are incorporated herein by reference.
- b. Class Representatives provided the Court with evidence in support of the request for a Case Contribution Award.
- c. Courts regularly give such awards to compensate named representatives and to incentive individuals to become named representatives. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. App'x 232 (10th Cir. 2009) (“Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.”); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. 12-cv-1319-D, 2015 WL 2254606, at *4-5 (W.D. Okla. May 13, 2015) (“Case contribution awards are meant to compensate class representatives for their work on behalf of the class, which has benefited from their representation.”).

- d. The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *Id.* § 17:18.
- e. Class Representatives seek an award of 1% of the cash settlement value (\$75,000) based on the demonstrated risk and burden as well as compensation for time and effort. The request for an award of 1% is consistent with awards entered in similar cases. *See Freebird, Inc. v. Cimarex Energy Co.*, 46 Kan. App. 2d 631, 644–45, 264 P.3d 500, 510 (2011) (affirming payment of incentive award equal to 1% of common fund); *Harris*, No. 19-CV-355-SPS (E.D. Okla. Feb. 27, 2020), Doc. 40 at 17 (The class representative’s “request for an award of two percent in consistent with awards entered by Oklahoma state and federal courts, as well as federal courts across the country.”).
- f. Because Class Representatives have dedicated time, attention, and resources to this Litigation and to the recovery on behalf of the Settlement Class from Defendants, I find Class Representatives are entitled to a Case Contribution Award to reflect the important role played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement. The Court finds Class Representatives’ request for an award of 1% of the cash value of the Settlement to be fair and

reasonable and supported by the evidence. The Court therefore awards a Case Contribution Award in the amount of \$75,000.00 to Class Representatives, to be apportioned as follows: \$56,250 to Cooper Clark Foundation and \$18,750 to Phillip Fink.

7. Any appeal or any challenge affecting this Order shall not disturb or affect the finality of the Judgment of the Settlement.

8. Exclusive jurisdiction is hereby retained over the parties and the Settlement Class Members for all matters relating to this Litigation, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Order.

9. There is no reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed pursuant to K.S.A. 60-254(b).

10. The Settlement Administrator is authorized and ordered to distribute the amounts awarded herein to the persons entitled thereto in accordance with the timelines provided in the Settlement Agreement and in accordance with payment instructions provided by Class Counsel.

11. If any Settlement Class Member appeals this Order, such Settlement Class Member is hereby ordered, pursuant to paragraph 7.3 of the Settlement Agreement, to which no objection was made, to post a cash bond in an amount to be set by the Court sufficient to reimburse the appellate fees of Class Counsel and Defendant's counsel and the lost interest to the Settlement Class caused by the delay in distribution of the Net Common Fund Amount.

IT IS SO ORDERED.

Dated this __ day of December ____, 2021.

HONORABLE BRADLEY AMBROSIER
DISTRICT COURT JUDGE