IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01475-KLM

CAROL THIELE and LYNN SWANEMYER, individually and on behalf of themselves and a class of similarly situated royalty owners,

Plaintiffs,

v.

ENERGEN RESOURCES CORPORATION,

Defendant.

ORDER GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AGREEMENT

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter comes before the Court on: (1) the **Joint Motion for Final Approval of Class Settlement** [#107] (the "Motion for Approval of Settlement"), and (2) **Class Counsel's Motion for an Award of Attorneys' Fees, Litigation Expense Reimbursements, and Incentive Award Payments to the Two Named Plaintiffs** (the "Motion for Fees") (collectively "Motions"). For the reasons stated at the hearing on March 18, 2021, and in this Order, the Motions [#106, #107] are **GRANTED**. Additionally, the parties' request for certification of a class for settlement purposes (*see* [#28] is **GRANTED**.

I. Procedural History

This case was initially filed on April 24, 2015 in state court and was timely removed to this Court on July 13, 2015. *See Notice of Removal* [#1]. The Amended Class

Action Complaint [#2] filed by Carol Thiele ("Thiele"), Lynn Swanemyer (Swanemyer") and Gerald Ulibarri ("Ulibarri") asserted a class action for underpayment of royalties against Defendant Energen Resources Corporation ("Energen"). Plaintiffs alleged that Energen underpaid royalties to them and to all other similarly situated members of the four proposed Colorado and New Mexico sub-classes "on natural gas production, including all constituents of the gas stream (collectively referred to herein as "Natural Gas"), from wells located in the states of Colorado and New Mexico ("Energen Wells") at any time since April 24, 2009 ("the Class Time Period")." *Id*. at 1-2. Plaintiffs asserted eight claims for relief alleging breach of contract, breach of implied duty to market, and violation of the New Mexico Oil and Gas Proceeds Payment Act.

On July 27, 2015, Energen filed a Motion to Dismiss or Stay Litigation [#18] under the "first-filed" rule, in light of a previously-filed action pending in the United States District Court for the District of New Mexico, styled as *Anderson Living Trust, et al. v. Energen Resources Corporation*, No. 1:13-cv-00909-WJ-CG (D.N.M. filed September 20, 2013) (the "*Anderson* action"). Energen contended that Plaintiffs' claims were substantially the same, if not identical to, the claims asserted in the *Anderson* action. *Id*. at 1.

On August 10, 2015, Plaintiff Ulibarri filed an Unopposed Motion to Dismiss Without Prejudice His Claims Against Energen [#24] ("Unopposed Motion to Dismiss"). Ulibarri asserted that Colorado did not appear to be the proper venue for Ulibarri's claims because, *inter alia*, Energen and Ulibarri are not residents of Colorado and a substantial part of the events which supported Ulibarri's claims under New Mexico law arose in New Mexico, including the fact that the wells from which Energen produced natural gas and

paid royalties to Ulibarri and other New Mexico royalty owners were located in New Mexico. *Id*. at 1-2. By Order of October 1, 2015, Circuit Judge David M. Ebel, who was then presiding over the case, granted Ulibarri's Unopposed Motion to Dismiss [#24]. Ulibarri's claims against Energen, which were set forth in the second, fourth, sixth, seventh, and eighth claims for relief of the First Amended Class Action [#2], were dismissed without prejudice.

On August 14, 2020, Thiele and Swanemyer filed a Motion for Class Certification of their First Claim for Relief for Breach of Contract Against Energen [#27]. That Motion sought to certify a class only as to the first claim asserting breach of contract on behalf of the Colorado NGPT Class.

On December 7, 2015, Judge Ebel issued a Memorandum and Order Temporarily Staying Case ("Order") [#64]. Judge Ebel thus granted in part and denied in part Energen's Motion to Dismiss or Stay Litigation [#18], staying the case rather than dismissing it. The Order [#64] noted that the plaintiffs in the *Anderson* action made several arguments similar to Plaintiffs' claims in this case, the most significant of which was that "the *Anderson* plaintiffs' class-action definition would include royalty owners in Colorado who claim that Energen breached its contracts by deducting NGPT from royalty payments—a definition which fits Plaintiffs." *Id*. at 2-3. Because the *Anderson* plaintiffs had engaged in extensive class-certification discovery and proposed a class that would cover Plaintiffs, or at least some of Plaintiffs' claims, the Court stayed the action until the New Mexico district court had a chance to rule on the class certification. *Id*. at 3. Judge Ebel noted that if the New Mexico district court granted certification over Colorado

royalty-holders' Natural Gas Processors Tax ("NGPT") claims, then "the *Anderson* class could comprehensively dispose of the litigation and avoid piecemeal litigation. *Id*.

In a Joint Status Report [#84] filed on February 6, 2020, the parties indicated that the New Mexico district court had granted Plaintiffs' Narrowed Motion for Class Certification, certifying a class composed of Colorado royalty owners with interests in 150 leases. *Id*. at 2-3. The parties further stated that on February 7, 2020, Energen filed a Petition in the Tenth Circuit for permission to appeal the district court's class certification orders pursuant to Fed. R. Civ. 23(f). In response, Judge Ebel ordered that the case would remain stayed pending resolution of Energen's 23(f) Petition filed in the Tenth Circuit Court of Appeals. *See* February 7, 2020 Order [#85].

On May 28, 2020, a Joint Status Report was filed indicating that the Tenth Circuit had denied Energen's Rule 23(f) Petition. The case was reopened and a Scheduling Conference was held in July 2020. *See* [#96].

On December 4, 2020, the parties filed a Joint Motion for Order (1) Preliminarily Approving Class Settlement, (2) Provisionally Certifying Opt-Out Class Settlement, (3) Approving Notice to Class Members, (4) Establishing Opt Out and Objection Procedures, and (5) Setting a Final Hearing Date to Consider Final Approval of the Class Settlement, Attorneys' Fees, Expenses, and Incentive Awards [#98]. Simultaneously, the parties filed a Joint Notice of Unanimous Consent to the Jurisdiction of Magistrate Judge, and Joint Motion for Entry of Order of Reference Under 28 U.S.C. § 636(c)(1) [#99]. An Order of Reference [#100] was issued on December 7, 2020, assigning the case to the undersigned for all purposes.

An Order Preliminarily Approving the Parties' Proposed Class Settlement [#102] was filed on December 14, 2020, and a modified Order was filed on December 16, 2020. The Court found in the December 14, 2020 Order [#102], upon preliminary review, that the Class Settlement, attached to the Motion [#104] at Exhibit A, was fair, reasonable, and adequate. *Id*. at 4-5. The Court also provisionally certified, for settlement purposes only, an opt-out class under Rule 23(a) and (b)(3). *Id.* at 5-87. A Notice of Class Settlement was approved to be mailed to members of the Class. The Notice included deadlines to request exclusion from the Class or to file objections, *id*. at 7-8, and these deadlines were also set out in the Order. *Id* at 9.

The Joint Motion for Approval of Class Settlement [#107] and the Motion for Fees [#106] were filed on February 15, 2021, and the hearing on these motions was held on March 18, 2021. *See* [#112]. At the fairness hearing, the Court indicated that it would certify the class, grant the Motion for Final Approval of Settlement, and grant the Motion for Fees. *See id.* The Court now turns to those issues.

II. CERTIFICATION OF PLAINTIFF CLASS

The parties request the Court's consideration, pursuant to Fed. R. Civ. P. 23, of the creation of a Plaintiff Class for settlement purposes only, described as follows:

> All persons and entities, including their respective successors and assigns, to whom Energen has paid royalties or overriding royalties (collectively, "Royalties") on natural gas produced by Energen from wells located in the state of Colorado pursuant to leases, overriding royalty agreements or other agreements which do not expressly authorize Energen to deduct monetary costs, including but not limited to gathering and/or processing costs, and/or the New Mexico natural gas processors' tax, from the sale prices Energen receives from the sale of marketable natural gas at the first commercial market in the calculation of Royalties.

Motion for Approval of Settlement [#107] at 2. The defined Class excludes: (a) the United States; (b) the state of Colorado; and (c) Energen and its affiliates, and its respective employees, officers and directors. *Id*.

Courts have broad discretion when deciding whether to certify a class. *See Shook v. Bd. of Cty. Comm'rs of the Cty. of El Paso*, 543 F.3d 597, 603 (10th Cir. 2008). "Certification is appropriate only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (citation omitted). Rule 23(a) requires that (1) the class be so numerous that joinder is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative party are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Wendell H. Stone Co., Inc. v. Five Star Advertising, LLC*, No. 19-cv-03157, 2021 WL 1080398, at *2 (D. Colo. March 17, 2020) (citing Fed. R. Civ. P. 23(a)). A class action may be sustained if the requirements of Rule 23(a) are satisfied, and if the class meets the requirements of one of the categories of Rule 23(b). *Id*.

Plaintiffs seek to certify the Class under Rule 23(a) and (b)(3). Rule 23(b)(3) provides that a class action may be maintained if

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings 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.

Id. "In the typical case where the plaintiff applies for class certification, plaintiff bears the burden of proving that Rule 23's requirements are satisfied." *Wendell H. Stone Co.*, 2021 WL 1080398, at *2.

After hearing statements of counsel, and after taking into account matters contained in Motion for Class Certification [#27], the Response, the Reply, the Court file, and after otherwise being duly advised of the pertinent circumstances, the Court makes the following findings:

A. Rule 23(a)

1. Numerosity

As to numerosity, Rule 23(a)(1) requires that the class membership be sufficiently large to warrant a class action because the alternative of joinder is impracticable. *See Wendell H. Stone Co.*, 2021 WL 1080398, at *4. There is "no set formula to determine if the class is so numerous that it should be so certified." *Rex v. Owens ex rel Okla.*, 585 F.2d 432, 436 (10th Cir. 1978). "What matters is whether joinder would be impracticable, not whether the number of proposed class members would cross some threshold." *Gandy v. RWLS, LLC*, No. 17-558 JCH/CG, 2019 WL 1407214, at *5 (D.N.M. Mar. 28, 2019) (citation omitted).

In this case, there are 368 members of the Settlement Class, which the Court finds is more than sufficient to satisfy the numerosity requirement. *See, e.g., Pliego v. Los Arcos Mexican Rests., Inc.*, 313 F.R.D. 117, 126 (D. Colo. 2016) (finding that a class of 177 members satisfied the numerosity requirement). Accordingly, the numerosity requirement is met.

2. Commonality

As to the second commonality factor, the Court is required to ensure that there are questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" *Wal-Mart Stores*, 564 U.S. at 349-50 (citation omitted). The claims of the class "must depend upon a common contention. . . [that is] of such a nature that it is capable of classwide certification—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. "[O]nly a single issue common to the class" is requires for the commonality element to be satisfied. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (citations and internal quotations omitted).

In this case, the parties allege that the success of each Class members' claim depends on whether Energen engaged in a common course of conduct under which it deducted certain post-production costs in the calculation of royalties. *See Motion for Approval of Settlement* [#107] at 5. While Energen denies that it improperly calculated the Class members' royalties, its denial is not based on individualized issues that undermine a common question capable of resolution. *Id*. Thus, the Court finds that the determination of whether Energen improperly deducted certain post-production costs in calculating the Class members' royalties depends on a common issue that will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350. Accordingly, the Court finds that the commonality requirement

is satisfied.

3. Typicality

The third Rule 23(a) factor requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The typicality requirement ensures that absent class members are adequately represented by evaluating whether the named plaintiff's interests are sufficiently aligned with the class' interest." *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1222 (D.N.M. 2012). "Typicality 'is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *In Re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 686 (D. Colo. 2014) (citation omitted); *see also In re Thornburg Mortg.*, 912 F. Supp. 2d at 1223 (holding that typicality is established if the claims of the plaintiff and the class arise from the same legal or remedial theory and they"'are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances'") (citation omitted).

Here, each Class member claims to have been damaged by the same course of conduct, namely Energen's common practice of deducting certain post-production costs in the calculation and payment of royalties to the members of the Class. *See Motion for Approval of Class Settlement* [#107] at 5. The Court finds that Plaintiffs' claims are based upon a common course of conduct by Energen, and Plaintiffs' theories of liability are the same as those of the other Class members. Accordingly, the Court finds that the typicality element is satisfied.

4. Adequacy of Representation

Finally, Rule 23(a)(4) requires that the class representative(s) "fairly and adequately protect the interests of the class." The Tenth Circuit has held that "[r]esolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interests with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter v. Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002).

In the case at hand, the parties represent that neither the named Plaintiffs nor their counsel have any conflicts of interest with other class members. *See Motion for Approval of Settlement* [#107] at 6. In addition, the Court finds that the named Plaintiffs and their counsel have continuously prosecuted this class action vigorously on behalf of all of the Class members. In support of this finding, the Court notes the substantial work that Class Counsel did in prosecuting the case as represented in the summary of work in the Motion for Fees [#106]. *Id* at 1-4; *see also* Ex. 1, Barton Decl. at 4-8. Furthermore, Class Counsel has extensive experience successfully representing royalty owners in numerous other class action royalty underpayment cases against natural gas producers. *See Motion for Approval of Settlement* [#107], Ex. 2, Barton Dec. at ¶¶ 5-8; *Br. in Supp. of Motion to Certify Class* [#28], Ex. 9, Barton Aff.; Ex. 10, Harken Aff.

Based on the foregoing, the Court finds that the prerequisites to maintain this action as a class action set forth in Fed. R. Civ. P. 23(a) are met.

B. Rule 23(b)(3)

The Court now turns to Rule 23(b)(3). Again, that rule requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b). "In determining predominance and superiority under Rule 23(b)(3), the Court considers the following factors: (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. *Id*. (citing Rule 23(b)(3)(A)-(D)).

1. Predominance

As noted by Chief Judge Brimmer of this Court, "[p]arallel with Rule 23(a)(2)'s commonality element, Rule 23(b)(3)''s predominance requirement imposes an obligation upon district courts to ensure that issues common to the class predominate over those affecting only individual class members." *In Re Crocs*, 306 F.R.D. at 689. The predominance requirement is, however, more demanding. *Id*. "Rule 23(b)(3)'s predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation based on 'questions that preexist any settlement.'" *Id.* (citation omitted).

Here, the predominant issues are whether Energen was obligated to pay royalties to the members of the Class under the lease agreements at issue based upon the sale proceeds received by Energen on the sale of residue gas and natural gas liquids to third-party purchasers, and whether Energen breached its contractual obligations to the members of the Class based upon Energen's practice of deducting certain post-production costs from the sale proceeds in the calculation and payment of royalties to the Class members. *See Motion for Approval of Settlement* [#107] at 6. Energen has employed a common method of royalty accounting with respect to the royalties paid to the members of the Class, and the Court finds that the issue of whether Energen's royalty accounting methods constitute a breach of Energen's contractual obligations to the Class is the predominant issue in this litigation. *Id.* Energen denies these claims, but its denial is not based on individualized issues that would predominate over common questions of law and fact. *Id*.

Based on the foregoing, the Court finds that the common questions of law and fact for the Class members predominate over any individual issues which might exist. The predominance requirement is therefore satisfied.

2. Superiority

Rule 23(b)(3) also requires that a class action be the superior method of adjudicating the controversy. Here, there have been no individual lawsuits filed by any of the 368 Class members regarding the claims at issue, which weighs in favor of class action superiority. *See In re Revco Sec. Litig.*, 142 F.R.D. 659, 669 (N.D. Ohio 1992). Further, the Court finds that concentrating this litigation in this Court is desirable,

because all of the natural gas production at issue occurred in this judicial district and most of the Class members reside in this judicial district. Finally, because this is a request for settlement-only certification, the Court does not need to consider the manageability factor in determining whether the superiority requirement has been satisfied. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Accordingly, the Court finds that the superiority requirement is satisfied.

3. Conclusion as to Class Certification

Based on the foregoing, the Court finds that the requirements of both Fed. R. Civ. P. 23(a) and (b)(3) are met. Accordingly, a Plaintiff Class is certified pursuant to Fed. R. Civ. P. 23(b)(3) for purposes of the settlement in this case. Plaintiffs Carol Thiele and Lynn Swanemyer are designated as the Class Representatives. George A. Barton and Stacy A. Burrows of Barton and Burrows, LLC are designated as Class Counsel.

III. Approval of the Settlement Agreement

The Court now turns to the parties' request that the Court give final approval to the Settlement Agreement, which the Court preliminarily approved on December 14, 2020 [#102]. The defined terms of the Settlement Agreement [#107-1], are incorporated by reference.

"'[T]rial judges bear the important responsibility of protecting absent class members' and must be 'assur[ed] that the settlement represents adequate compensation for the release of the class claims.'" *In Re Crocs*, 306 F.R.D. at 690 (citation omitted). Four factors are relevant to whether a proposed settlement is fair, reasonable and adequate: "(1) whether the proposed settlement was fairly and honestly negotiated; (2)

whether serious questions of fact and law 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 & Willbanks Corp.*, 314 F.3d at 1188.

After hearing statements of counsel and taking into account matters contained in the Motion for Approval of Class Settlement [#107], the Court file, and otherwise being duly advised of the pertinent circumstances, the Court makes the following findings.

A. Preliminary Findings

Pursuant to the Order entered on December 14, 2020 [#102], Class Counsel has complied with the Court's directions with respect to sending notice to the Class members. Class Counsel mailed the notice approved by the Court to all members of the Plaintiff Class who could be reasonably identified. The notice to Class members and manner of sending such notice comply with due process and with Fed. R. Civ. P. 23.

Pursuant to Fed. R. Civ. P. 23(c)(2) and the terms of the notice, members of the Plaintiff Class have been provided with the opportunity to exclude themselves from the Plaintiff Class. No Class members have opted out of the Plaintiff Class.

Plaintiffs and Class Counsel have entered into the Settlement Agreement (i) after taking into account the uncertainties, risks, and potential delays associated with the continued prosecution of this action, including those involved in securing a final judgment that would be favorable to the Plaintiff Class and not be disturbed on appeal; (ii) after taking into account the substantial benefits that will be received as a result of the

settlement; and (iii) after having concluded that the settlement provided for herein confers substantial benefits on the members of the Plaintiff Class, and is fair, just, reasonable, adequate, and in the best interests of the Plaintiff Class.

Energen has denied and continues to deny liability in this action, and asserted many defenses. Energen entered into the settlement in order to put to rest the present controversy between Plaintiffs, the Plaintiff Class, and Energen, and to avoid the further expense, inconvenience, and disruption of defending against the action. Energen also has taken into account the uncertainty and risks inherent in any litigation, especially in complex cases like this action, and the fact that substantial amounts of time, energy, and resources of Energen have been and, unless this settlement is consummated, will continue to be devoted to the defense of this action.

The Court finds that a class action settlement should be approved only if it is fair, reasonable, and adequate, after comparing the terms of the settlement with the likely results of litigation.

B. Findings as to Fairness, Reasonableness, and Adequacy

1. Whether the Proposed Settlement was Fairly and Honestly Negotiated

The Court first finds that the settlement as set forth in the Settlement Agreement was arrived at through arms-length, vigorous, and extensive negotiations between Class Counsel and counsel for Energen. As noted in Section II, *supra*, Class Counsel has extensive experience prosecuting royalty underpayment cases in Colorado and elsewhere. *See Motion for Approval of Settlement* [#107], Ex. 2, Barton Decl. ¶¶ 5-8. They have litigated, and successfully resolved, a number of other very significant royalty

underpayment cases on behalf of Colorado royalty owners. *See id.* This experience has obviously been of great assistance to Plaintiffs' counsel in fairly and honestly negotiating resolution of this litigation with Energen's counsel.

Moreover, Class Counsel vigorously prosecuted this case, another factor the Court may consider. *Ashley v. Regional Transp. Dist. & Amalgamated Transit Union Div. 1001 Pension Fund Trust*, No. 05-cv-01567-WYD-BNB, 2008 WL 384579, at *5 (D. Colo. Feb. 11, 2008) (quoting *Malchman v. Davis*, 706 F.2d 426, 433 (2nd Cir. 1983) (approving settlement where parties "conducted extensive discovery which [wa]s sufficient to evaluate the merits of the claims and defenses as well as the efficacy of the settlement.")) Before the Settlement Agreement was reached, the parties engaged in voluntary and extensive discovery. Energen produced hundreds of pages of documents, and gigabytes of data, totaling millions of data entries. *See Motion for Approval of Settlement* [#107], Ex. 2, Barton Decl. ¶ 11. Both Plaintiffs and Energen hired experienced royalty accounting experts to review this data and to calculate alleged damages sustained by the Class. An abbreviated summary of additional work that Class Counsel did in prosecuting the case over the last six years is discussed in the Motion for Fees [#106], further supporting the Court's finding that counsel vigorously prosecuted this case.

Based on the foregoing, the Court finds that the proposed settlement was fairly and honestly negotiated.

2. Whether Serious Questions of Fact and Law Exist

This factor requires the Court to determine "whether serious questions of law and

fact exist, placing the ultimate outcome of the litigation in doubt." *See Ashley*, 2008 WL 384579 at *6 (internal citation omitted) (approving settlement of claims of over 200 class members to avoid the "risk" inherent "when the litigation is complex and involves numerous parties"). The existence of such doubt "augurs in favor of settlement." *Belote v. Rivet Software, Inc.*, No. 12-cv-02792-WYD-MJW, 2014 WL 3906205 at *3 (D. Colo. Aug. 11, 2014) (internal citation omitted) (approving settlement). Courts analyzing this factor should consider that uncertainty is inherent in taking a case through jury trial. *See Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 285 (D. Colo. 1997) (approving settlement and acknowledging that the "one constant about litigation … is that the ultimate jury result is uncertain, unknown, and unpredictable").

In this case counsel has shown that serious questions of law placed the ultimate outcome of this litigation in doubt. The royalty underpayment issues presented on behalf of the 368 class members in this litigation are extremely complex. *See Motion to Approve Settlement* [#107], Ex. 2, Barton Decl. ¶¶ 9-10, 12. The parties retained experienced royalty accounting experts to perform the necessary analysis of the underlying accounting data. *See id*. ¶¶ 11, 13. Although Plaintiffs and their counsel indicate that they believe they have a strong case based on their experts' analyses, and would have a good chance of prevailing on the issue of liability, a favorable judgment in favor of the Class would be far from certain because of the serious questions of law and fact at issue. *See id*. ¶ 9. Ultimately, the outcome of a trial would be predicated on a court's or jury's assessment of legal questions regarding interpretation of the royalty and overriding royalty instruments and the competing experts' testimony over complex issues

of natural gas marketing and royalty accounting. This inevitably would depend on the factfinder's assessment of the facts and the credibility of each side's expert witness testimony regarding this subject matter, and the resolution of other risk factors, as identified in Class Counsel's declaration in support of this motion. *See* [#107-2]. Thus, the Class would have faced a recognizable risk of a judgment in favor of Energen on the issue of liability. *See id*.

Plaintiffs and the Class also would have faced a serious question regarding the amount of the alleged damages to which the Class members would be entitled. Ultimately, if the case were tried, there would have been two vastly different viewpoints presented concerning the measure of the Class members' alleged damages. *See Motion to Approve Settlement* [#107] and Ex. 2, Barton Decl. As with the issue of liability, counsel indicates that each side would have presented expert witness testimony concerning the proper calculation of any additional royalty payments to which the Class members might be entitled. *See id.* Although Plaintiffs and their counsel are confident that they would have presented a persuasive damage calculation for all Class members, the amount of damages to which the Class members are entitled would be contested, and there was considerable uncertainty regarding the amount of damages that a jury may have awarded to the Class. *Id*.

Furthermore, if the parties had not been able to negotiate a fair and reasonable Settlement Agreement, then the Class members would have been required to undertake protracted litigation, which Class Counsel believes presents a serious risk and uncertainty as to ultimately recovering on their royalty underpayment claims. *See*

Motion to Approve Settlement [#107] at 12-13. For instance, in five other Colorado royalty underpayment class actions which Class Counsel has handled in the last three years, the defendant natural gas producers filed for protection under Chapter 11 of the Bankruptcy Code which precluded the class members from obtaining any recovery on their pre-petition royalty underpayment claims. *Id*., Ex. 4, Burrows Decl. ¶¶ 3-35.

Based on the foregoing, the Court finds that serious questions of fact and law exist in this case, placing the ultimate outcome of the litigation in doubt.

3. The Value of an Immediate Recovery

Settlement has been held to be appropriate under this factor when it enables a favorable outcome for a class and avoids litigation and appeal. *See Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 807 F. App'x 752, 759 (10th Cir. 2020) (value of immediate recovery outweighed possibility of future relief); *Belote*, 2014 WL 3906205 at *4 (affirming value of immediate recovery where settlement occurred before the parties expended time and money on additional discovery, depositions, and dispositive motions); *Srebnik v. Dean*, No. 05-cv-01086-WYD-MJW, 2007 WL 2422146, at *3 (D. Colo. Aug. 22, 2007) (approving settlement where proceeding to trial "would require the expenditure of significant resources by all parties"); *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 548 (D. Colo. 1989) (value of immediate recovery outweighed possibility of future relief where partial settlement entitled plaintiffs to 17% of the damages sought).

Here, the Class derived noticeable value from immediate recovery. As noted earlier, through the Settlement Agreement, Energen has agreed to pay the Class

members approximately 87.5% of the total amount of challenged royalty underpayments at issue on production from wells subject to the Class members' leases. *See Motion to Approve Settlement* [#107], Ex. 2, Harken Decl. ¶ 12. The settlement thereby facilitates recovery for the entirety of most of Class members' claims while avoiding a time and resource-consuming litigation.

The likely duration of the litigation in the absence of settlement would certainly be several more years. *See Motion to Approve Settlement* [#107], Ex. 2, Barton Decl. ¶ 10. Although this case has been litigated for nearly five years, the case was stayed for a significant period pending a resolution of the class certification issue in the *Anderson* case. No hearing on class certification of a litigation class was set and no trial date was set. If a settlement had not been reached, a trial on the merits likely would not have taken place until sometime in 2022 or even 2023. In addition, if the Class prevailed in a trial on the merits, Energen likely would have appealed from an adverse judgment. *See id.* at ¶ 9. Furthermore, the experience of Class Counsel confirms that royalty underpayment cases of this nature can take many years to resolve, particularly when such cases are actually tried to a conclusion. *See id.* at ¶ 9-10.

Based on the foregoing, the Court finds that the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.

4. The Judgment of the Parties As to the Settlement

Class Counsel believe that the Settlement Agreement represents a very good outcome that is fair, adequate, and reasonable for Class members on the claims at issue, both for the past and the future. *See Motion to Approve Settlement* [#107], Ex. 2, Barton

Decl. ¶ 13. The settlement as set forth in the Settlement Agreement was arrived at in good faith and was based on a realistic appraisal by the parties and their counsel of the difficulties inherent in a case of this magnitude and complexity. *See id.*

The settlement in the amount of $1,400,000 represents approximately 87.5% of the total amount of postproduction costs that Plaintiffs challenged as improperly deducted under the relevant royalty instruments. *Motion to Approve Settlement* [#107], Ex. 2, Barton Decl. ¶ 12. "[C]ounsel's judgment as to the fairness of the agreement is entitled to considerable weight." *Belote*, 2014 WL 3906205 at *4 (quoting *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 695 (D. Colo. 2006)) (approving settlement negotiated by experienced counsel); *Alvarado Partners*, 723 F. Supp. at 548 (approving settlement where experienced class counsel believed the settlement "is in the best interests of the class"); *Martinez v. Maketa*, No. 10-cv-02242-WYD-KLM, 2011 WL 2222129, at *2 (D. Colo. June 7, 2011) (approving settlement after deferring to the parties' agreement that the settlement is fair and reasonable).

The Court also notes that no member of the Class objected to the settlement. The lack of any significant number of objectors to a class settlement is another factor that weighs heavily in favor of approval of the Class Settlement. *Elna Sefcovic LLC*, 807 F. App'x at 762; *see also Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1008 (D. Colo. 2014). Class Counsel represent that their communications with the class members were very positive, and there has been no assertion of collusion of improper pressure. *Motion to Approve Settlement* [#107] at 10, 17. In addition, the proposed settlement treats class members equitably relative to each other, compensating the

Class members based on the relative merits of their claims under their respective royalty instruments. *See id.* at 16.

5. Conclusion

Based upon the evidence presented, the arguments of counsel, and the entire record in the case, the Court concludes that the Settlement Agreement is fair, adequate, and reasonable. Accordingly, the Settlement Agreement [#107-1], and the terms of the settlement contained therein, are hereby finally approved.

V. AWARD OF FEES AND EXPENSES

Class Counsel has requested that their application for attorneys' fees and expenses and their application for incentive awards to the Class Representatives be approved. *See Motion for Fees* [#106]. Specifically, Class Counsel requests, pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), an Order: (1) awarding Class Counsel attorneys' fees in the amount of $490,000; (2) awarding Class Counsel litigation expense reimbursements in the amount of $67,320; and (3) approving a $15,000 incentive award to both of the named Plaintiffs, Carol Thiele and Lynn Swanemyer. *Id*. at 1. Energen takes no position on this request.

A. Attorneys' Fees and Litigation Expenses

As discussed in the Motion for Fees [#106], four attorneys employed by the Barton law firm invested substantial amounts of time in this case, totaling 887.6 attorney hours since their work on this case began in January 2015, through and including February 8, 2021. *Id*., Ex. 1, Barton Decl. ¶ 10. In addition, two paralegals worked a combined 66.5 hours on the case. *Id*. The combination of these hours, multiplied by the applicable

hourly rates, reflects a $593,487.50 lodestar for the Barton law firm. *Id*.; *see Harper v. Phillips & Cohen Associates, Ltd.*, No. 08-cv-01500-REB-KLM, 2009 WL 3059113, at *1 (D. Colo. Sept. 21, 2009) ("Any determination of reasonable attorney fees starts with a calculation of the 'lodestar' amount") (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The hours worked by each of the four attorneys and the two paralegals, along with their applicable hourly rates, are identified in more detail in the Motion for Fees [#106] and the Barton Declaration, Exhibit 1 thereto.

In addition, Class Counsel indicates that the Barton law firm will be required to devote significant additional time to the handling of this case after February 8, 2021, including preparation for and appearing for the final approval hearing, administering the mailing of the class settlement checks to the Class members, and preparing and sending appropriate 1099 tax forms to the Class members. The Motion for Fees [#106] estimates that after February 8, 2021, the Barton law firm will be required to devote approximately 30 additional attorney hours, at an average rate of $600 per hour, and 40 additional paralegal hours, at a rate of $175 per hour, to the completion of this class action litigation, which will represent an additional time value lodestar of $25,000. *Id*. at 5. Thus, the approximate total lodestar of the Barton law firm, through the completion of this litigation, will be $618,487. *Id*. at 5-6 and Ex. 1, Barton Decl. ¶ 11).

To determine the reasonableness of requested attorneys' fees in a common fund case, the Tenth Circuit has applied the following factors: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to

acceptance of the case; (5) the customary fee; (6) any prearranged fee, which is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974)). In a common fund case such as this one, the Tenth Circuit has recognized that the factor which should be given the greatest weight is the monetary results achieved for the benefit of the class, which results are often considered to be "decisive." *Id*. at 456.

The Court finds that the $1,400,000 Class Settlement which Class Counsel have obtained for the benefit of the Class is a very good result. Class Counsel has shown that there were substantial risks that the Class members would not obtain any recovery on their royalty underpayment claims against Energen. *Motion for Fees* [#106] at 6. First, Energen vigorously opposed the Plaintiffs' Motion for Class Certification [#27], and no ruling had been issued on that motion at the time when the parties' counsel negotiated a comprehensive Class Settlement. *Id*. at 6-7; Barton Decl. ¶ 14. Second, Energen also contested Plaintiffs' royalty underpayment claims on the merits, and there was considerable uncertainty as to whether the Class members would prevail on any part of their claims against Energen, even if the Class was certified. *Id*. There was also a risk that Energen, like other defendant gas producers in royalty underpayment cases which Class Counsel have recently prosecuted, could file for Chapter 11 Bankruptcy protection.

This could significantly impair the value of the Class members' royalty underpayment claims against Energen. *Id*.

Notwithstanding these substantial risks related to the Class members' claims, the $1,400,000 Class Settlement amount is approximately 87.5 percent of the amount of royalty underpayments (exclusive of interest) which the Class members were seeking to recover. *Motion for Fees* [#107] at 7; Ex. 1, Barton Decl. ¶ 15). The Court finds that this monetary amount achieved in settlement for the benefit of the class is an excellent result for the 368 Settlement Class members.

Another significant *Johnson* factor to consider is "the time and labor" involved. *Brown*, 838 F.2d at 454. As set forth previously, the Barton firm's hourly rate lodestar through the conclusion of this six-year litigation will be approximately $618,487. *Motion for Fees* [#106] at 7; Ex. 1, Barton Decl. ¶¶ 10-12. The requested $490,000 attorneys' fee is approximately 79 percent of the Barton law firm's hourly rate lodestar in this case. *Id*. Thus, the requested fees represent a .79 multiplier, which is far below the lodestar multiplier which this Court has awarded to class counsel in other cases. *See Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018) (approving fee award to plaintiffs' counsel in a collective FSLA action which represented a lodestar multiplier of 1.77, which "is consistent with lodestar multipliers approved by other courts in this District[]"); *Shaulis v. Falcon Subsidiary, LLC*, No. 18-cv-00293-CMA-NYW, 2018 WL 4620388, at *2 (D. Colo. September 26, 2018) (approving attorneys' fee award to class counsel which resulted in a multiplier of 1.36 to 1.72, "which falls within the range of fee multipliers courts routinely approve, ...").

Two other relevant *Johnson* factors are "the customary fee" and "awards in similar cases." *Brown*, 838 F.2d at 455. As Class Counsel points out, in numerous other royalty underpayment class actions in which this Court or Colorado state courts have awarded attorneys' fees to class counsel from a class settlement fund, the award has been for at least one-third of the class settlement fund, and often for a higher percentage. *Motion for Fees* [#107] at 8 (citing *Anderson v. Merit Energy Company*, Case No. 07-CV-00916 (D. Colo. Oct. 20, 2009) (Order awarding class counsel fees of approximately 42 percent of the 13 million dollar class settlement fund), Ex. 2; *Droegemueller v. Petroleum Dev. Corp.*, Case No. 07-cv-1362 (D. Colo. April 7, 2009) (Order awarding class counsel fees of one-third of the $8,040,493 class settlement amount), Ex. 3; *see also* Exs. 4 and 5. These cases demonstrate that Class Counsel's request for attorneys' fees in this case is in accordance with the customary attorneys' fee awards to class counsel in similar royalty underpayment class action cases.

Each of the foregoing factors, including results obtained, time and labor involved, and awards in similar cases, fully support Class Counsel's request for a $490,000 attorneys' fee award. In addition, because Class Counsel handled this case on a contingent fee basis, Ex. 1, Barton Decl. ¶ 19, they faced significant risks that the Class would not be certified, that the Class would not prevail on their breach of contract claims, and that Energen might file for bankruptcy. *Motion for Fees* [#106], Ex. 1, Barton Decl. ¶¶ 14, 19). These significant risks further support Class Counsel's fee request. *Lucas v. Kmart Corp.*, 2006 WL 2729260, at *6 (D. Colo. July 27, 2006) (recognizing that "the risk of non-recovery" is a factor that "weighs heavily" in determining an award of fees to

class counsel). Additionally, the absence of any objections to the fee requests by Class Members supports approval of the fee request. *See In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1652303, at *4 (D.N.J.2007).

Based on the foregoing, the Court finds that the fees requested by Class Counsel are reasonable and **grants** the Motion for Fees [#106] as to that issue.

The Court also finds that the litigation fees in the amount of $67,320 requested by Class Counsel are reasonable and should be awarded. The Tenth Circuit has held that litigation expenses should be reimbursed to Class Counsel in a common fund case if the requested litigation expenses are of the type typically billed by attorneys to paying clients in the marketplace. *Bratcher v. BrayDoyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993). The Court finds that is the situation here. *See Motion for Fees* [#106], Ex.1, Barton Decl. ¶ 17.

Based on the foregoing, the Court awards Class Counsel reasonable attorneys' fees in the amount of $490,000, and litigation expenses in the amount of $67,320. The Court directs that such fees and expenses be paid to Class Counsel from the Settlement Amount defined in paragraph 2 of the Settlement Agreement [#107-1].

B. Incentive Awards

Finally, the Court approves the requested incentive awards of $15,000 to the two named Plaintiffs. The purpose of incentive awards for class representatives is to encourage people with significant claims to pursue actions on behalf of others similarly situated. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Lucken Family Ltd. Partnership, LLP v. Ultra Res., Inc.*, No. 09-cv-01543-REB-MT, 2010 WL 5387559, *6

(D. Colo. 2010). Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and of rewarding individual efforts taken on behalf of the class. *See, e.g., Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000); *Ryskamp v. Looney*, No. 10-cv-00842-WJM-KLM, 2012 WL 3397362, *6 (D. Colo. 2012).

Here, the two Class Representatives devoted substantial time and effort which contributed to the ultimate Class Settlement. *See Motion for Fees* [#106], Ex. 1, ¶ 21. In addition, the Class Representatives took the initiative of retaining counsel to pursue the royalty underpayment claims at issue on behalf of the other Class members, which no other Settlement Class member has pursued through litigation. Accordingly, the Court will award an incentive award of $15,000 to Class Representative Carol Thiele and $15,000 to Class Representative Lynn Swanemyer.

VI. Approval of the Final Distribution Schedule

The parties presented to the Court the Final Distribution Schedule, which represents the Class members' proportionate share of the Settlement Amount defined in paragraph 2 of the Settlement Agreement, less the amounts awarded in Section V, *supra.* The Court finds that the Final Distribution Schedule should be approved. Class Counsel shall distribute payments to the Class members consistent with the Final Distribution Schedule, as provided in paragraph 6 of the Settlement Agreement [#107-1].

VII. Conclusion

Based on the foregoing,

IT IS HEREBY **ORDERED** that the Class identified in this Order and in the Settlement Agreement [#107-1] is approved for settlement purposes.

IT IS FURTHER **ORDERED** that the **Joint Motion for Final Approval of Class Settlement** [#107] is **GRANTED**, and the settlement as set forth in the Settlement Agreement [#107-1] is **APPROVED** as fair, reasonable, and adequate.

IT IS FURTHER **ORDERED** that Class Counsel's Motion for an Award of Attorneys' Fees, Litigation Expense Reimbursements, and Incentive Award Payments to the Two Named Plaintiffs [#106] is **GRANTED**. Class Counsel is awarded reasonable attorneys' fees in the amount of **$490,000**, and litigation expenses in the amount of **$67,320**. Class Representatives Carol Thiele and Lynn Swanemyer are each awarded an incentive award of **$15,000**.

IT IS FURTHER **ORDERED** that the parties shall take any and all steps necessary to implement the Settlement Agreement according to its terms and the terms of this Order.

IT IS FURTHER **ORDERED** that the Class' Released Claims (as defined in paragraph 7 of the Settlement Agreement) are fully and completely settled, discharged, and released. Distribution of the Settlement Amount shall be conducted pursuant to paragraph 6 of the Settlement Agreement, and Class members are deemed conclusively to have released and settled the Class' Released Claims.

IT IS FURTHER **ORDERED** that all such members of the Plaintiff Class are barred

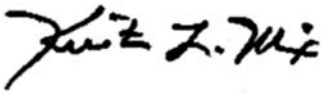
and permanently enjoined from commencing or prosecuting, either directly, representatively, derivatively or in any capacity, any of the Settled Claims, against the Energen Released Parties (as that term is defined in paragraph in paragraph 7 of the Settlement Agreement).

IT IS FURTHER **ORDERED** that without affecting the finality of this Final Judgment in any way, this Court shall retain continuing and exclusive jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment.

IT IS FURTHER **ORDERED** that the United States District Court for the District of New Mexico has certified a class of Colorado royalty owners claiming that they are owed additional royalties on gas used as fuel by Energen. *See* Joint Motion for Order (1) Preliminarily Approving Class Settlement, (2) Provisionally Certifying Opt-Out Class Settlement, (3) Approving Notice to Class Members, (4) Establishing Opt Out and Objection Procedures, and (5) Setting A Final Hearing Date to Consider Final Approval of the Class Settlement, Attorneys' Fees, Expenses and Incentive Awards [#98] (describing *Anderson Living Trust v. Energen Resources Corp.*, Case No. 1:13-cv-00909-WJ-CG ("*Anderson*")). The *Anderson* class includes royalty owners who also are members of the Settlement Class, but the *Anderson* action concerns only claims associated with the use of gas as fuel. The Settlement Agreement [#107-1] approved by this Court does not resolve claims associated with royalties allegedly owed on the use of gas as fuel.

Dated: April 19, 2021

BY THE COURT:



Kristen L. Mix
United States Magistrate Judge