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

DASA INVESTMENTS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:18-CIV-083-RAW
	)	
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	)	*(Removed from District Court of*
	)	*LeFlore County, State of*
Defendants.	)	*Oklahoma, Case No. CJ-18-25)*

PLAINTIFF'S MEMORANDUM IN SUPPORT OF 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

Plaintiff and Plaintiff's Counsel have achieved an outstanding recovery for the Settlement Class as a result of their vigorous prosecution of this Litigation.[1] Specifically, Plaintiff has reached a settlement with Defendants worth at least $15 million. Pursuant to the terms set forth in the Settlement Agreement, the Settlement provides: (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.

Plaintiff submits this Memorandum in Support of its 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 requests 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"), submitted concurrently with this filing.

The Preliminary Approval Order will, *inter alia*: (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiff as Class Representative for the Settlement Class; (4) appoint Ryan Whaley Coldiron Jantzen Peters & Webber PLLC 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)

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[1] All capitalized terms not otherwise defined herein shall have the meaning given to them in the September 9, 2019 Stipulation and Agreement of Settlement ("Settlement Agreement"), a copy of which is attached hereto as Exhibit 1.

appoint a Settlement Administrator; (7) appoint an Escrow Agent; and (8) set a hearing date for final approval of the Settlement and application for an award for Attorneys' Fees, Litigation Expenses, and Case Contribution Award to Plaintiff.

II. SUMMARY OF THE LITIGATION

Plaintiff initiated this action on February 7, 2018, by filing a class action petition in the District Court of LeFlore County, Oklahoma against the EnerVest Defendants ("Petition"). Plaintiff's Petition alleged that SM Energy Company ("SM Energy") failed to pay statutory interest under the Production Revenue Standards Act, OKLA. STAT. tit. 52, §570.10(D) (the "PRSA"), on a late payment of proceeds from a well originally operated by SM Energy, but subsequently sold to the EnerVest Defendants. Plaintiff's Petition alleged that by means of a Purchase Agreement effective as of October 1, 2013, the EnerVest Defendants acquired the subject well along with other wells and assets from SM Energy (hereinafter referred to as the "Acquired Wells"). Plaintiff further alleged that, as part of the acquisition, the EnerVest Defendants agreed to assume, and did assume, the obligations and liabilities on the Acquired Wells including, but not limited to, the obligation to pay royalty and/or interest, as well as the liability for SM Energy's failure to pay proceeds and/or interest.

The EnerVest Defendants removed the action to the United States District Court for the Eastern District of Oklahoma, under the Class Action Fairness Act of 2005, claiming diversity jurisdiction under 28 U.S.C. § 1332(d) ("CAFA") and that the amount in controversy exceeded $5 million, exclusive of interest and costs.

On March 23, 2018, the EnerVest Defendants filed a Motion to Dismiss for Failure to State a Claim. Doc. No. 7. The EnerVest Defendants argued they could not be held liable for statutory interest under the PRSA for SM Energy's late payment. The EnerVest Defendants further alleged

that even if they had assumed liability for late payments made by SM Energy under the Purchase Agreement, Plaintiff did not have a cause of action against them because Plaintiff is not a third-party beneficiary of the Purchase Agreement. *Id.* at pp. 7-8. In response, Plaintiff filed a First Amended Complaint on April 6, 2018, which added SM Energy as an additional defendant ("Complaint"). Doc. No. 9. In the Complaint, Plaintiff further alleged that Defendants ignored their obligation under the PRSA to pay statutory interest to owners in Oklahoma entitled to receive oil and gas proceeds through a uniform policy and practice by which they did not pay statutory interest on Untimely Payments to any owners unless the owner specifically requested Defendants do so. Complaint at ¶¶ 1, 10-11, 13-14, 32, 43. Based on these allegations, Plaintiff brought claims for breach of statutory obligation to pay interest, breach of the duty to investigate and pay, fraud, accounting and disgorgement, and injunctive relief. *Id.* at ¶¶ 51-86.

On April 20, 2018, the EnerVest Defendants filed a second Motion to Dismiss for Failure to State a Claim. Doc. No. 16. The EnerVest Defendants' again argued that Plaintiff failed to allege the EnerVest Defendants made an Untimely Payment to Plaintiff. The EnerVest Defendants further alleged that even if they had assumed liability for Untimely Payments made by SM Energy under the Purchase Agreement, Plaintiff did not have a cause of action against them because Plaintiff is not a third-party beneficiary of the Purchase Agreement. Doc. No. 16, pp. 2, 9-10. On May 14, 2018, SM Energy filed a Motion to Dismiss for Failure to State a Claim challenging all but one of Plaintiff's claims. Doc. No. 24. At the time of filing, the issues raised in the EnerVest Defendants' Motion were novel issues and claims that federal courts in Oklahoma had not addressed within the context of these specific claims. Plaintiff's Counsel, therefore, engaged in substantial legal research and spent significant time drafting their opposition to Defendants' Motions. Plaintiff's Counsel's research and briefing established that it had met its burden to state

a claim against the Defendants. Plaintiff's Counsel's research and briefing further established that the appropriate standard had been met in the Complaint for all the claims asserted in its Complaint. Plaintiff's opposition further distinguished this case from other types of royalty payment cases more commonly seen before the Court. Plaintiff filed its Responses to the EnerVest Defendants' and SM Energy's Motions to Dismiss on May 29, 2018. Doc. Nos. 26 and 27. Defendants replied to Plaintiff's Responses on June 15, 2018. Doc. Nos. 36 and 37. On February 5, 2019, the Court denied Defendants' Motions to Dismiss and left in place all of the claims asserted against Defendants in the Complaint. Doc. Nos. 44 and 45.

During the course of the extensive briefing set forth above, the Parties were also engaged in discovery related to the merits and class certification in this case. The EnerVest Defendants made an initial production of accounting and pay history data in April 2018 and Plaintiff served the Defendants with its First Requests for Production of Documents, First Requests for Admission, and First Set of Interrogatories on August 28, 2018. The written discovery to the EnerVest Defendants included thirty requests for production, five requests for admission, and fifteen interrogatories, to which the EnerVest Defendants responded. The written discovery to SM Energy included twenty-nine requests for production, four requests for admission, and fifteen interrogatories, to which SM Energy responded. Counsel for Plaintiff and Defendants engaged in multiple communications and good faith conferences related to the scope and sufficiency of Defendants' Responses to Plaintiff's discovery. Ultimately, Defendants produced several gigabytes of electronic data, including statutory interest payments, historical royalty payments, and suspended accounts for Oklahoma royalty owners, overriding royalty owners, and working interest owners.

The size and complexity of Defendants' pay data required Plaintiff to engage expert consultants to review the information produced by Defendants. This not only allowed Plaintiff to become more fully informed of the class claims and damages, it also provided the foundation for the Parties to explore the possibility of a non-judicial resolution to this matter. For more than one year prior to the Parties' mediation, counsel for Plaintiff worked with its experts in an effort to fully understand the accounting data provided by Defendants and to develop an accurate model for damages. This included multiple meetings, communications, and exchanges of additional data and material between the Parties and their respective experts.

After the Parties had obtained and analyzed sufficient information, counsel for the Parties (as well as their respective experts) engaged in multiple communications to establish the broad parameters of a potential settlement. Following these preliminary communications, the Parties initiated formal settlement negotiations under the supervision of Steven Barghols, an experienced and respected mediator. Mr. Barghols practiced law in the field of oil and gas litigation for more than 30 years. He has mediated over 3,000 cases and singularly holds the highest ranking given to any mediator in Oklahoma by *Chambers and Partners U.S.A.* In addition to his mediation and oil and gas experience, Mr. Barghols has been appointed as the chair of an arbitration panel, or sole arbitrator, in approximately 75 matters.

On May 14, 2019, the Parties attended a formal mediation session at Mr. Barghols' office. Prior to this session, the Parties submitted extensive mediation briefs to Mr. Barghols outlining their respective positions on liability, damages, and the strengths and weaknesses of their respective cases, including class certification. Mr. Barghols and the Parties worked throughout the day and into the evening but were unable to arrive at an agreement. Over the next month, the Parties continued to talk and exchange documents and information and were able to arrive at an

agreement in principal on Saturday, June 15, 2019. Thereafter, and over a period of several weeks, the Parties worked on finalizing a Memorandum of Understanding (MOU) outlining the broad parameters of a class settlement. Once the terms of the MOU were resolved, the Parties spent significant time extensively negotiating and drafting the terms of a formal settlement together with multiple related documents, which are documented and/or referred to in the Settlement Agreement.

Plaintiff filed its Second Amended Complaint on August 7, 2019, further modifying the class definition to remove its claim related to Owners legally entitled to O&G Proceeds held by Defendants in Suspense Accounts for more than the applicable time periods prescribed in the PRSA without the payment by Defendants for statutory interest, and to make additional exclusions from the class, including the Commissioners of the Land Office of the State of Oklahoma, Charles David Nutley, Danny George, Dan McClure, Kelly McClure Callant, and their relatives. Doc. No. 64, ¶ 28. The Second Amended Complaint was filed to conform the claims resolved in the Settlement Agreement to the claims asserted in this Litigation to avoid any confusion to class members as to exactly which claims are being settled and those that are not part of the settlement.

The Settlement would not have been possible without the discovery campaign, motion practice, extensive data review and proceed payment analysis conducted by Plaintiff's Counsel and their experts over the course of more than 1 ½ years of litigating this matter.

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 Rules of Civil Procedure 23 ("Rule 23").[2] *See, e.g.*, *Tennille v. Western Union Co.*, 785 F.3d 422,

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[2] Rule 23(a) sets out four prerequisites to class certification, which are referred to as (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. Additionally,

430 (10th Cir. 2015); *see also 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). 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.'" *Id.* (citation omitted). However, in the settlement context, courts need not inquire into trial manageability under Rule 23(b)(3)(D). *Motor Fuel*, 271 F.R.D. at 269.

Here, Plaintiff and Defendants 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 Plaintiff as class representative; and (iii) the appointment of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC as Class Counsel for the Settlement Class and Whitten Burrage as liaison local counsel. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, Exhibit 1. Accordingly, Plaintiff moves the Court to certify a Settlement Class consisting of:

> All non-excluded persons or entities who received working interest, royalty, and/or overriding royalty payments from Defendants (or Defendants' predecessors) for oil and/or gas proceeds related to wells located in Oklahoma at any time prior to November 1, 2019 ("Owners").
>
> The persons or entities excluded from the Class are: (1) agencies, departments, or instrumentalities of the United States of America or the State of Oklahoma; (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 that Plaintiff's counsel may be prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct, including, but not limited to, Charles David Nutley, Danny George, Dan McClure, Kelly McClure Callant, and their relatives; (5) officers of the court; and (6) Owners who are entitled to O&G Proceeds from an Oklahoma Well of less than $10.00 for a calendar year pursuant to Okla. Stat. tit. 52 § 570.10(B)(3)(a).

Rule 23(b) requires a showing that common questions predominate the dispute and that the class action, as a tool of dispute resolution, is superior to other methods.

Certification of the Settlement Class for settlement purposes will further the interests of Settlement Class Members and Defendants 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." *See Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (holding a class as small as 46 sufficient). Here, the Settlement Class consists of thousands of owners dispersed throughout Oklahoma and other states, making joinder of all Class Members impracticable. Second Amended Complaint ¶ 29. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, Exhibit 1. Accordingly, numerosity 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). Plaintiff need only show a *single* issue common to all members of the class. *See DG,* 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.*, *Cline v. Sunoco, Inc. et al*, Case No. 6:17-cv-313-JAG (E.D. Okla. Oct. 3, 2019) (certifying class asserting PRSA statutory interest claims and fraud claims for trial); *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); *Reirdon v. Cimarex Energy Co.*, Case No. 6:16-cv-00113-KEW (E.D. Okla. December 18, 2018), Dkt. No. 102 (Order Granting Final Approval) (certifying class for settlement purposes); *Chieftain v. Marathon Oil Co.*, Case No. CIV-17-334-SPS (E.D. Okla. March 8, 2019), 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 PRSA without awaiting a request for that interest from owners entitled to receive it. *See* 52 Okla. St. §570.10. Plaintiff alleges Defendants' alleged uniform practice of not paying statutory interest until an owner requests it presents numerous common questions of fact and law. Such common questions include, among others: (1) whether Defendants' alleged uniform practice violates the PRSA; and (2) whether Defendants defrauded Plaintiff and the Settlement Class by allegedly failing to pay statutory interest without a request and allegedly failing to disclose entitlement to statutory interest. This Court recently recognized these types of questions as sufficient to satisfy the commonality requirement of Rule 23 and in support for its decision to grant class certification in *Cline v. Sunoco,* Case No. 6:17-cv-313-JAG (Oct. 3, 2019 E.D. Okla.) (Doc. No. 126 at ECF pp. 5-6).

Clearly, there are questions of law and fact common to members of the Settlement Class. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.39 and 3.1, Exhibit 1. As such, 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. *DG*, 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, Plaintiff's claims are typical of the Settlement Class' because Defendants 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 Plaintiff alleges that Defendants engaged in a common course of conduct to deprive the Settlement Class of statutory interest and misrepresent and/or omit the amount of statutory interest owed to the Settlement Class. *See, e.g.*, Second Amended Complaint, ¶ 14. As a result, all Class Members who received a late payment under the PRSA suffered the same injury arising out of the same facts and all Owners entitled to payments of proceeds from Oklahoma Wells will benefit from the Future Benefits in the Settlement Agreement requiring the EnerVest Defendants to change their practices, and the same evidence could be used to establish Defendants' liability.

Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, Exhibit 1. Thus, Plaintiff's claims are typical of the claims of every Class Member.

4. Adequacy of Representation

Rule 23(a)(4) requires plaintiff to show it "will fairly and adequately protect the interests of the class." In the Tenth Circuit, the adequacy requirement is satisfied when (i) neither plaintiff nor his 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 Plaintiff and other members of the Settlement

Class. To the contrary, Plaintiff has had every incentive to vigorously prosecute this Litigation on behalf of the Settlement Class and have done so.

Second, Plaintiff has prosecuted this Litigation vigorously through qualified counsel. Plaintiff has demonstrated its dedication to this matter through participation in all aspects of the Litigation. Such dedicated conduct demonstrates Plaintiff understands its duties and obligations to the Settlement Class and accepts them willingly. Further, there is no dispute that Plaintiff's Counsel is adequate and has successfully prosecuted numerous class actions and other complex litigation in federal courts throughout the country.

Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, 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, Plaintiff's claims stem from a "'common nucleus of operative facts,'" common issues predominate and certification is appropriate. *Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.,* 275 F.R.D. 325, 331 (D. Kan. 2011) (citation omitted); *see* Second Amended Complaint, ¶ 35.

Defendants 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 until an owner specifically requested the statutory interest and allegedly concealing the amount of statutory interest an owner was entitled to. This alleged common conduct gave rise to each Class Member's claims, resulting in a sufficiently cohesive Settlement Class to warrant adjudication by representation.[3]

Because every Class Member's claims arise from Defendants' alleged systematic and uniform statutory interest calculation and payment methodology, common questions predominate over any individual issues. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, Exhibit 1. Accordingly, predominance is met.

[3] Numerous Oklahoma federal courts, including this Court, have certified classes in broader and much more complex royalty litigation. *See, e.g.*, *SM Energy Co., et al.*, No. 5:11-cv-00177-D (Dkt. No. 154) (certifying class for settlement purposes only); *Laredo Petroleum, Inc.*, 2015 U.S. Dist. LEXIS 177692, at *5-7 (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); *Kaiser-Francis Oil Co.*, U.S. Dist. LEXIS 56797 (certifying a class of 29,000 - 44,000 royalty owners with interests in over 1,000 different wells); *Marathon Oil Co.*, 2010 U.S. Dist. LEXIS 56650 (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).

6. Superiority

Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." 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 here. No Class Member has filed an individual action. Further, because this case has been litigated in this Court, concentrating the Litigation in this forum is desirable. There are no anticipated difficulties managing this case as a class action for settlement purposes only. Moreover, Defendants have agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶ 1.39 and 3.1, Exhibit 1. 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. *See 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).

This is particularly true in large, complex class actions such as this one. *See Big O Tires, Inc. v. Bigfoot 4x4, Inc.,* 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001).

Under Fed. R. Civ. P. 23(e), the trial court should approve a class action settlement when the requirements of Rule 23 are met and the settlement is fair to the class members. Fed. R. Civ. P. 23(e). The procedure for review of a proposed class action settlement is a well-established two-step process. *In re Motor Fuel Temperature Sales Practices Litig*., 258 F.R.D. 671, 675 (D. Kan. 2009); *see* 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. *See In re Motor Fuel*, 258 F.R.D. at 675; *accord*, 4 Herbert B. Newberg et al., NEWBERG ON CLASS ACTIONS § 11:25, at 38 (4th ed. 2002).

Through this Preliminary Approval Motion, Plaintiff requests 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 factors to consider when deciding whether to finally approve a class action settlement have traditionally been left to individual circuits. However, Rule 23(e) was amended effective December 1, 2018, establishing certain core factors to guide the court's decision to approve a class action settlement.[4] Specifically, Rule 23(e)(2) provides:

> (2) *Approval of Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > (A) the class representative and class counsel have adequately represented the class;
> >
> > (B) the proposal was negotiated at arm's length;
> >
> > (C) the relief provided for the class is adequate, taking into account:
> >
> > > (i) the costs, risks, and delay of trial and appeal;
> > >
> > > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-members claims;
> > >
> > > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > >
> > > (iv) any agreement required to be identified under Rule 23(e)(3); and
> >
> > (D) the proposal treats class members equitably relative to each other.

[4] The factors now set forth in Rule 23(e)(2) track closely with those previously identified by the Tenth Circuit, which included: (1) whether the proposed settlement was fair 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 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 Commns., LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016) (reciting four *Rutter* factors for consideration whether to finally approve class settlement as fair, reasonable and adequate); *Tennille*, 785 F. 3d at 434 (same).

Fed. R. Civ. P. 23(e)(2). As demonstrated below, each of these factors supports preliminary approval of the Settlement.

1. The Class Representatives and Class Counsel Have Adequately Represented the Class

The first factor weighs in favor of preliminary approval because the Plaintiff and Plaintiff's Counsel have adequately represented the Class. In discussing how to assess the quality of the representation provided for purposes of approving settlement, the advisory committee note to the 2018 amendments state "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base." Fed. R. Civ. P. 23 advisory committee notes, 2018.

Plaintiff's Counsel has engaged in significant discovery efforts over the twenty months this case has been pending including the analysis of several gigabytes of electronic data, including, check stubs, statutory interest payments, historical royalty payments, and suspended accounts for Oklahoma royalty owners and overriding royalty owners, which Plaintiff's Counsel studied extensively. Plaintiff's Counsel further engaged experts witnesses to review the information produced by Defendants so the Parties could appropriately consider the possibility of resolution. For over a year, counsel for Plaintiff worked with their experts in an effort to fully understand the accounting data provided by Defendants and develop a damages model. This included multiple meetings, communications, and exchanges of additional data and material between the Parties and their experts.

Plaintiff's Counsel has established an "information base" regarding statutory interest cases from their efforts in this case and other substantially similar cases. Over the past three years, Plaintiff's Counsel have served as counsel in eleven other cases involving claims for unpaid statutory interest substantially similar to the present case. Plaintiff's Counsel have been involved

in extensive motion practice, data analyses, and rigorous arm's-length negotiations in all those cases where the discovery has been completed or substantially completed. Plaintiff's Counsel has also been involved in extensive discovery in these cases, including more than thirty depositions related to the failure to pay statutory interest. Plaintiff's Counsel's efforts in other statutory interest cases have resulted in a collection of significant information which has laid the groundwork for the favorable Settlement reached in this case.

The outcomes of other similar cases further support approval of the Settlement. The proposed settlement in this case is equally as favorable as other statutory interest cases preliminarily approved and finally approved in this district. Counsel for Plaintiff served as class counsel in *Reirdon v. XTO,* Case No. 6:16-00087-KEW, a statutory interest case in this district substantially similar to this case. As stated above, Plaintiff's Counsel was involved in significant discovery in the *XTO* case and was able to reach a favorable settlement in that case. The *XTO* case was certified as a settlement class and finally approved on January 29, 2018. Counsel for Plaintiff also served as Plaintiff's counsel in *Reirdon v. Cimarex Energy Co.*, Case. No. 6:16-cv-00013-KEW (E.D. Okla.), another statutory interest case in this district substantially similar to this case. Plaintiff's Counsel was also involved in significant discovery in the *Cimarex* case and was also able to reach a favorable settlement for the class in that case. The *Cimarex* case was certified as a settlement class and finally approved on December 18, 2018. Counsel for Plaintiff also served as Plaintiff's counsel in *Chieftain v. Marathon Oil Co.*, Case No. CIV-17-334-SPS (E.D. Okla.), another statutory interest case in this district substantially similar to this case. Plaintiff's Counsel was also involved in significant discovery in the *Marathon* case and was also able to reach a favorable settlement for the class in that case. The *Marathon* case was certified as a settlement

class and finally approved on March 8, 2019. The proposed settlement in this case is equally favorable as the settlements finally approved in *XTO*, *Cimarex,* and *Marathon*.

Finally, Plaintiff has adequately represented the class. The Plaintiff was involved in and stayed apprised of the Litigation, contributed to the settlement negotiations, and attended the in-person mediation session. Therefore, the first factor – that the class representative and class counsel have adequately represented the class – supports preliminary approval.

2. The Proposal Was Negotiated at Arm's Length

The second factor weighs in favor of preliminary approval because the Settlement was fairly and honestly negotiated. *See 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, Plaintiff, through counsel, conducted extensive investigation and research into the claims asserted, reviewed extensive data and consulted with numerous experts. Further, the Settlement is the product of arm's-length negotiations between Plaintiff and Defendants and their experienced counsel at a point when Plaintiff and Defendants possessed more than sufficient evidence and knowledge to allow them to make informed decisions about the strengths and weaknesses of their respective cases. Settlement negotiations were conducted under the supervision of Mr. Barghols, a seasoned mediator in complex litigation. Moreover, during the mediation session, the legal issues were fully presented, not only for Mr. Barghols' benefit, but also for Plaintiff and Defendants to effectively evaluate class certification, liability and damages. As a result, Plaintiff and Defendants and their lawyers were well prepared for the serious and intelligent negotiations that led to the Settlement. *See In re Motor Fuel*, 258 F.R.D. at 675-76.

Additionally, courts in this Circuit have found settlements to be fairly and honestly negotiated when "[t]he completeness and intensity of the mediation process, coupled with the quality and reputations of the Mediators, demonstrate a commitment by the Parties to a reasoned process for conflict resolution that took into account the strengths and weaknesses of their respective cases and the inherent vagaries of litigation."[5] The use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion."[6] As noted above, the Settlement here resulted from a mediation supervised by Mr. Barghols, an experienced and respected mediator. Without question, Mr. Barghols' experience as a mediator is substantial, and his involvement here ensured Plaintiff and Defendants engaged in fair, arm's-length negotiations. The Settlement is the product of serious, informed, and well-mediated negotiations among experienced counsel with the assistance of an experienced and respected mediator. Therefore, the second factor—that the Settlement was negotiated at arm's length—supports preliminary approval.

3. The Relief Provided for the Class is Adequate, Taking into Account:

(i) The Costs, Risks and Delay of Trial and Appeal

The costs, risks, and delay of trial and appeal weighs in favor of approving this substantial Settlement. 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

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5 *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 285 (D. Colo. 1997); *see also Ashley v. Reg'l Transp. Dist.*, No. 05-cv-01567-WYD-BNB, 2008 U.S. Dist. LEXIS 13069, at *15-22 (D. Colo. Feb. 11, 2008) (finding settlement fairly and honestly negotiated where the parties engaged in formal settlement mediation conference and negotiations over four months).

6 *In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also D'Amato v. Deutsch Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

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 (citing *Wilkerson*, 171 F.R.D. at 284). 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*, 2008 U.S. Dist. LEXIS 86741, at *31-41 (W.D. Okla. 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 Plaintiff and Defendants 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, Defendants deny they committed any acts or omissions giving rise to any liability or violation of law. *See* Settlement Agreement at ¶ 11.1, Exhibit 1. Indeed, Defendants have always maintained their statutory interest policies—which form the basis of Plaintiff's and the Settlement Class' claims—comply with Oklahoma law. Thus, Defendants have entered into this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *See id.* While Plaintiff is optimistic about its chances of success at trial, there are a number of 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, including $8,000,000.00 in cash, and at least $7,00,000.00 in Future Benefits, renders the resolution of these questions unnecessary and provides a guaranteed recovery in the face of uncertainty.

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also support approval of the proposed Settlement. This 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." *See McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37. Here, the $8,000,000.00 Settlement, as well as the substantial Future Benefits received from the EnerVest Defendants' implementation of new practices and policies for payment of statutory interest without awaiting a request unless or until there is a change in the law (*see* Settlement Agreement at ¶ 2.4, Exhibit 1), 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 $8,000,000.00 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 Plaintiff is confident in its 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 Plaintiff succeeded in establishing liability at trial, the amount of damages would be hotly disputed, and Defendants would likely argue the Settlement Class is entitled to less than the $8,000,000.00 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 $8,000,000.00 in cash, and at least $7,000,000.00 in Future Benefits, it is clear the Settlement is in the best interest of Plaintiff, Owners, and the Settlement Class.

Accordingly, the costs, risks and delay of trial and appeal also supports preliminary approval of the Settlement.

(ii) The Effectiveness of Any Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class-Member Names

The proposed distribution method for this common-fund Settlement will be highly effective. Pursuant to the Settlement Agreement, Defendants will provide Plaintiff's Counsel its payment history data for payments made by Defendants prior to November 1, 2019 for wells located in Oklahoma, including the names, last known addresses, and tax identification numbers of persons or entities receiving those payments. *See* Settlement Agreement, ¶ 3.3, Exhibit 1. The Settlement Administrator will make reasonable efforts to: (a) verify the last-known address of potential Class Members provided by Defendant and (b) locate current addresses of any potential Class Members for whom Defendant has not provided addresses. *Id.* at ¶ 3.5.

Subject to the Court's approval, Plaintiff's Counsel shall direct the Settlement Administrator to allocate the Net Settlement Fund to individual Class Members who are participating in the Settlement proportionately based on the amount of statutory interest owed on the original underlying payment that allegedly occurred outside the time periods required by the PRSA, with due regard for the production date, the date the underlying payment was made, the amount of the underlying payment, the time periods set forth in the PRSA, any additional statutory interest that Plaintiff's Counsel believes has since accrued, and the amount of interest or returns that have accrued on the Class Member's proportionate share of the Net Settlement Fund during the time such share was held in the Escrow Account. *See* Settlement Agreement, ¶ 6.2, Exhibit 1.

The Net Settlement Fund will be distributed by the Settlement Administrator as soon as reasonably possible after final approval has been obtained for the Settlement and any appeals are exhausted. The Settlement Agreement specifies deadlines for distributing the Net Settlement Fund. *See* Settlement Agreement, ¶6.8, Exhibit 1.

This same distribution method has been used by Plaintiff's Counsel in multiple class action settlements with great success. This distribution method was recently approved and utilized in the case of *Reirdon v. XTO,* Case No. CIV-16-87-KEW, *Reirdon v. Cimarex Energy Co*., Case No. 6:16-cv-00113-KEW, and *Chieftain v. Marathon Oil Co.*, Case no. CIV-17-334-SPS, all statutory interest cases in this district substantially similar to this case.

(iii) The Terms of Any Proposed Award of Attorney Fees, Including Timing of Payment

Pursuant to the terms of the Settlement Agreement, Plaintiff's Counsel will apply to the Court for an award of attorneys' fees no later than 28 calendar days before the Final Approval Hearing. *See* Settlement Agreement, ¶ 7.1, Exhibit 1. Plaintiff's Counsel anticipates the motion will seek an award of attorneys' fees of $3,200,000.00. Plaintiff's Counsel will request that attorneys' fee award be paid from the $8,000,000.00 Gross Settlement Fund. *Id.* An attorneys' fee of $3,200,000.00 represents 40% of the Gross Settlement, and only 21.3% of the Gross Settlement Fund and the Future Benefits.

Plaintiff's Counsel has obtained an excellent recovery for the benefit of Class Members, which consists of: (1) a cash payment of $8 million to compensate the Settlement Class for past damages, and (2) Future Benefits to Owners of Oklahoma Wells consisting of binding changes to the EnerVest Defendants' statutory interest payment policies in Oklahoma which Plaintiff's experts estimate to have a present value of at least $7 million. The total value of the Settlement

equals at least $15 million. Indeed, the $8 million cash payment alone constitutes an outstanding recovery.

Plaintiff's Counsel are *not* requesting additional fees from the Future Benefits. However, the additional benefit conferred on the Settlement Class in the form of binding changes to the EnerVest Defendants' statutory interest payment practices and policies in Oklahoma is substantial as it guarantees at least another $7 million to Owners of Oklahoma Wells that, absent the Settlement, would have likely been retained by the EnerVest Defendants.

Pursuant to the Settlement Agreement, Attorneys' Fees awarded to Plaintiff's Counsel by the Court shall be paid to Plaintiff's Counsel from the Gross Settlement Fund, to the extent practicable through reasonably diligent efforts by the Escrow Agent, one business day following the date the Judgment becomes Final and Non-Appealable. *See* Settlement Agreement, ¶ 7.2, Exhibit 1.

(iv) Any Agreement Required to Be Identified Under Rule 23(e)(3)

The Parties have entered into a Supplemental Agreement with respect to the subject matter identified in ¶¶ 1.23 and 6.4 of the Settlement Agreement, Exhibit 1.

4. The Proposal Treats Class Members Equitably Relative to Each Other

The Settlement treats Class Members equitably relative to each other. All Class Members identified will receive their proportionate share of the Net Settlement Fund based on the amount of statutory interest owed on the original underlying payment that allegedly occurred outside the time periods required by the PRSA, with due regard for the production date, the date the underlying payment was made, the amount of the underlying payment, the time periods set forth in the PRSA, any additional statutory interest that Plaintiff's Counsel believes has since accrued, and the amount of interest or returns that have accrued on the Class Member's proportionate share of the Net

Settlement Fund during the time such share was held in Escrow. *See* Settlement Agreement ¶ 6.2, Exhibit 1.

Because all four factors weigh in favor of the Settlement here, Plaintiff respectfully requests 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." Additionally, Rule 23(e)(1)(B) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." 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)).

Plaintiff has 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. The Notice and Summary Notice (collectively, the "Notices") are attached to the Settlement Agreement as Exhibits 3 and 4, respectfully. As set forth in the Settlement Agreement, Plaintiff and Defendants have agreed that, no later than January 20, 2020, 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 and who has not opted out. Settlement Agreement at ¶ 3.6, Exhibit 1.[7]

Plaintiff and Defendants further agreed that, no later than January 23, 2020, 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. Within 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 Second Amended Complaint; (c) this Settlement Agreement; and (d) the Preliminary Approval Order. *Id.* The Notices direct Class Members to this website for additional information. 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 fully 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. Specifically, the Notices clearly describe: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) Plaintiff's Counsel's intent to request attorneys' fees, reimbursement of expenses, and case contribution awards; (iv) the procedure and timing for objecting to the Settlement; (v) the

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7 *See also e.g., Fager*, 854 F.3d at 1173-1174 ("the Supreme Court has consistently endorsed notice by first-class mail" and, thus, "[f]irst-class mail sufficed to give notice.").

procedure and timing for requesting exclusion; (vi) the date, time, and place of the Final Fairness Hearing; and (vii) ways to receive additional information about this Litigation and the proposed Settlement. 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, Plaintiff respectfully requests 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.[8] Further, under the terms of the Settlement Agreement, Plaintiff, Defendants and their Counsel will work directly with the Settlement Administrator for much of the notice, administration, and distribution processes. Thus, Plaintiff respectfully requests the Court appoint JND as the Settlement Administrator.

E. Appointment of Escrow Agent is Proper

Additionally, Plaintiff respectfully requests the Court appoint Signature Bank as the Escrow Agent. Pursuant to the terms of the Settlement Agreement, the Parties have agreed to

[8] More information about JND can be found on its website at: www.JNDLA.com.

Signature Bank as the Escrow Agent, subject to approval by the Court. Settlement Agreement, ¶ 1.12, Exhibit 1. Signature Bank was the court-approved Escrow Agent in the settlement approved in *Chieftain v. Marathon*, Case NO. CIV-17-334-SPS (E.D. Okla.).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court enter the agreed proposed Preliminary Approval Order, submitted concurrently with this filing, which will, *inter alia*, (1) certify the Settlement Class for Settlement purposes; (2) preliminarily approve the Settlement; (3) appoint Plaintiff as Class Representatives for the Settlement Class; (4) appoint Ryan Whaley Coldiron Jantzen Peters & Webber PLLC 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; (7) appoint Signature Bank as the Escrow Agent; and (8) 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 Plaintiff.

Dated: October 11, 2019

Respectfully submitted,

s/Patrick M. Ryan

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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s/Patrick M. Ryan
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