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

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| DONALD D. MILLER REVOCABLE FAMILY TRUST, trustee Donald D. Miller, on behalf of itself, and all others similarly situated,<br>Plaintiff,<br><br>v.<br><br>DCP OPERATING COMPANY, LP; and DCP MIDSTREAM, LP,<br><br>Defendants. | ) | Case No. CIV-18-0199-JH |

**ORDER AWARDING ATTORNEYS' FEES**

Before the court is Class Counsel's Motion for Approval of Attorneys' Fees (Dkt. No. 84) (the "Motion"), in which Class Counsel seeks approval of Class Counsel's request for attorneys' fees in the amount of $3,960,000.00.[1] The court has considered the Motion and the various materials submitted by counsel in support of it, as well as the arguments of counsel offered at the Final Fairness Hearing held June 23, 2021. For the reasons stated in this order and from the bench at the hearing, the court concludes the Motion should be granted, that a substantial fee is warranted in light of the excellent results obtained by counsel, but that a reasonable fee in the circumstances of this case is $3,465,000 rather than the amount sought by counsel. In addition to its comments as stated at the hearing, the court finds and concludes as follows:

1. Notice of Class Counsel's request for attorneys' fees 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 attorneys' fees are hereby determined to have been the best notice practicable under the circumstances, constitute due and sufficient notice to all persons and

[1] *Defined terms in this order have the same meanings as are set forth in the Settlement Agreement.*

entities entitled to receive such notice, and fully satisfy the requirements of Rule 23, Federal Rules of Civil Procedure, and due process. The Notice stated that Class Counsel would seek fees up to $3,960,000, subject to a reasonableness review by the court. Class Counsel's specific fee request was later filed of record and was available to class members prior to expiration of the deadline for objections. No objection to the fee request was asserted.

2. Class Counsel submitted substantial evidence in support of their request for attorneys' fees, including the Declaration of Bradley E. Beckworth on Behalf of Nix Patterson, LLP, the Declaration of Michael Burrage, the Declaration of Geoffrey P. Miller in support of the settlement and fee request, the Declaration of Donald D. Miller, Trustee of plaintiff, and affidavits from absent class members, as well as extensive exhibits and other materials.

3. The Settlement created a fund of $9,900,000.00 in cash for immediate payment to the Settlement Class. The settlement amount is an exceptional result in the circumstances of this case and by comparison to the results in other similar class action cases. It represents a 93.2% recovery of the amounts plaintiff asserts to be due the class from defendant. Further, of the portion of the class claims not subject to a potential statute of limitations defense, it represents a 100% recovery. In other words, Class Counsel's efforts resulted in recovery of virtually the full amount claimed and potentially available to the plaintiff class. Further, the settlement is not a "claims-made settlement," meaning that Settlement Class Members who do not opt out will automatically receive significant individual distribution payments without further effort on their part.

4. An award of attorneys' fees is authorized in this case. As stated in Fed.R.Civ.P. 23(h), the court in a class action case "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." However, where the court's jurisdiction is grounded in diversity of the parties, Rule 23(h) is not a separate source of authority for the award

of fees. Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455 (10th Cir. 2017). Here, the basis for the award is the agreement of the parties as reflected in the Settlement Agreement.

5. Use of the percentage-of-the-fund method is appropriate in determining the reasonableness of the fee sought here. The Settlement Agreement explicitly adopts the federal common law as the standard for determining the reasonableness of the fee and federal cases routinely use the percentage method in cases of this type. Further, in the Tenth Circuit, that is the preferred method. *See* Brown v. Phillips Petroleum Co., 838 F.2d 451 (10th Cir. 1988). The parties' agreement is plainly designed to avoid the result in the EnerVest case, supra, where the Tenth Circuit concluded Oklahoma law required the use of the lodestar approach, rather than the percentage method, in determining attorneys' fees in class actions. In this court's view, the parties' effort to avoid the required use of the lodestar approach has been successful, as there is no apparent reason why Oklahoma would not give effect to the parties' contractual choice of law agreement in these circumstances. Adoption of the federal common law is essentially a shorthand way of setting out the parties' agreement as to the standards for recovery of fees and Oklahoma will ordinarily give effect to the parties' agreement as to such matters where it does not conflict with Oklahoma public policy. Harvell v. Goodyear Tire and Rubber Co., 164 P.3d 1028, 1033-34 (Okla. 2006). It is now clear that use of the percentage of recovery method in these circumstances does not offend Oklahoma public policy. The Oklahoma Supreme Court has recently decided Strack Trustee v. Continental Resources, Inc., ___P.3d ___, 2021 WL 1540516 (Okla. 2021), where it explicitly concluded the Oklahoma class action statute permits use of the percentage of recovery method in determining the reasonableness of an attorneys' fee. As the Tenth Circuit's decision in EnerVest was based on its view of Oklahoma state law, the more recent pronouncement of the Oklahoma

Supreme Court in Strack controls and EnerVest no longer states the applicable rule. In any event, whether viewed as an independent question of state law or of giving effect to the parties' contractual agreement, the percentage of recovery method is an available and appropriate method for determining the reasonableness of the fee sought here.

6. The percentage of recovery method calculates the fee as a reasonable percentage of the value obtained for the benefit of the class. *See* Brown, 838 F.2d at 454. When determining attorneys' fees under this method, a court evaluates the reasonableness of the requested fee by analyzing the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). *See* Brown, 838 F.2d at 454-55. Not all of the factors apply in every case, and some deserve more weight than others, depending on the facts of the case. *Id.* at 456. Further, the court's ultimate responsibility is to "ensure that the amount and mode of payment of attorneys fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility." Comment to Fed.R.Civ.P. 23(h), 2003 amendments.

7. The twelve Johnson factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Gottlieb v. Barry, 43 F.3d 474, 482 n. 4 (10th Cir. 1994).

8. The eighth Johnson factor — the amount involved in the case and the results obtained

— has particular importance here. *See* Brown, 838 F.2d at 456 (holding this factor may be given greater weight when "the recovery [is] highly contingent and . . . the efforts of counsel were instrumental in realizing recovery on behalf of the class."). As noted above, the gross recovery for the class is nearly 100% of the amounts allegedly due. While that result was also no doubt due to the relative strengths of the parties' legal positions, the efforts of Class Counsel were instrumental in making that happen, in the face of sustained and substantial resistance from the defendants and their legal team.

9. Several of the Johnson factors clearly support a substantial fee here, but do not require extensive elaboration. The skill required to pursue claims of the sort advanced here is high. They require an in-depth knowledge by counsel of various aspects of the oil and gas business, familiarity with the intricacies of class action litigation, and the ability to litigate against highly competent defense counsel and an aggressive, well-financed defense. Further, the experience, reputation and abilities of Class Counsel are of the highest caliber. Courts in both the Eastern and Western Districts of Oklahoma are familiar with the work of the Nix Patterson and Whitten Burrage firms in class actions involving the oil and gas industry and their work is consistently outstanding.

10. Certain of the Johnson factors have less application here or at least do not suggest a substantial enhancement to what would otherwise be a reasonable fee. Class Counsel are routinely involved in cases of this sort — cases like this one likely qualify as their "bread and butter" — so this does not involve a case they or others would necessarily view as "undesirable." It does, of course, like many contingency cases, involve the advance of substantial litigation costs by the firms which increases the burden to them of pursuing the case. But it seems doubtful that these firms view the case as "undesirable." Further, there is no apparent basis for concluding that the firms missed out on pursuing some other, better-paying business because they elected to take this

one. The factors involving length of the client relationship or time limitations imposed by the client appear to have no significant impact here.

11. Apart from the "results obtained" factor discussed above, the combination and interplay of the remaining Johnson factors are the most important factors leading to the court's conclusion that a substantial (albeit lower than requested) fee is appropriate. First, this is a contingent fee case. In addition to the burden of advancing substantial litigation expenses, Class Counsel run the risk inherent in every contingent case that they will receive no recovery at all. As Class Counsel argues, no attorney with the necessary skill and experience would be likely to take a case like this one based on a standard hourly rate if there was a substantial risk of not being paid at all. In light of that risk, the contingent nature of the case warrants a fee that is some multiple of the fee that would otherwise be justified based on the lodestar or some similar method of determining reasonableness.

12. The time and labor required to prosecute this case was substantial. The submissions indicate Class Counsel (including paraprofessional time) spent approximately 1600 hours on the case and expect to spend an additional 230 to bring it to conclusion. These hours reflect extensive and intensive work over several years in pursuing the legal questions in the case, developing a factual basis for the case through extensive discovery and other efforts focused on the intricacies of defendant's payment system, and intensive settlement negotiations over an extended period. Although the submissions are not so extensive as to conduct a full lodestar analysis, as detailed time records have not been submitted, they do include the hourly rates involved and summaries of the time spent by various counsel. The hourly rates are substantial, ranging from $400 per hour to $875 per hour for attorneys, but do not appear out of line with rates customarily charged by similarly qualified firms dealing with complex oil and gas matters. Applying these rates to the

time totals provided, it appears a fee computed via the lodestar method would be between $900,000 and $1,000,000, depending on the extent of post-approval services ultimately required. While the court has not used the lodestar method here directly in determining a reasonable fee, the method is a useful as a baseline for the determination of "multiples" as a cross-check on results suggested by the percentage approach. *See* Strack, 2021 WL 1540516 at *5 (¶¶ 18 - 19). In any event, this was a substantial case involving substantial time and attention from counsel.

13. The elements of time and complexity and of awards in similar cases are related here. Class Counsel contend this case is difficult and complex and that 40% contingency fees are the norm in cases of this sort. The court agrees that this is a difficult and complex case, though not to the same extent as the sorts of oil and gas cases that are most often cited in support of a 40% contingency arrangement. The great majority of cases concluding a 40% contingency is reasonable are oil and gas royalty cases, rather than cases like this one seeking the recovery of statutory interest. And the few statutory interest cases which have approved a 40% contingency arrangement have often done so on the assumption that those cases are like royalty cases. *See, e.g.*, Reirdon v. XTO Energy Inc. ("Reirdon I"), No. 6:16-cv-87, Order Awarding Attorney Fees, Doc. #124 (E.D. Okla. Jan. 29, 2018); Reirdon v. Cimarex Energy Co. ("Reirdon II"), No. 6:16-cv-113, Order Awarding Attorney Fees, Doc. #105 (E.D. Okla. Dec. 18, 2018) (citing only Reirdon I as a PRSA case); Chieftain Royalty Co. v. Marathon Oil Co. ("Chieftain I"), No. 6:17-cv-334, Order Awarding Attorneys' Fees, Doc. #120 (E.D. Okla. Mar. 8, 2019); Chieftain Royalty Co. v. Newfield Exploration Mid-Continent Inc., No. 6:17-cv-336, Order Awarding Attorneys' Fees, Doc. #71, (E.D. Okla. Mar. 3, 2020) (citing Reirdon I, Reirdon II, and Chieftain I in addition to royalty cases); and McClintock v. Enterprise Crude Oil LLC, No. 6:16-cv-136, Order Awarding Attorneys' Fees, Doc. #120, (E.D. Okla. Mar. 26, 2021) (citing Reirdon I, Reirdon II, and Chieftain

I in addition to royalty cases). But all cases are not "comparable" just because they involve oil and gas. The court is unpersuaded that royalty and statutory interest cases are the same in terms of complexity or that the percentage rates in one are necessarily suggestive of a reasonable fee in the other.

For one thing, the risks are different. Identifying a "common question" is fairly straightforward in a statutory interest case — is demand for payment necessary under the Oklahoma statute? — but more involved in a royalty case, where the impact of such things as differing leases, complex marketing schemes, and the like make the question more complex. As a result, the likelihood of class certification is different. Counsel at the hearing could not recall (nor is the court aware of) any statutory interest case where class certification has been seriously sought but denied. That is not the circumstance in royalty cases, where denials of class certification do occur. Foster v. Apache Corp., 285 F.R.D. 632; (W.D. Okla. 2012); Foster v. Merit Energy Co., 282 F.R.D. 541 (W.D. Okla. 2012). So counsel pursuing a class action royalty case on a contingency basis tend to run a bigger risk of non-recovery, and a lesser chance of a favorable settlement, than counsel pursuing a statutory interest case like this one.

Royalty cases are also more complex as a general matter. They generally involve all the complexities involved in the marketing and production systems for oil or gas, in addition to legal issues which tend to be less clear and more varied than a dispute over whether interest was paid on a particular payment. In a statutory interest case like this one, once the threshold questions of the necessity of demand for payment and the impact of any limitations period have been resolved (neither, to be sure, a necessarily easy determination), it becomes a more straightforward matter of doing the accounting based on payments that were made.

Perhaps most significant in assessing the customary fee in other cases is the fact that all the

cases cited by Class Counsel and its experts in their submissions predate the Oklahoma Supreme Court's decision in Strack. In that case, a royalty case, the Court rejected as an abuse of discretion the trial court's approval of a 40% contingency fee in the circumstances existing there. It did so on the basis that, after doing a cross-check via the lodestar approach, the record did not support a fee 3.17 times larger than what the lodestar approach would have generated. While Strack does not suggest that a multiple of 3.17 or higher is always unreasonable regardless of circumstances, it at least makes it abundantly clear that 40% is not the "standard" percentage fee for oil and gas royalty cases. And, as noted above, this case is not a royalty case.

14. Taking together the impact of all the Johnson factors, the court concludes that a substantial fee for Class Counsel is warranted in this case and that, in light of the contingency nature of the fee engagement, a fee substantially in excess of the amounts arrived at by an approximation of the lodestar approach is warranted. But the court further concludes that a 40% rate is greater than what is reasonable under the circumstances and standards applicable here and that a 35% rate appropriately reflects the application of the Johnson factors. That rates results in a fee of $3,465,000. While that rate and amount result in a "multiple" of the lodestar that is greater than what the Oklahoma Supreme Court rejected in Strack, the court concludes it is warranted here in light of the 93% recovery achieved for the Settlement Class.[2]

For the reasons stated above and at the hearing, the Class Representative's Motion for Approval of Attorneys' Fees [Doc. #84] is **GRANTED** to the extent indicated. Class Counsel shall be entitled to reasonable attorneys' fees in a total amount of $3,465,000, to be paid from the

[2] *The Strack opinion does not indicate what relative results were obtained by the plaintiff and class counsel in that case, but the court assumes it was significantly less than 93% of what was sought. Further, the court notes that the amount authorized here and the "multiplier" it implicitly adopts is within the range of multipliers for pre-Strack royalty cases in the Oklahoma district courts.* See *Gensler Declaration, Doc. #84-4.*

Gross Settlement Fund, with the expectation that the reduction from the requested amount will be allocated among the two firms as they may agree.

**IT IS SO ORDERED**.

Dated this 29th day of June, 2021.

JOE HEATON
UNITED STATES DISTRICT JUDGE

**Subject:** Activity in Case 6:18-cv-00199-JH Donald D. Miller Revocable Family Trust et al v. DCP Operating Company, LP et al Order

**Date:** Tuesday, June 29, 2021 at 9:30:40 AM Central Daylight Time

**From:** CM-ECFRetMail_OKED@oked.uscourts.gov

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**U.S. District Court**

**Eastern District of Oklahoma**

## Notice of Electronic Filing

The following transaction was entered on 6/29/2021 at 9:30 AM CDT and filed on 6/29/2021

**Case Name:** Donald D. Miller Revocable Family Trust et al v. DCP Operating Company, LP et al

**Case Number:** 6:18-cv-00199-JH

**Filer:**

**Document Number:** 98

**Docket Text:**

**ORDER AWARDING ATTORNEY FEES...the Class Counsel's motion for approval of attorneys' fees [84] in which Class Counsel seeks approval of Class Counsel's request for attorneys' fees is granted to the extent indicated in the order...see order for specifics. Signed by Judge Joe Heaton (Minter, Lisa)**

**6:18-cv-00199-JH Notice has been electronically mailed to:**

Michael Burrage mburrage@whittenburragelaw.com, cnorman@whittenburragelaw.com, docketing@whittenburragelaw.com

Michael E. Smith mesmith@hallestill.com, knelson@hallestill.com

Bradley E. Beckworth bbeckworth@nixlaw.com, bkellogg@nixlaw.com, codyhill@nixlaw.com, sprince@nixlaw.com, swhatley@nixlaw.com

Jeffrey J. Angelovich jangelovich@nixlaw.com, ncameron@nixlaw.com, sprince@nixlaw.com

Lisa P. Baldwin lbaldwin@nixlaw.com, ncameron@nixlaw.com

Trey Duck tduck@nixlaw.com, sprince@nixlaw.com

Brooke A. Churchman bchurchman@nixlaw.com, ncameron@nixlaw.com

Andrew G. Pate dpate@nixlaw.com, ncameron@nixlaw.com

Cody L. Hill codyhill@nixlaw.com, mgomez@nixlaw.com, sprince@nixlaw.com

Daniel M. McClure dan.mcclure@nortonrosefulbright.com, inga.domask@nortonrosefulbright.com

James E. Warner jwarner@nixlaw.com

Winn Cutler winncutler@nixlaw.com

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