

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)

**MOTION FOR AWARD OF ATTORNEYS FEES, EXPENSES, AND CASE
CONTRIBUTION AWARDS AND MEMORANDUM IN SUPPORT**

Having obtained a cash settlement of \$7.5 million for the Settlement Class, Class Representatives respectively move the Court for an award of Class Counsel Fees in the amount of 40% of the Common Fund Settlement Proceeds, for reimbursement of Litigation Expenses advanced by Class Counsel on behalf of the Settlement Class in the amount of \$135,403.02 and Administration Expenses in the amount of \$48,000, and case contribution awards in the amount of 1% of the Common Fund Settlement Proceeds.¹

These requests for Class Counsel Fees and case contribution awards are based on the going rates for such awards in class action litigation of this type. The requests for Litigation Expenses and Administration Expenses are based on the actual amounts incurred by Class Counsel in prosecuting the Litigation and administering the Settlement. As set forth in the Settlement

¹ Capitalized terms not otherwise defined shall have the meaning ascribed to them in the Settlement Agreement (attached as Exhibit 1 to Plaintiffs' Motion for Preliminary Approval).

Agreement and the Notice provided to the Settlement Class, the requested awards will be paid from the Common Fund Settlement Proceeds. For the reasons set forth below, the requested awards are fair and reasonable, and therefore should be approved.

A. The Requested Class Counsel Fee is Fair and Reasonable.

Under K.S.A. 60-223(h), “the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties’ agreement.” K.S.A. 60-223(h). An award of attorney’s 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). The forty percent fee requested here for Class Counsel is reasonable. The market rate for these types of class actions is forty percent, as reflected in myriad federal and state court class actions and as reflected in the contingent fee arrangements in this case, executed before Class Representatives and Class Counsel knew how the Litigation would progress and whether any recovery would be obtained.

In assessing the reasonableness of the requested fee, courts consider: (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).

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

Here, the result is exceptional—\$7.5 million in cash. This benefit is guaranteed and automatically bestowed upon the Settlement Class. There are no claim forms to fill out, elections to make, and no documentation to scavenge out of old records. Settlement Class members do not have to take any action whatsoever to receive their benefits. The only thing they must do is remain in the Settlement Class, *i.e.*, not opt out, and wait for distribution of their checks after the Court grants, if it does grant, final approval of the Settlement. Accordingly, the “results obtained” factor strongly supports a fee request of forty percent of the Common Fund Settlement Proceeds.

The other factors also support approval of the fee request. Although these factors do not merit as much weight as the results-obtained factor, the Declaration of Class Counsel, **Exhibit 1**, addresses each of them.² To summarize:

² The exhibit references herein are made to the exhibits offered in support of Class Representatives’ Motion for Final Approval of Class Action Settlement filed on December 3, 2021. That motion, and its supporting exhibits, are incorporated as is fully set out in this memorandum.

Time and Labor. Class Counsel began pursuing the claims at issue in this Litigation more than 13 years ago in *Wallace B. Roderick Revocable Living Trust v. OXY USA, Inc.*, No. 2008 CV9 (Kan. Dist. Ct. Kearny Cnty.). **Ex. 1**, Counsel Decl. at ¶ 5. After Class Counsel successfully obtained certification of the class in *Roderick*, the case was removed to federal court where it was decertified in 2016. *Id.* Since filing this Litigation, Class Counsel have invested thousands of hours researching, investing, prosecuting, and resolving the Litigation. *Id.* at ¶¶ 5–19.

Novelty and Difficulty. While oil-and-gas class actions are not new in Kansas, they are difficult and complex enough that very few law firms undertake them. *See Harris v. Chevron U.S.A., Inc., et al.*, No. 19-CV-355-SPS (E.D. Okla. Feb. 27, 2020), Doc. 40 at 8 (“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 continued difficulty of this area of the law, both in an oil-and-gas context and in a class action context, is also evident from the various positions taken by various judges, some denying class certification altogether. **Ex. 1**, Counsel Decl. at ¶ 31.

Skill Required. Class actions are inherently difficult and generally hard fought. Oil-and-gas litigation is as well. Combined, the two areas of law require substantial skill and diligence. *See Harris*, No. 19-CV-355-SPS (E.D. Okla. Feb. 20, 2020), Doc. 40 at 9 (“The Declarations prove that this Class Lawsuit 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.”). Indeed, very few firms even undertake such litigation. **Ex. 1**, Counsel Decl. at ¶ 32.

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

Further, the positions taken by Class Counsel regarding interpretation of Kansas law on various points preclude them from representing industry clients who wish to take opposite or opposing positions on these issues. *Id.* at ¶ 33.

Customary Fee. Class representatives negotiated contracts to prosecute this case on a fully contingent basis, with a fee arrangement of 40% of any recovery obtained for the putative class. *Id.* at ¶ 25. Courts have recognized that in class actions with increased complexity and risk, like this one, a 40% contingent fee is customary. *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.”). A 40% contingent fee is the market rate for oil and gas class actions like this one. **Ex. 1**, Counsel Decl. at ¶ 27. *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.”).

Fixed Hourly or Contingent Fee. As set forth above, Class Counsel undertook this Litigation on a purely contingent fee basis and assumed a substantial risk that the Litigation would yield no recovery, leaving them uncompensated and without any ability to recover expenses. **Ex. 1**, Counsel Decl. at ¶¶ 25, 40. Courts consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorney's fees. *See, e.g., Hay Creek Royalties, LLC v. Roan Resources*, No. 19-CV-177-CVE-JFJ (N.D. Okla. Apr. 28, 2021), Doc. 74 at 8 (“Class

Counsel undertook this Litigation on a purely contingent fee basis ... assuming substantial risk that the Litigation would yield no recovery and leave them uncompensated.”); *see also Harris*, No. 19-CV-355-SPS (E.D. Okla. Feb. 20, 2020), Doc. 40 at 11 (“If Class Counsel had not been successful, they would have received zero compensation (not to mention reimbursement for expenses).”). Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of an hourly rate.

Time Limitations. This was not a factor in this case and should not influence the Court one way or the other. **Ex. 1**, Counsel Decl. at ¶ 37.

Amount in Controversy and Result Obtained. In negotiating the Settlement, the Parties had varying damage models, as is customary in this type of litigation. The \$7.5 million cash settlement represents a significant portion of Class Counsel’s overall damage model, and even exceeds some models. Defendant, of course, argued it had *zero* liability for the claims asserted in the Litigation. **Ex. 1**, Counsel Decl. at ¶ 35. The result obtained in a contingent fee case is by far the most important factor in determining the fee to award, as noted above.

Experience, Reputation, and Ability of Counsel. Class Counsel have extensive experience and demonstrated ability in these types of class actions. *Id.* at ¶ 2.

Nature and Length of Professional Relationship with Client. Although of little relevance in a case where the client does not engage regularly in litigation to warrant a discounted hourly rate, this factor supports the requested fee. Class Counsel worked extensively with Class Representatives throughout the Litigation to prosecute the claims. **Ex. 1**, Counsel Decl. at ¶ 38.

Awards in Similar Cases. Forty percent is a customary fee award in royalty underpayment class action litigation and supports the fee request in this case. *See supra* at 5.

In sum, the analysis of the foregoing factors strongly demonstrates that approval of the fee request is warranted.

B. Request for Reimbursement of Litigation Expenses and Administration Expenses is Reasonable.

In connection with approval of the Settlement of the Litigation, and in accord with the Notice to the Class, Class Representatives respectfully move the Court for reimbursement of expenses incurred in successfully prosecuting, resolving this Litigation, and administering the Settlement. “As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 950B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000); K.S.A. 60-223(h) (authorizing the Court to reimburse counsel for “nontaxable costs authorized by law or by the parties’ agreement”). And where a settlement agreement calls for the costs of administration to be borne by the settlement fund, the court should approve the same. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-2509-LHK, 2013 WL 6328811, at *5 (N.D. Cal. Oct. 30, 2013) (permitting all costs incurred in disseminating notice and administering the settlement to be paid from the settlement fund pursuant to the terms of the settlement agreement).

As described above, Class Counsel has obtained an excellent recovery for the benefit of Settlement Class members, which necessitated incurring expenses that Class Counsel paid or is obligated to pay. To date, Class Counsel have incurred \$135,403.02 in prosecuting and resolving this case. **Ex. 1**, Counsel Decl. at ¶ 42. All the expenses incurred have been reasonable and necessary to the prosecution of the Class Lawsuit. *Id.*

In addition, the Settlement Agreement directs payment of the expenses of administering the notice and distribution to the Settlement Class. Settlement Agreement at ¶¶ 1.1, 1.12. The Administration Expenses required to complete distribution of the Settlement total \$48,000. **Ex. 3**, JND Decl. at ¶ 19.

Because the Expense Request is fair and reasonable, and for the reasons set forth herein, the Expense Request should be granted.

C. Request for Case Contribution Awards is Reasonable

Class Representatives request a \$75,000 case contribution award, which is 1% of the Common Fund Settlement Proceeds. The requested case contribution award was included in the Notice provided to the Settlement Class members and is reasonable under the law. The requested 1% award is warranted given Class Representatives' efforts to achieve the exceptional Settlement. **Ex. 1**, Counsel Decl. at ¶ 44. It is consistent with awards granted in Kansas state court class action settlements and similar class action settlements in other courts. *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.").

Class Representatives seek the award based on the demonstrated risk and burden as well as compensation for time and effort. *See Ex. 1*, Counsel Decl. at ¶ 44. Having worked with Class Representatives in the investigation, filing, prosecution, and settlement of the Litigation, Class Counsel fully supports the request. *Id.* at ¶ 45. As such, Class Representatives' request for a case contribution award is fair and reasonable and should be granted.

CONCLUSION

For the reasons set forth in this Motion, Class Representatives move the Court to grant this Motion and to enter an Order approving the following to be paid from the Common Fund Settlement Proceeds in accord with the Settlement Agreement and Notice: 1) Class Counsel Fees in the amount of forty percent of the Common Fund Settlement Proceeds (\$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 1% of the Common Fund Settlement Proceeds, to be paid as follows: \$56,250 to Cooper Clark Foundation and \$18,750 to Phillip Fink. Class Representatives will submit a proposed order to the Court for the relief requested in this Motion prior to the Settlement Fairness Hearing.

Respectfully submitted,

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**Attorneys for Plaintiffs and the
Settlement Class**

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December 2021, a true and correct copy of the above document was filed with the court's electronic filing system, which automatically serves all counsel of record.

/s/ Rex A. Sharp _____