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

Bill Fankhouser and Tim Goddard on behalf of themselves and all others similarly situated, Plaintiffs,	)	
v.	)	Case No. CIV-07-798-L
XTO Energy, Inc. f/k/a Cross Timbers Oil Co., a Delaware Corp. ("XTO"), Defendants	)	

MOTION IN SUPPORT OF CLASS COUNSEL'S FEE REQUEST AND REQUEST FOR SEPARATE ALLOCATION OF FEES TO WHITE AND TO PRIOR CLASS REPRESENTATIVES

Edward L. White, P.C. ("White") files this Motion in Support of Class Counsel's Fee Request and Request for Separate Allocation of Fees to White. White supports the motion filed by Helms, Underwood & Cook ("Helms"), current counsel for the class in the present case, for an attorney fee not to exceed $18,400,000 ("Attorney Fee Award"), all costs reasonably incurred in prosecuting this case in an amount not to exceed $300,000 ("Costs"), and a class representative fee not to exceed $100,000 ("Representative Fee").[1] For

[1] In addition to Ed White, Martin High had entered an appearance on behalf of plaintiffs working of counsel with Edward L. White, PC. High is a professor of Chemical Engineering at Oklahoma State University and also an attorney.

White 10
EXHIBIT

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the reasons presented in Helms' Motion (Doc. 485), each of these requests is more than justified based on the excellent results obtained for the Class.

In addition, White ask the Court to separately identify an appropriate portion of the Attorney Fee Award and a corresponding appropriate portion of the Representative Fee as reasonable compensation for the time expended, the efforts, and the financial risk undertaken by White and by prior class representatives Ladene Beer ("Beer") and Katherine Boeck-Sanko ("Sanko"). Finally, White asks to be reimbursed for specific litigation expenses and expert fees incurred by White in an amount not to exceed $100,000.[2]

BACKGROUND

First, the obvious: the Court was not pleased with White, Beer or Sanko when their active participation in this case ceased in mid-2010. The Court's Order of April 13, 2010 (Doc. 189) exemplified the Court's frustration. Without conceding or re-litigating the issues involved, it was clear at that time that new counsel and new representative plaintiffs would benefit the class. New counsel and new class representatives were identified, intervened, and continued the case. The new counsel's excellent work and the efforts of the new class representatives building on the work previously undertaken by

[2] It is White's understanding that its costs combined with the costs incurred by Helms will not aggregate to more than $300,000.

White and the prior class representatives ultimately led to the current happy outcome for the Class.

That history does not erase the years of hard work and dogged pursuit of claims on behalf of this class by White, Beer and Sanko. The roots of the present case go all the way back to 2001. White was approached by a group of landowners and royalty owners primarily in Texas County, Oklahoma (calling themselves "Rural Residents for Natural Gas Rights" or "RRNGR") who were concerned about certain industry practices related to royalties and free domestic gas. The matter was originally presented to White as undifferentiated complaints by the membership against several companies including XTO related to a wide variety of royalty and production-related issues.

A predecessor case was filed against XTO and several other companies in Texas County, Oklahoma district court on January 30, 2002 (Case No. CJ-2002-11), and Beer and Sanko were named as class representatives in that case as it related to claims against XTO. Initially, the case in Texas County focused on issues related to free domestic gas. However, over time, the claims of the membership became differentiated into two general themes: (1) complaints about use of free domestic gas in residences under specific lease terms; and (2) complaints about how various companies paid royalties.

The Second Amended Petition filed August 2, 2002 added a claim seeking an accounting for royalties alleging underpayment by the Defendants using various artifices including, but not limited to, sales by Defendants "to their customers, who are, in many cases, wholly owned subsidiaries or affiliates owned by the same parent company," which eventually turned out to be a key issue in the present action.

The differentiation of types of claim and difficulties managing the multi-defendant litigation led to separating the litigation into multiple cases. A petition in a severed action against XTO was filed on October 4, 2004, again in Texas County, Oklahoma (Case No. CJ-04-59). The litigation against XTO continued slowly with XTO resisting every effort by Plaintiffs at discovery and procedural progress in the state case. White filed at least three motions to compel prior to entry of Helms into the case, and after Helms entered several more motions to compel were filed. XTO was less than forthcoming, and its course of conduct slowed the litigation greatly.

Around the April 2007 time frame, XTO expressed a purported interest in settlement discussions. Based on information then available, counsel made a demand to XTO for payment of damages in excess of $25 million for the prospective class. However, XTO did not have any real interest in settlement discussions at that time, since no discussions were had after the demand was

made. Instead, XTO used that demand as a pretext for removing the claims to this Court under the then relatively new Class Action Fairness Act codified at 28 USC § 1332(d)(2). *See* Notice of Removal (Doc. 1) at ¶9. Typically, actions cannot be removed to federal court more than one year after they are filed, but that one year bar is inapplicable to class actions removed to federal court under the Class Action Fairness Act. *See* 28 USC § 1453(b). Thus, it came to be that this matter was removed to federal court on July 19, 2007, nearly three years after the first petition was filed in a severed case and nearly five years after the first claims for compensation for underpayment of royalties was asserted in the first state court action.

Once in federal court, XTO's delay tactics continued. For example, White on behalf of Beer and Sanko and the putative class filed a motion to compel (Doc. 19), XTO filed a motion for protective order (Doc. 32), and Plaintiffs also filed a motion for leave to conduct additional depositions (Doc. 37). In June 2008 the Court granted Plaintiffs' motions in whole or in part and denied XTO's motion. (Doc. 45 filed June 26, 2008).

On May 7, 2008, White on behalf of Beer and Sanko and the putative class filed a motion for class certification and brief in support. (Doc. 27). After additional discovery and extensive briefing, a two-day hearing on class certification was held on October 6 and 7, 2008. Thereafter, the Court sought

additional information relevant to whether class certification was proper. (Doc. 57). After more information was provided by both sides, the Court certified a class in March 20, 2009. (Doc. 75). XTO's request for leave to appeal this decision was rejected by the 10th Circuit (Case 09-701).

Notice was provided to the class as ordered by the Court and also by a web site set up by White. After mailing out just over 2000 notices, calls came back from more than 100 class members, and emails and letters were also received inquiring about the class. Only 12 individuals and 6 firms asked to be excluded.

Shortly after class certification, summary judgment was sought on liability. (Doc. 81 filed May 20, 2009). The issues were extensively briefed, and in a February 5, 2010 order, the Court granted partial summary judgment on the issue of liability to Beer and Sanko. (Doc. 148). At this point in the case, White on behalf of Beer and Sanko and the certified class had established the requisites for common treatment of the claims of Beer and Sanko and that those named plaintiffs were entitled to summary judgment. White, on behalf of the then-certified class also filed a motion seeking summary judgment in the amount of nearly $18 million on behalf of the certified class. (Doc. 144).

The case was set on the Court's April 2010 trial docket. (Doc. 155). The parties had already begun final preparations for trial, and multiple pretrial

motions and documents had been filed. (e.g., Daubert motions, motions in limine, and the like). However, this was the point where the Court became concerned, and the Court's concern ultimately led to intervention of Helms on behalf of Goddard and Fankhouser. White's work on behalf of the class as a counsel of record ended in mid-2010, but White continued to assist Helms thereafter by transferring all file documents and by addressing issues as requested by Helms.

Thus, for 8 of 10 years this case was pending, it was prosecuted on behalf of the class by White with Beer and Sanko as class representatives. White expended thousands of hours and circa $100,000 seeking to vindicate the class claims. This nearly decade of work by White formed the foundation on which Helms and the interveners built their case. It seems fair to note that at least a part of the reason XTO may have been motivated to settle was the obvious fact that this case was not going away. Successive counsel doggedly pursued the claims in the face of a hearty defense by XTO. It could be argued that this case wore XTO down.

ARGUMENT AND AUTHORITY

I. ATTORNEY FEES

Helms, in their brief, ably stated the law applicable to attorney fees, so White will not take the Court's time restating those principals. Further, as it

relates to the commonly applicable factors, Helms stated the case well regarding why they militate in favor of the fee award requested. Thus, White will only revisit the particular factors that are different from Helms as it relates to White's request for an appropriate portion of the Attorney Fee Award to compensate White for its time and effort in prosecuting this case for many years. The relevant factors in considering a fee award in a common fund case include the following:

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. Whether the fee is fixed or contingent;
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

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The only ones that vary for White's application for fees as compared to Helms are the following numbered factors addressed herein: (1) "the labor and time involved," and White's time and labor differed from Helms'; and (4) "the preclusion of other employment by the attorney due to acceptance of the case," and given White's smaller attorney count, this case was relatively more burdensome for White. White submits that the remaining factors do not vary materially from White to Helms, and they will not be re-addressed in this Motion having been well briefed by Helms.

A. TIME AND LABOR INVOLVED

Ed White spent more than 2,500 hours working on this case, and Martin High spent more than 500 hours (collectively, "White"). *See* Affidavits attached hereto as Exhibit 1 (White) and Exhibit 2 (High). Those hours, however, only capture a portion of the work on this case as not every call, email, research trail examined, document review, memorandum, or the like could be captured on a case where the work stretched out for nearly a decade. White understands that Helms attorneys collectively put more than 4,000

hours into this case in the last two years. Thus, counsel's time exceeds 7,000 in the aggregate with White's time comprising nearly 43% of the total.[3]

White typically bills $350 per hour for litigation work. However, White was never guaranteed $350 per hour for the thousands of hours of work. In class litigation, uncertainty is the norm. Certification can be denied because of individualized issues. Liability cases can fall apart. Competing cases can swoop in and take the case away from counsel. There are no guarantees.

In part, that is why cases have rejected the idea that detailed time records must be submitted in this type of case because the "amount and results" factor is more important than the "time and labor" factor in a common fund case. *See, e.g., Brown v. Phillips Petrol. Co.*, 838 F.2d 451, 456 (10th Cir.), cert. denied, 488 U.S. 822 (1988); and *Powell v. Henry*, 267 S.W.2d 107, 109 (Ark. 1980) (rejecting the idea that detailed time records must be submitted because, "[w]hile time spent is an important element to be considered in determining the reasonable value of an attorney's services, it is not the controlling factor and is sometimes a minor one").

[3] Putting the 7,000 hours in perspective, if a typical work year involves 260 days or so subtracting weekends and holidays, then 7,000 hours is 3.4 years of 8-hour-days.

B. THE PRECLUSION OF OTHER EMPLOYMENT DUE TO ACCEPTANCE OF THE CASE

From 2002 – 2010, White handled this litigation with two lawyers. Ed White is a full-time attorney with Edward L. White, PC, but Martin High is of counsel, and he is also a professor of chemical engineering at Oklahoma State University, so High's ability to devote time to cases he works on with White is limited. In essence, most of High's work from 2002 – 2010 with White was consumed with work on this case. There were a couple of other, smaller, oil and gas matters they worked on together, but this case took almost all of High's time working with White. Similarly, a major portion of Ed White's time and efforts were devoted to this case. Other work had to be turned away because there was neither time to devote to it nor was there the ability to fund other litigation as costly as the present case. *Beer v. XTO* became White's sole big litigation file from 2002 – 2010.

Neither White nor Helms associated co-counsel. This was positive in one aspect in that the attorneys who worked on the case were intimately familiar with its facts, with documents, with witnesses, and with its procedural history. Further, disputes among counsel were minimized, and a more efficient litigation strategy could be pursued.

Given the foregoing facts, prosecuting a class action as big and complex as this one necessarily precluded other employment for White and Helms during their time representing the class. *See, e.g., In re Savings Invest. Svc. Corp. Loan Commitment Litig. v. Heitner Corp.* (unpub.), 1990 WL 61936 at *4 (W.D. Okla. 1990) ("Because the case required each firm to devote resources, it is arguable that each was precluded from accepting other employment"); and *Stalcup v. Schlage Lock Co.*, 505 F.Supp.2d 704, 708 (D. Colo. 2007) ("because of the demands of this case. It is fair to assume, however, that lead counsel's efforts on this case could have been devoted to other cases which may have proven worthwhile."). Similarly, in this case, counsel turned away other clients due to the fact that both there was neither enough time nor money to support other significant litigation files.

II. CLASS REPRESENTATIVE FEE

Beer and Sanko are no longer named as class representatives, but they so served from 2002 – 2010. They took time to review pleadings, to participate in discovery, they took personal risks for the benefit of the class, attended many hearings over the years, and each submitted to two depositions. The purpose of a class representative fee award is "to compensate the named plaintiff for any personal risk incurred by the individual for the benefit of the lawsuit," and that purpose will be served by

awarding a class representative fee to Beer and Sanko. *McNeely v. Nat'l Mobile Health Care, LLC*, (unpub.), 2008 WL 21277124 at *16 (W.D. Okla. 2008). That purpose would be advanced by awarding a representative fee to Beer and Sanko. Whatever the Court thought about White's efforts on behalf of the class should not be imputed to Beer and Sanko.

III. LITIGATION EXPENSES

White expended more than $130,000 to advance the predecessor state litigation and the litigation upon removal to federal court. White attempted to remove from this total any expenses that were not directed to claims against XTO. The total thus adjusted is just under $100,000. See attached affidavits of White and High. These costs were necessary to the successful prosecution of this action. Therefore, White asks for the Court to award it costs it incurred in prosecution of this action.

CONCLUSION

WHEREFORE, White asks, in addition to granting the relief sought by Helms in its Motion (Doc. 485), for the Court to grant White a portion of any fee awarded, to Grant White its costs incurred in pursuit of this litigation, and to award a reasonable class representative fee to Beer and Sanko.

Respectfully submitted,

/S/ Edward L. White

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Attorneys for former Class Representatives Beer and Sanko and former Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of July, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Attorneys for Defendant XTO Energy, Inc.

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Conner L. Helms
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Erin M. Moore
HELMS UNDERWOOD & COOK
Class Counsel

/S/ Edward L. White

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

BILL FANKHOUSER and TIM GODDARD, on behalf of themselves and all others similarly situated, Plaintiffs,	)	
v.	)	**Case No. CIV-07-798-L**
XTO ENERGY, INC. f/k/a CROSS TIMBERS OIL COMPANY, a Delaware Corporation ("XTO"), Defendant.	)	

AFFIDAVIT OF EDWARD L. WHITE

STATE OF OKLAHOMA)
) .ss
COUNTY OF OKLAHOMA)

I, Edward L. White, of legal age and sound mind, being duly sworn, state as follows:

1. I am an attorney licensed and in good standing in the States of Oklahoma. I have been practicing in Oklahoma since 1994. I am a the President of Edward L. White, PC. I have extensive trial experience and am admitted to practice before various courts. I am also an AV rated attorney by my peers according to Martindale-Hubbell.

2. I have extensive experience in oil and gas litigation representing plaintiffs. I have represented individuals and companies in cases involving royalty interests and domestic gas issues. My law firm is currently involved in one other active class action lawsuit involving oil and gas issues.

3. Ladene Beer ("Beer") and Katherine Boeck-Sanko ("Sanko") were originally named as representative plaintiffs in a state court action in Texas County, Oklahoma styled *Shields et al.*

[including Beer and Sanko] *v. Anadarko et al.* [including XTO] (Case No. CJ-2002-11), from which a separate case against XTO was severed and styled *Beer, et al. v. XTO Energy, Inc.* (Case No. CJ-04-59), which was removed to federal court by XTO (same case number). Beer and Sanko thus served as representative plaintiffs from 2002 to 2010.

4. Throughout the time that I was involved in litigation with XTO, I was the supervising attorney. Martin High, of counsel with Edward L. White, PC, assisted me during most of the time during which I was involved. My legal assistant was also utilized throughout the proceedings for assistance with drafting pleadings, handling and review of discovery documents, and trial preparation.

5. I have reviewed the time entries in this case and the total hours through June 30, 2012 were more than 2,500 hours. The hours spent were reasonable in light of the complexity of the case, the distance of witnesses, the vigorous defense by the Defendant, and the results obtained.

6. The case also required experts to be hired. Plaintiffs' experts included Cynthia Heyman, Steve Reese, and Dan Reineke. Each charged an hourly rate that has been paid. Their time and expenses were reasonable and necessary in obtaining the results in this case.

7. The total costs through July 19, 2012 are more than $97,000 which includes the expert witness fees, deposition costs, hearing transcripts, witness fees, costs of mailing notices, publication of notices and other recoverable costs. The expenditures were reasonable and necessary in obtaining the results in this case.

8. I have reviewed the results in other class action underpayment of royalty cases, and I understand that the majority of the cases have settled for less than 100% of the actual damages owed to the class members, usually for less than 70% of actual class damages, not to mention what was owed for statutory interest. Based on these partial recoveries, courts have awarded attorneys fees averaging 40% of the settlement fund. The settlement in this case is substantially more than 150% over the actual damages even with statutory interest included.

9. The time spent in pursing the claims in this case precluded the attorneys and legal assistants from working on other cases, many in which are hourly cases where the clients are billed monthly. I bill $350 for my time.

10. The fee agreements with my clients were contingency fee agreements.

11. In my opinion, an attorney fee award of $18,400,000.00 and an award of $300,000 or less for costs is reasonable in this case.

12. It is my understanding that other courts have awarded class representatives a fee for prosecuting class actions and that in similar cases, the courts have awarded up to 6.00% of the fund. In this case, the class representatives are requesting a fee of $100,000 which is 0.27% of the cash amount of the settlement and is 0.24% of the total value of the settlement. In my opinion, the class representative fee is reasonable and fair in this case.

FURTHER AFFIANT SAITH NOT.

Edward L. White

Signed and sworn to before me on July 20, 2012 by Edward L. White.

Notary Public

My Commission Expires:

1/31/2015

(SEAL)

CHERYL A. LONG
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2015

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

BILL FANKHOUSER and TIM GODDARD, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-07-798-L
XTO ENERGY, INC. f/k/a CROSS TIMBERS OIL COMPANY, a Delaware Corporation ("XTO"),	)	
Defendant.	)	

AFFIDAVIT OF MARTIN S. HIGH

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

I, Martin S. High, of legal age and sound mind, being duly sworn, state as follows:

1. I am an attorney licensed and in good standing in the State of Oklahoma. I have been practicing law in Oklahoma since 2005. I am Of Counsel in the law firm of Edward L. White, P.C ("ELW, PC"). Mr. Edward L. White is the principal in this firm and has extensive experience in a wide range of legal matters including class actions and matters related to oil and gas production. I am licensed to practice before the United States Patent and Trademark Office.

2. I also practice as a solo practitioner through my firm Martin S. High, P.C. Through this firm I primarily practice intellectual property law including the prosecution of U.S patent, trademark and copyright applications. I represent landowners in the negotiation of mineral leases and pipeline right-of-way agreements. I regularly accept pro bono clients via Legal Aid of Oklahoma seeking representation in a variety of family law matters.

3. I have represented plaintiffs in oil and gas involving royalty interest disputes through ELW PC.

4. I am earned a Ph.D. in chemical engineering in 1990, I am a licensed Professional Engineer in the Commonwealth of Pennsylvania, and I teach chemical engineering at the undergraduate and graduate levels at Oklahoma State University.

5. I was co-counsel in the class action case entitled *Beer, et al. v. XTO Energy, Inc.* until the case was decertified, predecessor class representatives were removed, and Mr. White and I were removed as class counsel.

6. Only very limited use of law clerks was made during the period I was involved in the case. A legal assistant employed by ELW PC aided us in the assembly of documents and submission of pleadings.

7. I have reviewed my time records for the work on this case and the amount of time that I expended through April 13, 2012 was 522.5 hours. The hours spent were reasonable in light of the type, details and nature of the case, and particularly given the strenuous defense by the XTO.

8. I do not anticipate expending further time on this case.

9. I incurred costs of $ 1871.76 which primarily include costs for mileage for consultations with Mr. White and clients. In addition, I incurred costs associated with purchases of pipeline prices for the purpose of calculation of damage.

10. The fee agreements with our clients were contingency fee agreements made through ELW PC.

FURTHER AFFIANT SAITH NOT.

Martin S. High
MARTIN S. HIGH

Signed and sworn to before me on the 20th day of July, 2012 by Martin S. High.

Notary Public

My Commission Expires:

(SEAL)

JAN R. INMAN NOTARY PUBLIC # 02003240 EXP. 03/19/14 STATE OF OKLAHOMA