

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

DASA INVESTMENTS, INC.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 6:18-cv-083-SPS
)	
ENERVEST OPERATING, L.L.C.;)	
ENERVEST ENERGY INSTITUTIONAL)	
FUND XIII-A, L.P.; ENERVEST ENERGY)	
INSTITUTIONAL FUND XIII-WIB, L.P.;)	
ENERVEST ENERGY INSTITUTIONAL)	
FUND XIII-WIC, L.P.; ENERVEST, LTD.;)	
and SM ENERGY COMPANY,)	
)	
Defendants.)	

**CLASS COUNSEL’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
APPROVAL OF REIMBURSEMENT OF LITIGATION EXPENSES**

I. SUMMARY OF ARGUMENT

In connection with approval of the Settlement¹ in the above-captioned Litigation, Class Counsel respectfully move the Court for reimbursement of expenses incurred in successfully prosecuting and resolving this Litigation not to exceed \$350,000 (the “Expense Request”)—the

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated September 9, 2019 (the “Settlement Agreement”), a copy of which was attached as Exh. 1 to Plaintiff’s Memorandum of Law in Support of Plaintiff’s 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 (Doc. No. 66-1).

amount set forth in the Notice.² This request is fair and reasonable and, therefore, Class Counsel respectfully request that it be approved.

Class Counsel have obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of \$8 million (the “Gross Settlement Fund”) to compensate the Settlement Class for past damages; and (2) Future Benefits consisting of binding changes to the EnerVest Defendants’ statutory interest payment practices and policies in Oklahoma. These Future Benefits are estimated to have a present value of at least \$7 million, bringing the total value of the Settlement to at least \$15 million.³ The \$8 million cash Gross Settlement Fund alone is an outstanding recovery for Class Members.⁴

To achieve this remarkable recovery for the Class Members, Class Counsel were required to expend a significant amount of out-of-pocket expenses that were necessary and reasonable for the prosecution of this action. Class Counsel now seek reimbursement of those reasonable

² To date, Class Counsel have incurred out-of-pocket expenses of \$ 114,916.89. Class Counsel may incur additional expenses between now and the Final Approval Hearing. As such, at the Final Approval Hearing, Class Counsel may seek reimbursement for expenses incurred after the date of this filing, not to exceed \$350,000. Due to the nature of invoicing and payment cycles, Class Counsel’s current Litigation Expenses do not include payments for expert work performed by Barbara Ley since December 2019. Class Counsel estimate the expense of Ms. Ley’s work from January 2020 through the Final Fairness Hearing to be approximately \$85,000 which includes work on matters related to, *inter alia*, analysis of Defendants’ pay data to support Class notice and the plan of allocation. Class Counsel’s Expense Request does not include the Administration, Notice, and Distribution Costs associated with effectuating the Settlement.

³ See Affidavit of Barbara Ley at ¶3 (“Ley Aff.”), attached as Exh. 3 to Plaintiff’s Final Approval Memorandum).

⁴ See Declaration of Patrick Ryan and Jason M. Ryan on Behalf of Class Counsel at ¶5 (“Joint Class Counsel Declaration”), attached as Exh. 2 to Plaintiff’s Final Approval Memorandum; *see also* Ley Aff. at ¶3.

expenses, in an amount not to exceed \$350,000, - the amount set forth in the Notice.⁵ To date, Class Counsel have advanced \$114,916.89 in prosecuting and resolving this case. *See* Joint Class Counsel Decl. at ¶67. In addition to these expenses, Class Counsel will incur additional expenses between now and the Final Approval Hearing. *See id.* As such, at the hearing, Class Counsel will seek reimbursement for expenses incurred after the date of this filing, not to exceed \$350,000. *Id.* In addition, Class Counsel reserve their right to make additional expense requests following the Final Approval Hearing; however, in no event will Class Counsel’s cumulative expense requests exceed the \$350,000 stated in the Notice. Because the Expense Request is fair and reasonable, and for the reasons set forth below, the Expense Request should be granted. *See* Declaration of Steven Gensler at ¶¶95-97 [Doc. No. 88].

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of brevity, Class Counsel will not recite the factual and procedural background of this Litigation again herein. Instead, Class Counsel respectfully refer the Court to the Final Approval Memorandum, the Joint Class Counsel Declaration, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if fully set forth herein.

III. ARGUMENT

A. The Parties Have Agreed Federal Common Law Controls the Reasonableness of Any Requests for Expenses

⁵ A copy of the Notice is attached as Exhibit A to the Declaration of Jennifer M. Keough on behalf of Settlement Administrator, JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement (“JND Decl.”), which is attached as Exh. 4 to Plaintiff’s Final Approval Memorandum.

The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the reasonableness of attorneys' requests for reimbursement of expenses:

*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 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.*

Settlement Agreement at ¶11.8 (Doc. No. 66-1) (emphasis added).

The Parties' decision to contractually agree that federal common law controls the reasonableness of attorneys' expenses should be enforced. *See Chieftain Royalty Company v. Marathon Oil Company*, Case No. 6:17-cv-334-SPS, United States District Court, Eastern District of Oklahoma, Doc. No. 121 at 4-5; *Reirdon v. XTO Energy Inc.*, Case No. 16-cv-87-KEW, United States District Court, Eastern District of Oklahoma, Doc. No. 125 at 4-5; *Reirdon v. Cimarex Energy Company*, Case No. 16-cv-113-KEW, United States District Court, Eastern District of Oklahoma, Doc. No. 104 at 4-5. This Court previously approved and held this contractual language to be enforceable. *See Chieftain Royalty Company v. Marathon Oil Company*, Doc. No. 121 at 4-5; *Reirdon v. XTO Energy Inc.*, Doc. No. 125 at 4-5 and *Reirdon v. Cimarex Energy Co.*, Doc. No. 104 at 4-5.

Moreover, the Tenth Circuit Court of Appeals has recognized parties' freedom to contract regarding choice of law issues, and the fact that courts typically honor the parties' choice of law. Indeed, the Tenth Circuit has explained, "[a]bsent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what

will be their rights and liabilities under the contract.” *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).

Further expanding on this freedom to contract, the *Restatement* states:

These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Restatement 2d of Conflict of Laws § 187, cmt. e (Am. Law Inst. 1988); *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.”).

B. The Request for Reimbursement of Expenses Is Reasonable Under Federal Common Law

Applying the Parties’ chosen law—federal common law—Rule 23(h) allows courts to reimburse counsel for “non-taxable costs that are authorized by law or by the parties’ agreement.” *See Fed. R. Civ. P. 23(h)*. “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. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000) (citations omitted). Similarly, should the Court choose to disregard the Parties’ choice of law and instead apply Oklahoma state law, the Oklahoma class action statute provides “the court may

award...nontaxable costs that are authorized by law or by the parties' agreement." Okla. Stat. tit. 12, § 2023(G)(1).

Class Counsel respectfully request reimbursement of Litigation Expenses that have been and may be advanced or incurred by Class Counsel in prosecuting and resolving this Litigation. *See* Joint Class Counsel Decl. at ¶¶67-69.⁶ Class Counsel set forth in the Notice that they would seek up to \$350,000 in reimbursement of expenses. *See* Exh. A to JND Decl. To date, Class Counsel's out-of-pocket expenses are \$ 114,916.89.⁷ All of these expenses were reasonably and necessarily incurred by Class Counsel and they are directly related to the prosecution and resolution of this Litigation. *See* Joint Class Counsel Decl. at ¶¶67-69. The costs include routine expenses related to copying, court fees, postage and shipping, phone charges, legal research, and travel and transportation, as well as expenses for experts, document production and review, and

⁶ In similar actions, this Court awarded Class Counsel (a) \$226,213.85 in past expenses and additional expenses up to \$350,000 (*see* Order Awarding Reimbursement of Litigation Expenses (Doc. No. 121) in *Chieftain Royalty Company v. Marathon Oil Company*, Case No. 6:17-cv-334-SPS (E.D. Okla. March 8, 2019); (b) \$223,056.78 in past expenses and additional expenses up to \$300,000 (*see* Order Awarding Reimbursement of Litigation Expenses (Doc. No. 125) in *Reirdon v. XTO Energy Inc.*, Case No. 16-87-KEW (E.D. Okla. Jan. 29, 2018) and (c) \$174,191.50 in past expenses and additional expenses up to \$250,000 (*see* Order Awarding Reimbursement of Litigation Expenses (Doc. No. 104) in *Reirdon v. Cimarex Energy Co.*, Case No. 16-cv-113-KEW (December 18, 2018). In another action, this Court awarded Class Counsel litigation expenses in an amount not to exceed \$3,250,000. *See* Order Awarding Reimbursement of Litigation Expenses (Doc. No. 232) in *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018).

⁷ Because additional expenses will continue to be incurred through and after the Final Approval Hearing, Class Counsel specifically request reimbursement of \$114,916.89 *plus* the ability to recover additional litigation expenses up to \$350,000—the noticed amount—to the extent such expenses are actually incurred. At the Final Approval Hearing, Class Counsel will provide the Court with updated charts of Class Counsel's actual expenses incurred.

mediation. These types of expenses are typical of large, complex class actions such as this.⁸ *Id.* As such, the Expense Request is fair, reasonable, and should be granted. *See* Gensler Decl. at ¶88.

In addition, multiple absent Class Members have executed affidavits in support of Class Counsel's Expense Request. *See* the Affidavit of Michael J. Weeks on behalf of class member Pagosa Resources, LLC (attached to Final Approval Memorandum as Exh. 9); the Affidavit of Robert Abernathy on behalf of class member Acorn Royalty Company, LLC (attached to Final Approval Memorandum as Exh. 8); the Affidavit of absent class member Dan Little (attached to Final Approval Memorandum as Exh. 5); the Affidavit of Robert E. Gonce, Jr. on behalf of class member Castlerock Resources, Inc. (attached to Final Approval Memorandum as Exh. 6); the Affidavit of Phil Steffano on behalf of class member Clear Energy, Ltd. (attached to Final Approval Memorandum as Exh. 7); and the Affidavit of Kelsie Wagner on behalf of class members The Kelsie Wagner Trust and The Wade Costello Trust (attached to Final Approval Memorandum as Exh. 10);

Therefore, Class Counsel respectfully request the Court award the Expense Request in full and award any additional amount Class Counsel may incur after the filing of this Memorandum not to exceed \$350,000, upon fourteen (14) days written notice to the Court.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request the Court enter an order granting approval of the Expense Request of \$ 114,916.89, *plus* the ability to recover additional expenses up to \$350,000—the noticed amount—to the extent such expenses are actually incurred.

DATED: February 21, 2020

⁸ As stated *supra*, Class Counsel's Expense Request does not include the Administration, Notice, and Distribution Costs associated with effectuating the Settlement.

Respectfully submitted,

s/Patrick M. Ryan

Patrick M. Ryan, OBA No. 7864
Jason A. Ryan, OBA No. 18824
Paula M. Jantzen, OBA No. 20464
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73104
Telephone: 405-239-6040
Facsimile: 405-239-6766
pryan@ryanwhaley.com
jryan@ryanwhaley.com
pjantzen@ryanwhaley.com

Michael Burrage, OBA No. 1350
WHITTEN BURRAGE
512 N Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

J. Kevin Hayes – khayes@hallestill.com
Pamela S. Anderson – panderson@hallestill.com
Jay P. Walters – jwalters@gablelaw.com
Guy S. Lipe – glipe@velaw.com

s/Patrick M. Ryan

Patrick M. Ryan