

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

CHIEFTAIN ROYALTY COMPANY,)

)

)

Plaintiff,)

)

v.)

Case No. 6:17-cv-00336-KEW

)

*(Removed from District Court of
Atoka County, State of Oklahoma,
Case No. CJ-17-45)*

NEWFIELD EXPLORATION)

)

MID-CONTINENT INC.,)

)

Defendant.)

ORDER AWARDING CASE CONTRIBUTION AWARD

Before the Court is Class Representative Chieftain Royalty Company’s (“Chieftain”) Motion for Approval of Case Contribution Award (the “ Case Contribution Motion”) (Doc. No. 58) and Memorandum of Law in Support Thereof (the “Case Contribution Memorandum”) (Doc. No. 59), wherein Chieftain seeks a Case Contribution Award of \$75,000.00 to be paid from the Gross Settlement Fund. The Court has considered the Motion and Memorandum, all matters submitted in connection therewith, and the proceedings on the Final Fairness Hearing held March 2, 2020. For good cause shown, the Court finds the Motion should be **GRANTED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement (Doc. No. 50-1) and all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court, for purposes of this Order, incorporates its findings of fact and conclusions of law from its Order and Judgment Granting Final Approval of Class Action Settlement as if fully set forth herein.

3. 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.

4. The Notice stated that Chieftain intended to seek a Case Contribution Award of up to \$75,000.00 to be paid from the Gross Settlement Fund. *See* Declaration of Jennifer M. Keough on Behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement (“JND Decl.”) (Doc. No. 65-4 at p.11). Notice of Chieftain’s request for a Case Contribution Award 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 request for a Case Contribution Award 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 Rule 23, Federal Rules of Civil Procedure, and due process.

5. Chieftain provided the Court with abundant evidence in support of his request for a Case Contribution Award, including: (1) the Case Contribution Motion and Memorandum; (2) the Declaration of Chieftain Royalty Company (“Chieftain Decl.”) (Doc. No. 65-1); (3) Declaration of Robert Barnes and Patrick M. Ryan, on Behalf of Class Counsel (“Joint Class Counsel Decl.”) (Dkt. No. 65-2); and (4) the Affidavits of Absent Class Members (Doc. Nos. 65-6 through 65-9). This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was objected to or otherwise refuted by any Settlement Class Member.

6. Chieftain is hereby awarded a Case Contribution Award of \$75,000.00 to be paid from the Gross Settlement Fund. In making this Case Contribution Award, the Court makes the following findings of fact and conclusions of law:

(a) The Settlement has created a fund of \$19,500,000.00 in cash, which is a significant benefit to the Settlement Class. Settlement Class Members will benefit from the Settlement that occurred because of the substantial efforts of Class Representative and Class Counsel. Additionally, the Settlement provides for Future Benefits valued at an estimated \$12,000,000.00;

(b) On January 6, 2020, JND caused the Form Notice of Settlement to be mailed to 30,381 Class Members in the Class Mailing List. JND subsequently caused the Notice to be mailed on January 30, 2020, to an additional 312 Class Members identified by Class Counsel's expert. *See* JND Decl. at ¶10. The Notice expressly stated that Class Representative intended to seek a Case Contribution Award of up to \$75,000.00 to be paid from the Gross Settlement Fund. The Notice also directed class members to a website for further information. *Id.* at ¶14;

(c) Chieftain filed his Motion approximately fourteen (14) days prior to the deadline for Settlement Class Members to object. No objections were filed regarding Class Representative's Request for a Case Contribution Award;

(d) The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

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

See Settlement Agreement at ¶11.8 (emphasis added) (Doc. No. 50-1);

(e) This choice of law provision should be and is hereby enforced. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing *Restatement 2d of Conflict of Laws*, § 187, cmt. e (Am. Law. Inst. 1988)); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006); *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶17, 917 P.2d 998, 1002 (concluding that parties' contractual choice of law should be given effect because it does not violate Oklahoma's constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n. 10 (4th Cir. 1983) ("Parties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity."). This Court has enforced similar language in prior settlements. *See, e.g., Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Doc. No. 119); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Doc. No. 103); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Doc. No. 126); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) (Doc. No. 230); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Doc. No. 260);

(f) Applying federal common law,¹ federal courts regularly grant incentive

¹ Because the Parties here contractually agreed that federal common law controls the Case Contribution Award, I find that the opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative of 0.5%, is wholly inapplicable. Moreover, Class Representative here seeks a flat award based on his hours spent times a reasonable rate and the personal financial risk he has taken on for the benefit of the class, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*.

awards to compensate named plaintiffs for the work they performed. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 F. App'x 232, 235 (10th Cir. 2009) (unpublished) (“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.”) (citations omitted); *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award[.]”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class”); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (“There is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *56 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 to class representatives, equaling .93% of current cash portions

of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *see also Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) (Doc. No. 119); *Reirdon v. Cimarex Energy Co.*, No. 16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018) (Doc. No. 103); *Reirdon v. XTO Energy, Inc.*, No. 16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018) (Doc. No. 126); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 11-cv-00029-KEW (E.D. Okla. Mar. 27, 2018) (Doc. No. 230); *Cecil v. BP America Production Co.*, No. 16-cv-00410-KEW (E.D. Okla. Nov. 19, 2018) (Doc. No. 260);

(g) 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.” 5 *Newberg on Class Actions* § 17:3 (5th ed.) (“*Newberg*”). The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (noting that if the lead plaintiff’s services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be “untethered to any service or value [the lead plaintiff] will provide to the class”); *Newberg* at § 17:18;

(h) Here, Class Representative seeks a modest, dollar-based award of \$75,000.00. This request is supported by the abundant evidence submitted by Class Representative, including a declaration from Chieftain and numerous Absent Class Members. *See Newberg* at § 17:12 (evidence might be provided through “affidavits submitted by class counsel and/or the class representatives, through which these persons

testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”). This evidence demonstrates Chieftain is seeking payment at an approximate hourly rate of \$400.00 based on his extensive background in oil and gas and educational background for reasonable time expended on services that were helpful and non-duplicative to the litigation;

(i) The education and work history background of Chieftain’s president and owner (Robert Abernathy) more than justify this hourly rate. *See* Chieftain Decl. at ¶3. Chieftain actively purchases producing and non-producing mineral and royalty interests in eleven states and owns hundreds of mineral and royalty interests in over 12,000 acres. Mr. Abernathy received a B.A. from Tulane University and a Juris Doctorate from Oklahoma City University School of Law. He is licensed to practice law in Oklahoma where he practiced for over 20 years, specializing in oil and gas, real estate, bankruptcy and probate law. He is a nationally recognized speaker on royalty ownership issues. He has spent over 11 years speaking to thousands of mineral interest owners around the country on all aspects of mineral ownership including estate planning and Oklahoma Corporation Commission rulings and regulations. He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter. He is also a founding member of the American Royalty Council. In addition, he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *Id.*;

(j) As demonstrated by his Declaration, both the rate and efforts of Chieftain are reasonable. Specifically, at the time of Mr. Abernathy’s Declaration, he had dedicated a total of approximately 190 hours to this Litigation. Chieftain Decl. at ¶17. These hours

were spent collecting documents for discovery, reviewing emails and draft pleadings, motions, briefs and other court documents from Class Counsel, reviewing depositions, consulting and/or meeting with Class Counsel and traveling to and from meetings. *Id.* All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id.* The additional time that he expects to spend on this Litigation through the Final Fairness Hearing is at least 40 hours. *Id.* And, he will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the administration of the Settlement. Chieftain will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Mr. Abernathy never worked another hour on this case, the request of \$75,000.00 would be justified based on the reasonable hourly rate of \$400.00 plus personal financial risk associated with a potentially unfavorable outcome that all benefit the Class;

(k) Chieftain (through Mr. Abernathy) was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition in August 2017. *See* Chieftain Decl. at ¶¶6-7. He actively and effectively fulfilled his obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon him during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *Id.* at ¶17. Chieftain has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed significantly to the prosecution and resolution of this case. *Id.* In addition, Chieftain collected documents for discovery, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages and actively participated in the negotiations that led to the Settlement of this Action. *Id.*;

(l) Chieftain was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *Id.* at ¶18. In fact, Chieftain understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on its request. *Id.* In other words, Chieftain fully supports the Settlement as fair, reasonable and adequate, even if it is awarded no case contribution award at all. *Id.* Chieftain has no conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, Absent Class Members have executed affidavits supporting Chieftain's request for a Case Contribution Award. *See* Doc. Nos. 65-6 through 65-9;

(m) Because Chieftain has dedicated his time, attention and resources to this Action and taken on the financial risk of an unfavorable result which all benefit the Settlement Class, the Court finds he is entitled to the requested Case Contribution Award of \$75,000.00 to reflect the important role that he played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement;

(n) Thus, Chieftain's request for a Case Contribution Award of \$75,000.00 is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness.

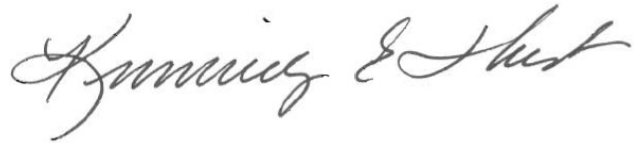
7. Any appeal or any challenge affecting this Order Awarding Case Contribution Award shall in no way disturb or affect the finality of the Order and Judgment Granting Final Approval of Class Action Settlement, the Settlement Agreement or the Settlement contained therein.

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 Rule 54(b), Federal Rules of Civil Procedure.

IT IS SO ORDERED this 3rd day of March 2020.

A handwritten signature in cursive script, reading "Kimberly E. West".

THE HONORABLE KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF OKLAHOMA