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

MICHAEL KERNEN, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. CIV-18-00107-JD
CASILLAS OPERATING, LLC,	)	
Defendant.	)	

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

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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 prosecution of this Litigation.[1] Specifically, Plaintiff has reached a settlement with Defendant Casillas Operating, LLC ("Defendant") valued at $7,700,000.00. Pursuant to the terms set forth in the Settlement Agreement, the Settlement provides for: (1) a cash payment of $2,700,000.00 (the "Gross Settlement Fund") to compensate the Settlement Class for past damages; and (2) Future Benefits to the Settlement Class consisting of binding changes to Defendant's statutory interest payment practices and policies in Oklahoma. These Future Benefits are estimated to have a present value of at least $5,000,000.00, bringing the total value of the Settlement to at least $7,700,000.00.

Plaintiff submits this Memorandum in support of his 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").

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

[1] Capitalized terms not otherwise defined herein shall have the meaning given to them in the January 11, 2021 Stipulation and Agreement of Settlement ("Settlement Agreement"), which is attached hereto as Exhibit 1.

Representative for the Settlement Class; (4) appoint Barnes & Lewis, LLP, Nix Patterson, LLP, and Ryan Whaley Coldiron Jantzen Peters & Webber, PLLC, as Class Counsel for the Settlement Class, and Whitten Burrage, LLP, as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notice; (6) appoint a Settlement Administrator; and (7) 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.

II. SUMMARY OF THE LITIGATION

Plaintiff initiated this action December 22, 2017, with the filing of Plaintiff's Original Complaint in the District Court of Garvin County, State of Oklahoma. On February 2, 2018, Defendant removed the Litigation to the United States District Court for the Western District of Oklahoma pursuant to the Class Action Fairness Act of 2005 ("CAFA"), claiming diversity jurisdiction under 28 U.S.C. § 1332(d) and that the amount in controversy exceeded $5,000,000.00, exclusive of interest and costs. On February 12, 2021, Plaintiff filed his First Amended Complaint pursuant to the Parties agreement (Dkt. No. 92).

Plaintiff's First Amended Complaint alleged Defendant ignored its obligation under Oklahoma law to pay statutory interest to owners in Oklahoma entitled to receive oil and gas proceeds through a uniform policy and practice by which it did not pay statutory interest to any owners, unless the owner specifically requested Defendant do so. Plaintiff's First Amended Complaint ¶ 6-8. Based on these allegations, Plaintiff brought claims for

breach of statutory obligation to pay interest, fraud, accounting and disgorgement, and injunctive relief. *Id*. ¶¶ 36-70.

Plaintiff and Plaintiff's Counsel prosecuted the Litigation for over three years, which included Plaintiff engaging in motion practice and substantial discovery related to subject matter jurisdiction, the merits, and class certification. Plaintiff's litigation efforts also included conducting research, accounting review and analysis, consultation by and with experts, settlement negotiations among counsel, damage modeling, and other investigations and preparation. Plaintiff and Plaintiff's Counsel attest that the information, documents, and materials elicited during discovery—which were the result of extensive preparation, document review, legal research and expert analysis on class certification, liability, and damages—undoubtedly contributed to the outstanding Settlement now before the Court.

Over the course of the litigation, the Court granted four requests by the Parties for amended Scheduling Orders to accommodate ADR proceedings and extend discovery. Dkt. Nos. 39, 41, 50, 63. The Parties continued settlement negotiations and on October 14, 2020, submitted a Joint Motion to Stay Current Briefing Deadlines and Pretrial Proceeding informing the Court that the Parties had reached a tentative agreement to settle the Litigation. Dkt. No. 84. The Parties then spent considerable time extensively negotiating and drafting the terms of a formal settlement, which are documented in the Settlement Agreement. The Settlement would not have been possible without the extensive discovery campaign, document review and royalty payment analysis conducted by Plaintiff's Counsel and their experts.

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 Rule of Civil Procedure 23 ("Rule 23"). *See, e.g., Tennille v. Western Union Co*., 785 F.3d 422, 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); *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 791 (10th Cir. 2019). 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 Defendant 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 Barnes & Lewis, LLP, Nix Patterson, LLP, and Ryan Whaley Coldiron Jantzen Peters & Webber, PLLC, as Class Counsel and Whitten Burrage, LLP, as liaison local counsel. Accordingly, Plaintiff moves the Court to certify a Settlement Class consisting of:

> All non-excluded persons or entities to whom: (1) Defendant (or Defendant's designee) made a Late Payment of oil and/or gas proceeds from an Oklahoma well between July 28, 2016 and June 24, 2020, and (2) who have not been paid statutory interest on the Late Payment per the Production Revenue Standards Act. A "Late Payment" for purposes of this class definition means payment of proceeds from the sale of oil and/or gas production from an oil and/or gas well after the statutory periods identified in OKLA. STAT. tit. 52, § 570.10(B)(1) (i.e., commencing not later than six (6) months after the date of first sale, and thereafter not later than the last day of the 2nd succeeding months after the end of the month within which such production is sold). Late Payments do not include: (a) payments of proceeds to an owner under OKLA. STAT. tit. 52, § 570.10(B)(3) (minimum pay); (b) prior period adjustments; or (c) pass-through payments.
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> 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 (and their affiliates) who are the Oklahoma Corporation Commission (OCC) designated operator of more than fifty (50) Oklahoma wells in the month when this Class definition was originally filed; (5) 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, William L. Galbreath, Verdeen L. Slatten, Jack A. Slatten, Verdeen L. Slatten Family Limited Partnership, Neva M. Dorman, Ann Ellis Boles, Fischer-Jones, LLC, B.N. Taliaferro, Jr. individually and as Trustee of the B. N. Taliaferro Management Trust, Jack B. Searle, Tamara D. Searle, OGI, Inc., and their relatives; and (6) officers of the court.

See Settlement Agreement, ¶ 1.46. Certification of the Settlement Class for settlement purposes will further the interests of Settlement Class Members and Defendant 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." *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. Moreover, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1. 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 Devaughn*, 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., Harrel's LLC v. Chaparral Energy, LLC*, 923 F.3d 779 (10th Cir. 2019) (affirming class certification in royalty class action); *McClintock v. Enterprise Crude Oil, L.L.C.,* No. 6:16-cv-00136-KEW (E.D. Okla. Dec. 16, 2020), Dkt. No. 104 (Order Granting Preliminary Approval of Class Action Settlement); *McClintock v. Continuum Producer Services, L.L.C.*, No. 6:17-CV-00259-JAG (E.D. Okla. June 4, 2020), Dkt. No. 65 (Order and Judgment Granting Final Approval of Class Action Settlement); *Cline v. Sunoco, Inc. (R&M),* No. 6:17-CV-313-JAG, 333 F.R.D. 676, 688 (E.D. Okla. Oct. 3, 2019) (granting contested class certification motion and certifying class for royalty class action); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019), Dkt. No. 122 (Order and Judgment Granting Final Approval of Class Action Settlement); *Rhea v. Apache Corp.*, No. CIV-14-0433-JH, 2019 U.S. Dist. LEXIS 65381 (E.D. Okla., Feb. 15, 2019) (granting contested class certification motion for royalty class action); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-00113-KEW (E.D. Okla. Dec. 18, 2018), Dkt. No. 102 (Order and Judgment Granting Final Approval of Class Action Settlement); *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); *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 holders of oil and gas proceeds to pay statutory interest as set forth in the Production Revenue Standards Act ("PRSA") without awaiting a request for that interest from owners entitled to receive it. *See* OKLA. STAT. tit. 52, § 570.10. Plaintiff alleges Defendant's 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 Defendant's alleged uniform practice violates the PRSA; and (2) whether Defendant defrauded Plaintiff and the Settlement Class by allegedly failing to pay statutory interest without a request and improperly retaining the proceeds for Defendant's own benefit.

Clearly, there are questions of law and fact common to members of the Settlement Class. Moreover, Defendant has agreed the Settlement Class should be certified for settlement purposes. *See* Settlement Agreement, ¶¶1.46, 11.1. Accordingly, 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. *Devaughn*, 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 Defendant 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 Defendant engaged in a common course of conduct to deprive the Settlement Class of statutory interest and Defendant improperly retained the proceeds for their own benefit. *See, e.g.,* Plaintiff's First Amended Complaint ¶ 6. As a result, all Class Members who received a Late Payment under the PRSA suffered the same injury arising out of the same facts. Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. Thus, Plaintiff's claims are typical of the claims of every Class Member.

4. Adequacy of Representation

Rule 23(a)(4) requires plaintiffs to show they "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). This factor is satisfied. 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.

Second, Plaintiff has prosecuted this Litigation vigorously through qualified counsel. Plaintiff has demonstrated his dedication to this matter through participation in all aspects of the Litigation. Such dedicated conduct demonstrates that Plaintiff understands his 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 complicated litigation in federal courts throughout the country, including this Court. The Court can take judicial notice that counsel is qualified and experienced to conduct this Litigation.[2] Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. Accordingly, adequacy is met.

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[2] *See, e.g., McClintock v. Enterprise Crude Oil, L.L.C.,* No. 6:16-cv-00136-KEW (E.D. Okla. Dec. 16, 2020), Dkt. No. 104 (Order appointing Plaintiff's Counsel as Class Counsel for purposes of settlement); *McClintock v. Continuum Producer Services, L.L.C.*, No. 6:17-CV-00259-JAG (E.D. Okla. Nov. 22, 2019), Dkt. No. 42 (same); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Dec. 17, 2018), Dkt. No. 74 (same); *Reirdon v. Cimarex Energy Co.*, No. 6:16-cv-00113-KEW (E.D. Okla. Sept. 28, 2018), Dkt. No. 57 (same); and *Reirdon v. XTO Energy Inc*., Case No. 6:16-cv-00087-KEW (E.D. Okla. Oct. 17, 2017), Dkt. No. 79 (same).

B. The Rule 23(b)(3) Factors Have Been Satisfied

1. Predominance

Rule 23(b)(3) requires "questions of law or fact common to class members predominate over any questions affecting only individual members." *Id*. "'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 also* Plaintiff's First Amended Complaint, ¶ 21.

Defendant 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, thereby, improperly retained the proceeds for its own benefit. Plaintiff's First Amended Complaint, ¶¶ 28-32. This allegedly common conduct gave rise to each Class Settlement Member's claims, resulting in a sufficiently cohesive Settlement Class to warrant adjudication by representation.[3]

Because every Class Settlement Members' claims arise from Defendant's alleged systematic and uniform statutory interest calculation and payment methodology, common questions predominate over any individual issues.

Moreover, as stated *supra*, Defendant has agreed the Settlement Class should be certified for settlement purposes. Accordingly, predominance is met.

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[3] Numerous Oklahoma federal courts, including this Court, have certified classes in broader and much more complex royalty litigation. *See, e.g., Chieftain Royalty Co. v. SM Energy Co*., et al., No. 5:18-cv-01225-J (W.D. Okla. Jan. 13, 2021) (Dkt. No. 97) (certifying class for settlement purposes only); *Chieftain Royalty Co. v. SM Energy Co*., et al., No. 5:11-cv-00177-D (W.D. Okla. Dec. 23, 2015) (Dkt. No. 154) (certifying class for settlement purposes only); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., No. CIV-12-1319-D, 2015 U.S. Dist. LEXIS 177692, at *5-7 (W.D. Okla. Dec. 29, 2014) (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); *Hill v. Kaiser-Francis Oil Co*., No. CIV-09-07-R, 2010 U.S. Dist. LEXIS 56797 (W.D. Okla. June 9, 2010) (certifying a class of 29,000 - 44,000 royalty owners with interests in over 1,000 different wells); *Hill v. Marathon Oil Co*., No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650 (W.D. Okla. June 9, 2010) (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).

2. Superiority

Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. 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. 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 in managing this case as a class action for settlement purposes only. Moreover, Defendant has agreed the Settlement Class should be certified for settlement purposes. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

C. The Court Should Grant Preliminary Approval of the Proposed Settlement

Courts strongly favor settlement as a method for resolving disputes. *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 Federal Rule of Civil Procedure 23(e), the trial court must approve a class action settlement. 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 also* 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. *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 his 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 Tenth Circuit has identified four factors to consider when deciding whether to finally approve a class action settlement:

(1) whether the proposed settlement was fairly 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 and expensive 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 Commc'ns, LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016) (reciting *Rutter* factors for consideration of whether to finally approve class settlement as fair, reasonable and adequate); *Tennille*, 785 F.3d at 434 (same). As demonstrated below, each of these factors supports preliminary approval of the Settlement.

1. The Proposed Settlement Is the Product of Extensive Arm's-Length Negotiations Between Experienced Counsel

The first prong 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 Defendant and their experienced counsel at a point when Plaintiff and Defendant possessed more than sufficient evidence and knowledge to allow them to make informed decisions about the strengths and weaknesses of their respective cases. Plaintiff, Defendant, and their respective 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.

The Settlement is the product of serious, and informed negotiations among experienced counsel. Therefore, the first factor—that the Settlement be fairly and honestly negotiated—supports preliminary approval.

2. Serious Questions of Law and Fact Exist

Additionally, 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 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 v. Martin Marietta Corp.,*171 F.R.D. 273, 284 (D. Colo. 1997)). 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*, No. CIV-07-933-M, 2008 U.S. Dist. LEXIS 86741, at *31-41 (W.D. Okla. Oct. 27, 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 Defendant 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, Defendant denies it committed any acts or omissions giving rise to any liability or violation of law. *See* Settlement Agreement at ¶11.1, Exhibit 1. Indeed, Defendant has always maintained its statutory interest policies—which form the basis of Plaintiff's and the Settlement Class's claims—comply with Oklahoma law. Thus, Defendant has entered into this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *See id*. While Plaintiff is optimistic about his chances of success at trial, there are a number of significant obstacles he 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, which includes the payment of

$2,700,000.00 in cash, renders the resolution of these questions unnecessary and provides a guaranteed recovery in the face of uncertainty.

Because serious issues of law and fact remain in dispute, the second factor supports preliminary approval of the Settlement.

3. The Value of the Immediate Recovery Outweighs the Mere Possibility of Future Relief After Long and Expensive Litigation

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also support approval of the proposed Settlement. This third factor 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." *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37. Here, the $2,700,000.00 Settlement 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 $2,700,000.00 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 his 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 Defendant would likely argue the Settlement Class is entitled to far less than the $2,700,000.00 cash 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 $2,700,000.00 in cash, it is clear the Settlement is in the best interest of Plaintiff and the Settlement Class.

Accordingly, this third factor—the value of the immediate recovery compared to the mere possibility of future relief after long and expensive litigation—also supports preliminary approval of the Settlement.

4. Plaintiff, Defendant, and Their Counsel Believe the Proposed Settlement is Fair, Reasonable, and Adequate

Finally, Plaintiff, Defendant, and their Counsel agree the Settlement is fair, reasonable, and adequate. "Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Lucas*, 234 F.R.D. at 295 (quoting *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002)). "[T]he Court should . . . 'defer to the judgment of experienced counsel who has competently evaluated the strength of his proof.'" *Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 U.S. Dist. LEXIS 26379, *39 (N.D. Okla. May 13, 2003) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983)). In fact, "[w]hen a settlement is reached by experienced counsel after negotiations

in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus*, 209 F. Supp. 2d at 1182 (citing *Trief v. Dun & Bradstreet Corp*., 840 F. Supp. 277, 281 (S.D.N.Y. 1993)) ("[A]bsent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.").

Here, Plaintiff's Counsel—which consists of law firms with considerable experience in Oklahoma class actions—only agreed to settle this action after extensive investigation, written discovery, motion practice, data analyses, and rigorous arm's-length negotiations. Additionally, as noted above, Plaintiff and Plaintiff's Counsel have compared the substantial recovery the Settlement Class will receive from the resolution of this Litigation against the risks, delays, and uncertainties of continued litigation and appeals. Plaintiff was involved in and stayed apprised of the Litigation, and contributed to settlement negotiations. Plaintiff and Plaintiff's Counsel believe the Settlement is fair, adequate, and reasonable and should be approved. Defendant likewise believes the Settlement should be approved. As such, the fourth factor—that counsel believes the settlement is fair, adequate, and reasonable—supports preliminary approval.

Because all four factors weigh in favor of the Settlement here, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement.

D. 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." *Id*. Additionally, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." *Id*. 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 Short Form Notice of Proposed Settlement, (the "Short Form Notice") that will be distributed to the Settlement Class, as well as a Summary Notice of Proposed Settlement (the "Summary Notice") that will be published in various newspapers, and the Long Form Notice of Proposed Settlement, Motion for Attorneys' Fees and Final Fairness Hearing that will be available on the website and by direct mailing upon request (the "Long Form Notice"). The Short Form Notice for mailing, Summary Notice of Settlement for publication, and Long Form Notice (collectively, the "Notices") are attached to the Settlement Agreement as Exhibits 3, 4 and 5, respectively. As set forth in the Settlement Agreement, Plaintiff and Defendant have agreed that, within 30 days after entry of the Preliminary Approval Order, or at such time as is ordered by the Court, the Court-appointed Settlement Administrator shall begin disseminating the Short Form Notice by sending a copy of the Notice via first-class mail to the last known mailing address of all potential Class Members who have been identified

after reasonable efforts to do so. Settlement Agreement, ¶ 3.5. Plaintiff and Defendant further agreed that, within ten (10) days after mailing the Short Form Notice, 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. *Id.* Within 10 days after mailing the Short Form Notice 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 Short Form Notice and Summary Notice, (b) the Long Form Notice, (c) the First Amended Complaint, (d) the Settlement Agreement, and (e) the Order Granting Preliminary Approval. *Id*. The Notices direct Class Members to this website for additional information including the Long Form Notice. It is not economically feasible to send the Long Form Notice to all Class Members. However, in addition to being available to view and download from the website, the Long Form Notice will be directly mailed to any Class Members who request it by contacting the Settlement Administrator.

In accordance with Rule 23(c)(2)(B), the proposed Notice will 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 and direct them to additional detailed information. Specifically, the Notices clearly describe

and/or explain: (i) the nature of the action; (ii) definition of the settlement class; (iii) the class claims, issues, or defenses; (iv) that a class member may have to enter an appearance through an attorney if the member so desires; (v) that the Court will exclude from the class any member who requests exclusion; (vi) the date, time, and place of the Final Fairness Hearing; (vii) ways to receive additional information about this Litigation and the proposed Settlement; and (viii) the binding effect of a class judgment. 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 Eastern District of Oklahoma has approved a nearly identical notice process in similar cases, including: *McClintock v. Enterprise Crude Oil, L.L.C.,* No. 6:16-cv-00136-KEW (E.D. Okla. Dec. 16, 2020), Dkt. No. 104 (Order Granting Preliminary Approval of Class Action Settlement…Approving Form and Manner of Notice); *McClintock v. Continuum Producer Services, L.L.C.*, No. 6:17-CV-00259-JAG (E.D. Okla. Nov. 22, 2019), Dkt. No. 42 (same). The Court should approve the Notices and the manner through which they will be delivered and communicated to the Settlement Class.

E. 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. *See* www.jndla.com. Further, under the terms of the Settlement Agreement, Plaintiff, Defendant 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.

IV. CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff respectfully requests the Court enter the agreed proposed Order Granting Preliminary Approval, which 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 Barnes & Lewis, LLP, Nix Patterson, LLP, and Ryan Whaley Coldiron Jantzen Peters & Webber, PLLC, as Class Counsel for the Settlement Class, and Whitten Burrage, LLP as liaison local counsel for the Settlement Class; (5) approve the form and manner of the proposed Notices; (6) appoint JND Legal Administration as Settlement Administrator; and (7) 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: February 12, 2021.

Respectfully submitted,

s/Robert N. Barnes

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CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing on February 12, 2021, with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Robert N. Barnes
Robert N. Barnes