

**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.)

**ORDER AWARDING REIMBURSEMENT
OF LITIGATION EXPENSES**

Before the Court is Class Counsel’s Motion for Approval of Reimbursement of Litigation Expenses (“Motion”) [Doc. No. 110] and Memorandum of Law in Support Thereof (“Memorandum”) [Doc. No. 111], wherein Class Counsel seeks entry of an Order approving Class Counsel’s request for Reimbursement of Litigation Expenses, which were incurred in successfully prosecuting and resolving this Litigation, in an amount not to exceed \$200,000.00—the amount set forth in the Short Form Notice and Long Form Notice. The Court has considered the Motion and Memorandum, all matters submitted in connection therewith, and the proceedings on the Final Fairness Hearing. Upon review, the Court finds the Motion should be **GRANTED**.

IT IS THEREFORE ORDERED as follows:

1. This Order incorporates by reference the definitions in the Amended Stipulation and Agreement of Settlement (“Settlement Agreement”) [Doc. No. 100-1] and

all terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court, for purposes of this Order, incorporates herein its findings of fact and conclusions of law from its Order and Judgment Granting Final Approval of Class Action Settlement as if fully set forth herein [Doc. No. 121].

3. The Court has jurisdiction to enter this Order and over the subject matter of the Litigation and all Parties to the Litigation, including all Settlement Class Members.

4. The Short Form Notice and Long Form Notice (“Notices”) state that Class Counsel would seek Reimbursement of Litigation Expenses, which were incurred in successfully prosecuting and resolving this Litigation, in an amount not to exceed \$200,000.00. The Notices also state that Class Counsel would request approval of Administration, Notice and Distribution Costs associated with effectuating the Settlement in an amount not to exceed \$175,000.00 to be paid from the Gross Settlement Fund. Notice of Class Counsel’s request for Reimbursement of Litigation Expenses and approval of Administration, Notice and Distribution Costs was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the request for Reimbursement of Litigation Expenses and approval of Administration, Notice and Distribution Costs is hereby determined to have been the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23, Federal Rules of Civil Procedure, and due process.

5. Class Counsel provided the Court with abundant evidence in support of their request for Reimbursement of Litigation Expenses, including but not limited to: (1) the Motion and Memorandum and exhibits thereto; (2) the Declaration of Robert N. Barnes, Andrew G. Pate, and Patrick M. Ryan on behalf of Class Counsel and exhibits thereto [Doc. No. 113-2]; (3) the Declarations of Robert N. Barnes, Patranell Britten Lewis, and Emily Nash Kitch on behalf of Barnes & Lewis LLP; Andrew G. Pate on behalf of Nix Patterson, LLP; Patrick M. Ryan on behalf of Ryan Whaley Coldiron Jantzen Peters & Webber PLLC; and Michael Burrage on behalf of Whitten Burrage [Doc. Nos. 108-1 through 108-4]; (4) the Declaration of Michael Kernen [Doc. No. 113-1]; (5) the Declaration of Jennifer M. Keough on behalf of Settlement Administrator JND Legal Administration LLC, Regarding Notice Mailing and Administration of Settlement [Doc. No. 113-4]; (6) the Affidavit of Barbara A. Ley, CPA, CITP, CFF [Doc. No. 113-3]; (7) the Affidavits of Absent Class Members: Robert E. Gonce, Jr. (“Castlerock Aff.”); Robert Abernathy (“Chieftain Aff.”); Robert F. Odom (“Odom Aff.”); Dan Little (“Little Aff.”); and Mike Weeks (“Pagosa Aff.”); [Doc. Nos. 113-6 through 113-10]; and (8) the applicable law, and all pleadings, declarations, and records on file in this matter. This evidence was submitted to the Court well before the objection and opt-out deadline, and none of the evidence was objected to or otherwise refuted by any Settlement Class Member.

6. Class Counsel is hereby awarded Reimbursement of Litigation Expenses in an amount not to exceed \$200,000.00, to be paid from the Gross Settlement Fund. In

making this award, the Court makes the following findings of fact and conclusions of law:

(a) Class Counsel have obtained an excellent recovery for the benefit of Class Members, which consists of (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, which 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—an outstanding recovery for Class Members;

(b) On September 13, 2021, JND caused the Short Form Notice of Settlement to be mailed to 6,433 unique mailing records identified in the mailing data. *See* JND Decl. [Doc. No. 113-4] at ¶ 6. The Short Form Notice expressly stated that Class Counsel would seek Reimbursement of Litigation Expenses in an amount not to exceed \$200,000.00. The Short Form Notice also directed class members to a website for further information, including the Long Form Notice, and also provided the option of requesting a Long Form Notice be sent via U.S. Mail. There were no objections to the requested reimbursement of expenses;

(c) Class Counsel filed its Motion approximately fourteen (14) days prior to the deadline for Settlement Class Members to object. No objections were filed regarding Class Counsel’s Motion for Approval of Reimbursement of Litigation Expenses;

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

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

Settlement Agreement at ¶ 11.8 (emphasis added) [Doc. No. 100-1];

(e) The Parties cite the following cases in support of their position that this choice of law provision should be enforced: *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing *Restatement (Second) of Conflict of Laws* § 187, cmt. e (Am. Law Inst. 1988)); *see also Williams v. Shearson Lehman Bros.*, 1995 OK CIV APP 154, ¶ 17, 917 P.2d 998, 1002 (concluding that the parties' contractual choice of law should be given effect because it does not violate Oklahoma's constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) (“[P]arties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity.”). Courts in this district, and other federal courts in Oklahoma, have upheld identical or similar choice of law provisions. *See, e.g., Miller v. DCP Operating Co., L.P.*, No. CIV-18-0199-JH

(E.D. Okla. June 29, 2021) [Doc. No. 98 at 3]; *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-18-1225-J (W.D. Okla. Apr. 27, 2021) [Doc. No. 115 at 5–6]; *McClintock v. Enterprise Crude Oil, LLC*, No. CIV-16-136-KEW (E.D. Okla. Mar. 26, 2021) [Doc. No. 120 at 3–5]; *McClintock v. Continuum Producer Services, L.L.C.*, No. CIV-17-00259-JAG (E.D. Okla. June 4, 2020) [Doc. No. 61 at 4–5]; *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS (E.D. Okla. Mar. 8, 2019) [Doc. No. 120 at 4–5]; *Reirdon v. Cimarex Energy Co.*, No. CIV-16-113-KEW (E.D. Okla. Dec. 18, 2018) [Doc. No. 105 at 4–5]; *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) [Doc. No. 231 at 4–5]; *Reirdon v. XTO Energy Inc.*, No. CIV-16-00087-KEW (E.D. Okla. Jan. 29, 2018) [Doc. No. 124 at 4–5]. The Court is aware of the Tenth Circuit’s holding in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017). The Settlement Agreement in this case, however, specifically includes the choice of law language set forth above;

(f) Applying federal common law, Rule 23(h) of the Federal Rules of Civil Procedure allows courts to reimburse counsel for “nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). To this end, district courts have noted, “[a]s with attorneys’ fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred . . . in addition to the attorney fee percentage.” *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (citations omitted). Similarly, Oklahoma’s

class-action statute provides “the court may award . . . nontaxable costs that are authorized by law or by the parties’ agreement.” *See* 12 Okla. Stat. § 2023(G)(1);

(g) Class Counsel set forth in the Notice that they would seek up to \$200,000.00 in reimbursement of expenses. *See* JND Decl. [Doc. No. 113-4]. To date, Class Counsel’s out-of-pocket expenses are \$169,462.46. *See* [Doc. No. 113-2 ¶ 72]; [Doc. No. 108-1 ¶ 18]; [Doc. No. 108-2 ¶ 11]; [Doc. No. 108-3 ¶ 15]. I find that all of these expenses were reasonably and necessarily incurred by Class Counsel and are directly related to their prosecution and resolution of this Litigation. Moreover, I find that these expenses are fair and reasonable under Oklahoma state law for the same reasons they are fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See* [Doc. No. 113-2 ¶ 73]. As such, the Expense Request is fair, reasonable and is hereby granted;

(h) Therefore, Class Counsel is awarded \$169,462.46 in past expenses and may request any additional amount Class Counsel may incur not to exceed \$200,000.00, upon written notice to the Court.

7. Class Counsel’s request for approval of Administration, Notice and Distribution Costs associated with effectuating the Settlement in an amount not to exceed \$175,000.00 to be paid from the Gross Settlement Fund is also approved.

8. Any appeal or any challenge affecting this Order Awarding Reimbursement of Litigation Expenses shall in no way disturb or affect the finality of the Order and

Judgment Granting Final Approval of Class Action Settlement, the Settlement Agreement or the Settlement contained therein.

9. The Court (along with any appellate court with power to review the Court's orders and rulings in the Litigation) reserves exclusive and continuing jurisdiction over the Litigation, Class Representative, the Settlement Class, Defendant, and the other Released Parties for the purposes of: (a) supervising and/or determining the fairness and reasonableness of the implementation, enforcement, construction, and interpretation of the Settlement, the Settlement Agreement (together with the documents referenced therein and the exhibits thereto), any Plan of Allocation Order entered by the Court, and this Judgment; (b) hearing and determining any application by Class Counsel for an award of Attorneys' Fees, and Litigation Expenses and/or a Case Contribution Award for Class Representative, if such determinations were not made at the Final Fairness Hearing; (c) supervising the distribution of funds from the Settlement Account; (d) resolving any dispute regarding a Party's right to terminate the Settlement pursuant to the Settlement Agreement or Supplemental Agreements; (e) enforcing the terms of the Settlement, including the entry of injunctive or other relief to enforce, implement, administer, construe, and interpret the Settlement Agreement and Supplemental Agreements; and (f) exercising jurisdiction over any challenge to the Settlement on any basis whatsoever.

10. There is no reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 3rd day of January 2023.

A handwritten signature in black ink, appearing to read "Jodi W. Dishman", written over a horizontal line.

JODI W. DISHMAN
UNITED STATES DISTRICT JUDGE