UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CHESAPEAKE ENERGY CORPORATION	CIVIL ACTION NO. H-21-1215

MEC PLAINTIFFS' MOTION FOR AND MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Plaintiffs in the MEC Class Action respectfully move for an order granting final approval to the class action settlement between them and defendant Chesapeake Appalachia, L.L.C. ("Chesapeake") and for an award of attorneys' fees and reimbursement of litigation expenses. The Settlement Agreement[1] provides for a monetary relief that would have been otherwise unavailable to individual class members, and includes important and valuable injunctive relief that will allow Class members to choose how their royalties are paid, and ensure that they are paid on the *higher* of two options – a downstream price net of deduction of post-production costs and an in-basin price with *no* such deductions.

This settlement is the end of a winding road that began eight years ago. Thanks to the tenacity and perseverance of Plaintiffs and Class Counsel, who have seen this settlement through original proceedings in Pennsylvania and worked with other litigants, including the Pennsylvania Attorney General, Settlement Class Members will benefit now and into the future in their dealings with Chesapeake post-bankruptcy. Plaintiffs respectfully request that the Court grant final approval to the settlement, and approve attorneys' fees and reimbursement of costs to the attorneys who have shepherded the case to its conclusion and delivered the benefits that final approval will realize.

I. NATURE AND STAGE OF THE PROCEEDING

Plaintiffs bring this motion for final approval of this settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and for attorneys' fees and reimbursement of costs pursuant to Rule 23(h).

[1] "Settlement Agreement" refers to the MEC Class Action Settlement Agreement, which was filed as Dkt. 3175-3 in the bankruptcy proceeding. Capitalized terms used throughout this memorandum have the same meanings ascribed to them in the Settlement Agreement.
"Plaintiffs" refers to the following plaintiffs who executed and are parties to the Settlement Agreement: James P. Burger, Jr.; Barbara H. Burger; Karen M. Fuller; Randy K. Hemerly; Amanda L. Schlick; and Janet C. Young.

A. Factual and Procedural Background.

Plaintiffs and Settlement Class Members are parties to gas and oil leases with Chesapeake in Pennsylvania. Chesapeake's leases with Plaintiffs and Settlement Class Members include a "Market Enhancement Clause" (hereinafter "MEC") or "Ready for Sale or Clause," provisions that Plaintiffs allege preclude Chesapeake, as the lessee, from deducting so-called "post-production costs" that are incurred to transform gas into marketable form or make the gas ready for sale or use. *See* Settlement Agreement ¶¶ 1.20 and 1.28. (These clauses do permit Chesapeake to deduct a pro rata share of costs incurred after the gas is marketable or ready for sale or use.)

Plaintiffs allege that Chesapeake underpaid royalties due to Plaintiffs and Settlement Class Members by deducting costs that were incurred prior to the Gas entering the interconnect point of a transmission pipeline, in breach of the MEC provisions of the leases. Plaintiffs contend that Chesapeake's Gas is not in marketable form until it meets the quality and pressure specifications of the interstate pipeline into which it is delivered. Plaintiffs contend, therefore, that the raw Gas produced by Chesapeake is not marketable at the well and that Chesapeake's deductions for gathering, dehydration and compression are improper and in breach of the Pennsylvania Leases, *i.e.*, the deductions are for activities that are necessary to transform the Gas into marketable form. Chesapeake, on the other hand, contends that the Gas produced or to be produced under Plaintiffs' and Settlement Class Members' leases is marketable at the wellhead, the post-production costs were reasonable, and that Chesapeake is entitled to deduct the costs at issue.

This case began with Class Counsel's factual investigation, over the course of more than a year, into potential claims regarding royalty underpayments by Chesapeake, leading to the filing of an action in the Middle District of Pennsylvania in 2013. *See Demchak Ptnrs. Ltd.*

P'ship v. Chesapeake Appalachia, L.L.C., 3:13-cv-02289-MEM (M.D. Pa.). Prior to filing, Class Counsel engaged in extended discussions with Chesapeake's counsel, which in turn led to Chesapeake's provision of substantial amounts of information to Class Counsel, including interviews of Chesapeake's internal revenue accounting personnel, as well as production of documents (including the gathering agreement at issue) and royalty data. Plaintiffs and Chesapeake then retained Judge Edward N. Cahn, a retired federal judge in Pennsylvania now serving as a mediator, who conducted an in-person mediation in June 2013, leading to an agreement that the parties then finalized. *See* accompanying Declaration of Larry D. Moffett ¶ 12; Dkt. No. 3-1, at 4-6; Dkt. No. 3-6 (Declaration of Edward N. Cahn).[2] Plaintiffs then initiated their case in the Middle District of Pennsylvania and submitted their motion for preliminary approval of the proposed settlement on August 31, 2013.

On September 12, 2013, another group of Pennsylvania lessors, referred to here as the Burkett-Intervenors, filed a motion to intervene in the Middle District of Pennsylvania case. *See* Dkt. No. 25 (motion) and 40 (memorandum in support). The Burkett-Intervenors, who had filed a putative class arbitration against Chesapeake before the American Arbitration Association on April 1, 2013, also sought to dismiss the Plaintiffs' case and remove it and the pending claims to that arbitration, arguing, among other things, that the class settlement proposed to this Court did not provide adequate relief to the Settlement Class. Chesapeake then filed a declaratory action enjoining the Burkett-Intervenors from pursuing a class arbitration. *See* Civ. No. 3:13-3073. The Burkett-Intervenors opposed that motion and filed a motion to consolidate Chesapeake's declaratory action with the Plaintiffs' case. *See* Dkt. No. 63 and 65.

[2] Unless otherwise noted, docket entries refer to the *Demchak* docket in the Middle District of Pennsylvania.

As the parties pursued these requests for relief, they also re-initiated settlement discussions. On May 7, 2014, counsel for Plaintiffs, the Burkett-Intervenors, and Chesapeake engaged in in-person mediation under the supervision of Judge Cahn and Richard Schiffrin, an attorney with decades of experience representing plaintiffs, including in Pennsylvania. Thereafter, the parties continued their efforts at resolution of each of the pending cases, and then held a third day of mediation after telephonic discussions between all the parties, again with the assistance of Judge Cahn and Mr. Schiffrin, on October 29, 2014. The parties this time reached an agreement with amended terms, with the Burkett-Intervenors joining in and supporting the class settlement. Moffett Decl. ¶¶ 21-23. Like the original settlement, the amended settlement provided for retrospective relief, in the form of a monetary payment of 55 percent of post-production costs deducted from MEC lessors' royalties prior to June 2014 and 34 percent of such deductions to the effective date of the settlement, which the parties estimated would total approximately $17 million. The settlement also provided for prospective relief, as Chesapeake agreed to bear 34 percent of future post-production costs. *See* Dkt. 80-1.

Judge Mannion granted preliminary approval of the amended settlement on September 30, 2015. On December 9, 2015, at the end of the opt-out and objection period, the Pennsylvania Attorney General filed an objection asking that the Court reject the settlement, Dkt. 109, at 1, and contemporaneously filed a case against Chesapeake and Anadarko Petroleum Corporation and Anadarko E&P Onshore, L.L.C., asserting claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1- 209-9.3. *See* Dkt. 109-1. Judge Mannion then adjourned the final approval hearing, Dkt. 145, and ultimately stayed the case, acknowledging the parties' ongoing attempts to reach resolution. Dkt. 173. Chesapeake and its co-defendants challenged the Attorney General's case on the pleadings, and after more than five

years of litigation, the Pennsylvania Supreme Court held on March 24, 2021 that the Attorney General could not assert claims under the UTPCL. In the meantime, Chesapeake's financial condition worsened, and it ultimately filed for bankruptcy on June 28, 2020.

On this ever-shifting terrain, the parties continued to negotiate, prior to and through Chesapeake's bankruptcy filing, including attempts at a global resolution that would include the Attorney General's and other royalty litigation, with the parties engaging Judge Cahn, and another nationally recognized mediator, John Perry, for several in-person mediations in late 2016 and into 2017. Moffett Decl. ¶ 27. At the same time, to protect the interests of the class, Class Counsel engaged bankruptcy counsel and engaged with other royalty owners, including through the bankruptcy through the royalty owners' committee. Plaintiffs ultimately reached this settlement in March 2021.

Judge Jones granted preliminary approval to the settlement on April 7, 2021, and ordered that final approval would be decided by an Article III court. A group of lessors filed an appeal of Judge Jones' order; following briefing and oral argument on that appeal, this Court affirmed the findings and conclusions of the bankruptcy court. *See In re: Chesapeake Energy Corporation*, 4:21-cv-1215 (S.D. Tex.), Dkt. 37 ("Preliminary Approval Order"). In the meantime, notice has issued to the Settlement Class, informing Settlement Class Members of their rights under the settlement, including the deadline of July 6, 2021 to opt-out or object to the settlement.

B. Terms of the Settlement.

The settlement provides for both monetary relief and injunctive relief. First, Chesapeake has agreed to create a common fund of $5 million to be distributed to the Settlement Class Members on a pro rata basis. There is no claims process, and no part of the settlement funds

available to Class Members will revert to Chesapeake.[3] Absent this monetary payment, nearly all Settlement Class Members would receive nothing for past deduction of post-production costs, as those retrospective claims have been discharged. The settlement amount will be paid out immediately after the settlement is final.

Second, Settlement Class Members will, for the first time, have the opportunity to elect how Chesapeake calculates and pays their royalties. Settlement Class Members will be able to select among three options set out in the Settlement Agreement – (1) the higher of the In-Basin Index Price Without Post-Production Deductions and the Netback Price; (2) the In-Basin Index Price Without Post-Production Deductions; or (3) the Netback Price. (Under the In-Basin Index Price Without Post-Production Deductions option, royalties are calculated based on the weighted average of two index prices (the Leidy Hub and the TGP Zone 4-300) and paid *without* deduction of Post-Production Costs.) If no election is made, the Settlement Class Member's royalties will be based on option 1, which is the option that is both most beneficial to the class member and economically rational, as Settlement Class Members' royalties will be calculated on the *higher* of the two payment options.

Further, Chesapeake has agreed not to deduct from its calculation of Class Members' royalties volumes of gas used as fuel, lost, or unaccounted for, and instead will pay royalties on 100 percent of such volumes. Settlement Agreement ¶ 6.6.

In exchange for these benefits, Chesapeake and its affiliates will be released from any claims the Settlement Class Members may have against Chesapeake or its affiliates based on the calculation, payment, and/or reporting of royalties pursuant to a Pennsylvania Lease. The

[3] Under the Plan of Allocation, the Settlement Fund will be reduced on a pro rata basis if Settlement Class Members exclude themselves from the class.

Settlement affects only Chesapeake, its affiliates and the other parties identified in the Settlement Agreement and does not affect how any other entity calculates and/or pays Royalties.[4]

The Settlement Class is defined as follows:

> all individuals and entities, including their predecessors and successors-in-interest, who, according to the business records maintained by Chesapeake, are or have been lessor parties to one or more Pennsylvania Leases, to the extent of their interests in such Pennsylvania Leases. The Settlement Class excludes (a) Chesapeake; (b) any person or entity who owns a working interest in or operates a gas well in Pennsylvania; (c) any person or entity who receives royalty in kind pursuant to a Pennsylvania Lease; (d) any person or entity who has previously released Chesapeake from liability concerning or encompassing any or all Settled Claims; (e) the federal government; (f) legally-recognized Indian Tribes; and (g) any person who serves as a judge in this civil action and his/her spouse.[5]

II. ISSUES TO BE RULED UPON AND STANDARD OF REVIEW

This motion raises two issues. The first is whether the proposed settlement is "fair, adequate, and reasonable," warranting final approval. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012); Fed. R. Civ. P. 23(e)(2). The second is whether the requested fees and costs are reasonable. *Union Asset*, 669 F.3d at 642-43; Fed. R. Civ. P. 23(h).

III. SUMMARY OF ARGUMENT

The proposed settlement should be granted final approval because it represents an outstanding result. Settlement Class Members receive monetary relief that would have been

[4] The Settlement is between and among not only Plaintiffs and Chesapeake, but also the Burkett-Intervenors. The Burketts will voluntarily dismiss their arbitration, with prejudice, within five days of the Effective Date. *See* Settlement Agreement ¶ 9.

[5] Under the Settlement Agreement, "Pennsylvania Leases" is defined as "each and every oil and gas lease that (a) covers a leasehold located in Pennsylvania except for the portions of Southwestern Pennsylvania covered by the Gas Gathering Contract Cost of Service - South Marcellus, (b) contains a Market Enhancement Clause or Ready for Sale or Use Clause, and (c) is or has been owned, in whole or in part, by Chesapeake Appalachia, L.L.C. as a lessee, according to the business records maintained by Chesapeake. Chesapeake represents that upon reasonable investigation, the only Pennsylvania Leases that are in production are located in the Marcellus Region." Agreement ¶ 1.23.

unavailable absent the settlement, and provides injunctive relief that guarantees that Settlement Class Members' royalties will be calculated on the *higher* of two options, and that will deliver substantial monetary benefits going forward.

The Court should grant the requested fees and reimbursement of costs because they represent a small percentage of the overall economic value of the settlement, and will result in a sharply negative lodestar for a group of attorneys who have worked on this case for nearly eight years on a purely contingent basis.

IV. ARGUMENT

A. The Settlement Class Should Be Finally Certified.

As this Court noted in the Preliminary Approval Order, two courts have already examined the Settlement Class and the claims against Chesapeake in this case and found that the requirements of Rule 23(a) and of Rule 23(b)(3) are satisfied. *See* Preliminary Approval Order, at 10-11. This Court also carefully considered and rejected the objectors' arguments considering the typicality and adequacy of the representative plaintiffs. *Id.* at 11-16. This Court may adhere to that finding, which follows the same conclusion as the Middle District of Pennsylvania and the bankruptcy court, and conclude that the requirements of Rule 23 are satisfied for purposes of settlement.[6]

B. The Court Should Grant Final Approval to the Settlement.

"[T]here is a strong judicial policy favoring the resolution of disputes through settlement and that a presumption is made in favor of the settlement's fairness, absent contrary evidence." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D. La. 2007) (quoting *Smith v.*

[6] Plaintiffs refer to and incorporate the Declaration of Kathryn Tran, to be filed today, which provides updated information concerning, among other things, the size of the Settlement Class, further supporting the finding that Rule 23(a)'s numerosity requirement is satisfied.

Crystian, 91 Fed. Appx. 952, 955 (5th Cir. 2004)). "To safeguard the interests of absent class members, district courts must determine whether proposed class-action settlements are fair, adequate, and reasonable." *Union Asset*, 669 F.3d 632 at 639. In 2018, Rule 23 was amended to set out a list of factors that courts are to consider in making this determination:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The Advisory Committee explained that these factors are not intended to "displace" any factor previously adopted by Courts of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(3) advisory committee notes. The Fifth Circuit's factors, from *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983), direct courts to look at:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

As these factors mirror the procedural and substantive factors in the amended Rule 23(e)(2), courts have continued to apply the *Reed* factors, informed by the amended Rule 23(e). *See In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d 456, 484–85 (E.D. La. 2020); *Davis v. Mindshare Ventures LLC*, No. 4:19-cv-1961, 2020 WL 3246329 (S.D. Tex. June 12, 2020).

C. The Settlement Is Procedurally Fair.

The first and third *Reed* factors, as well as amended Rule 23(e)(2)(A) and (B), focus on procedural fairness – whether the settlement was achieved as a result of informed, vigorous, arms' length negotiations. An examination of these factors leaves no doubt that this settlement is procedurally fair.

First, the settlement comes as a result of multiple mediations, conducted both on a bilateral (between Plaintiffs and Chesapeake) and multilateral (involving other plaintiffs and Chesapeake) basis, supervised by nationally recognized and experienced mediators. A "presumption in favor of settlement is warranted" where negotiations took place "between sophisticated parties with the guidance of an experienced, professional mediator." *In re Drywall*, 424 F. Supp. 3d at 486. *See also In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 931 (E.D. La. 2012) (finding that involvement of mediator "further weigh[s] in favor of finding that the Settlement was fairly negotiated"); Preliminary Approval Order, at 22 (noting involvement of mediators and collecting authorities holding that such involvement indicates arms-length negotiations).

There can be no suggestion that this settlement was the result of any fraud or collusion. As the Pennsylvania Attorney General's previous objection illustrated, these claims have been highly scrutinized, not only by the Attorney General, but by an engaged group of class members, many of them sophisticated entities. Class Counsel have welcomed that scrutiny, and delivered benefits that reflect vigorous advocacy.

Finally, the settlement is between parties and their counsel who were well-informed of the substantive claims at issue and the risks in pursuing them. Class Counsel have continuously requested and received data and information from Chesapeake, updated as time has passed. Class Counsel, who have successfully litigated and resolved numerous gas royalty class actions,

fully understood the risks of litigating further. *See* William B. Rubenstein, 4 *Newberg on Class Actions* § 13:49 (5th ed. 2012) (extensive exchange of information in litigation supports the assumption that "the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information"). They had gathered information that was more than sufficient for them to determine the risks and benefits of settlement, without the expense of formal discovery. *See, e.g.*, *In re Heartland Payment Sys. Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1064 (S.D. Tex. 2012) (holding that class settlement can be approved "even if the parties have not conducted much formal discovery") (quoting *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 650 (N.D. Tex. 2010) and collecting other authorities).

D. The Settlement is Substantively Strong.

Subsections (C) and (D) of Rule 23(e)(2), as well as certain of the *Reed* factors (the case's complexity and expense, the probability of plaintiffs' success on the merits, and the range of possible recovery), direct the Court's attention to the substantive terms of the settlement. In affirming the bankruptcy court's finding that the settlement's terms were fair, reasonable, and adequate, this Court conducted a thorough review of the benefits of the settlement, and the risks that Plaintiffs and Settlement Class Members would face absent settlement. *See* Preliminary Approval Order, at 18-22. The Court can and should adhere to that conclusion – there is no doubt that this settlement passes muster.

1. This Case's Risks and Costs Weigh Heavily in Favor of Final Approval.

A review of the substantive terms of the settlement "requires courts to compare the benefits and risks of the proposed settlement as well as the potential future relief in light of the uncertainties of the litigation." *In re Drywall*, 424 F. Supp. 3d at 487. *See also* Fed. R. Civ. P.

23(e)(2)(C) (providing that courts should look at whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal"). The relief provided by this settlement, in the face of Chesapeake's bankruptcy and in light of numerous uncertainties, is remarkable.

First, as this Court pointed in the Preliminary Approval Order, the monetary relief available to Settlement Class Members as retrospective relief, while not as generous as in the pre-bankruptcy MEC settlement proposed in the Middle District of Pennsylvania, would not be available at all to the thousands of Settlement Class Members whose claims were extinguished by Chesapeake's bankruptcy. *See* Preliminary Approval Order, at 21. As this Court correctly concluded, "the class settlements are the most practical vehicle for recovery for most of the class members." *Id.* Class Members who did file proofs of claim in the bankruptcy can opt-out and pursue those claims, but will face the costs and uncertainties of litigation, including the possibility that they will not prevail. As this Court recognized, the question of marketability is fact-specific, and the outcome of litigation over it can never be predicted. *Id.*

Second, the settlement's injunctive provisions allow MEC Settlement Class Members to receive the *higher* of two options for calculating their royalty payments, a result that "could not be achieved through litigation." *Id.* at 19. According to the calculations of an accountant who has provided expert accounting services in the oil and gas industry for more than forty years, the net present value of the going-forward option now available to MEC Settlement Class Members is between $39.71 million and $45.19 million over a five-year period, and between $65.98 million and $86.97 million over a ten-year period. The expert's declaration, which includes his calculations and assumptions in arriving at these valuations, is attached as Exhibit 12 to the

Moffett Declaration.[7] As the Court noted, the Pennsylvania Attorney General, which opposed the earlier iteration of the MEC settlement in the Middle District of Pennsylvania, *see* Preliminary Approval Order at 22, approves of the settlement, further evidencing the strength of this agreement.

This is an outstanding result under this or any other circumstances, and particularly so in light of the risks of continuing to litigate through class certification, trial, and appeals, all of which would introduce uncertainty, delay, and cost. *See, e.g.*, *Heartland*, 851 F. Supp. 2d at 1064 ("Litigating this case to trial would be time consuming, and inevitable appeals would likely prolong the litigation, and any recovery by class members, for years.") (internal quotation and citation omitted). Such an expenditure of time and money under these circumstances, in which Settlement Class Members' retrospective damages were subject to discharge, would be particularly troublesome. In light of these circumstances and the particular risks at play, this settlement is a favorable result and can be approved by this Court.

2. <u>The Claims Process Is Straightforward, and Class Members Are Treated Equitably Relative to Each Other.</u>

Rule 23(e)(2)(C) and (D) provide that the Court should look at the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," and "whether the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C) & (D).

The claims process and treatment of Settlement Class Members raise no concerns. The plan of allocation, which is part of the Settlement Agreement (filed with the preliminary approval motion as Dkt. 3175-3), sets out a straightforward process for determining Settlement

[7] In the Preliminary Approval Order, this Court stated that Class Counsel could provide analysis of the benefits of the going-forward relief at the final approval stage. *See* Preliminary Approval Order, at 20 n.2.

Class Members' share of the settlement proceeds, based on deductions taken from their royalties through December 31, 2020. Settlement Class Members will not need to make claims, and are treated equitably – the plan of allocation applies to the entire class.

3. Attorneys' Fees Are Reasonable.

Rule 23(e)(2)(C)(iii) refers to the "terms of any proposed award of attorney's fees, including timing of payment."[8] For the reasons set out below, counsel's requested fee is reasonable under the circumstances, represents a small fraction of the total economic value created by the settlement, and will be well below the lodestar attributable to the eight years of work on this litigation.[9]

E. The Class Notice Plan Has Been Effectuated.

Before a proposed class settlement may be finally approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). In cases involving certification of a class under Rule 23(b)(3), which requires:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi)

[8] Subsection iv refers to agreements required to be identified under Rule 23(e)(3). Fee allocation agreements may not fall within this subsection because they do not affect the relief available to the class, *see* Newberg § 13.55, but Class Counsel and counsel for the Burkett-Intervenors agreed in October 2014 to split any fees awarded from this litigation. The Fifth Circuit has endorsed the use of aggregate fee awards, leaving allocation to class counsel. *See Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992).

[9] The sixth *Reed* factor is "the opinions of the class counsel, class representatives, and absent class members." 703 F.2d at 172. Because the opt-out and objection deadlines have not yet passed, Class Counsel will address this factor in their reply in support of this motion.

> the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). The notice program here, designed and implemented in consultation with the Settlement Administrator, included both direct mailing to Settlement Class Members using data provided by Chesapeake, plus the establishment of a dedicated website and toll-free number for Settlement Class Members seeking additional information. It meets all applicable standards.

F. The Requested Fees and Costs Are Reasonable.

Rule 23(h) authorizes a district court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). It is also well settled that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Courts generally determine appropriate fees using either: "(1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier." *Union Asset*, 669 F.3d at 642-43.

The Fifth Circuit has held that district courts have "the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach informed by the *Johnson* considerations." *Union Asset*, 669 F.3d at 644 (referring to *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974), *overruled on other grounds, Blanchard v. Bergeron*, 489 U.S. 87 (1989)). *See also Ramirez v. J.C. Penney Corp., Inc.*, No. 6:14-CV-601, 2017 WL 6462355, at *5 (E.D. Tex. Nov. 30, 2017) ("In cases involving

a common fund, the Fifth Circuit has expressly approved of the use the percentage method to calculate attorney's fees, so long as it is cross-checked with the *Johnson* factors."). Here, Class Counsel request a fee of $2 million. As explained below, this request amounts to less than 4.5 percent of the total economic value of the settlement, and represents a negative lodestar multiplier of 0.42. Under any approach, the requested fee is reasonable.

1. The Requested Fee is Reasonable As a Percentage of the Fund.

As this Court has held, "The first step under the [percentage] method requires determining the actual monetary value conferred to the class members by the settlement." *In re Heartland*, 851 F. Supp. 2d at 1075 (internal quotation and citation omitted). Consistent with this approach, where a class settlement includes both monetary and injunctive relief, courts "include [the latter] as part of the value of a common fund for purposes of applying the percentage method of determining fees" when "the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained." *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003). "The court then sets the benchmark percentage to be applied to this value." *In re Heartland*, 851 F. Supp. 2d at 1075.

Here, the value of the going-forward relief available to Settlement Class Members dwarfs the immediate cash component of the settlement. As noted above, an accountant with years of oil and gas experience has calculated the net present value of the going-forward option as between $39.71 million and $45.19 million over a five-year period, and between $65.98 million and $86.97 million over a ten-year period. *See* Exh. 12 to Moffett Declaration.

Further, any determination of this settlement's total value must also include the cost of class notice and administration, all of which costs Chesapeake is bearing. As this Court and others have recognized, "Courts often include the costs of notice in valuing a class-action

settlement." *In re Heartland*, 851 F. Supp. 2d at 1077-78.[10] Additionally, courts have the discretion to use the gross settlement amount in calculating the percentage. *See, e.g., Kornhill v. Haverhill Ret. Sys.*, 790 F. App'x 296, 298 (2d Cir. 2019).

Taking the low end of the five-year estimate for the value of the injunctive relief and combining it with the monetary fund available through this settlement (and excluding the value of the notice and administration costs that Chesapeake is bearing), the total economic value of this settlement is over $44 million. Counsel's request for a fee of $2 million comes out to a percentage of less than 4.5 percent. One-third is the "oft-awarded percentage in common fund class action settlements in this Circuit." *Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, No. 4:17-CV-3852, 2019 WL 387409, at *4 (S.D. Tex. Jan. 30, 2019) (gathering multiple authorities). Class Counsel's request is thus far below percentages approved in most cases, particularly where the size of the common fund is relatively modest.[11] The request covers both Class Counsel and counsel for the Burkett-Intervenors, who have worked together since 2014 to reach a resolution on behalf of the Settlement Class.

[10] *See also Weeks v. Kellogg Co.*, No. CV 09-08102 MMM RZX, 2013 WL 6531177, at *29 (C.D. Cal. Nov. 23, 2013) (It is "proper to include [the cost of notice and settlement administration] in the value of the class action settlement" where plaintiffs "successfully negotiated a provision that required defendants to bear" those costs and "thus ensured that more money would be available to pay claimants."); *In re Anthem, Inc. Data Breach Litig.*, 15-MD-2617, 2018 WL 3960068, at *8-9 (N.D. Cal. Aug. 17, 2018) ("These costs 'of providing notice to the class can reasonably be considered a benefit to the class' in this case. The same is true of the other administrative costs (such as processing claim forms and operating a call center to answer Settlement Class Members' questions) that contribute to 'distribut[ing] [the] settlement award in a meaningful and significant way.'").

[11] Even as the total economic value of the settlement is very large, counsel are aware of the limited funds available now, and adjusted their request accordingly and consistent with guidance from other courts assessing fee requests from smaller common funds. *See Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774–75 (11th Cir. 1991) ("To avoid depleting the funds available for distribution to the class, an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded."); *see also In re Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1119–20 (10th Cir. 2017) (finding no abuse of discretion where district court approved settlement agreement permitting for attorneys' fees and costs in excess of half the money paid by defendant); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310, 313 (S.D.N.Y. 1997) (gathering cases in which fees and expenses were 45, 46, and 53 percent of the common fund); *Miller v. CEVA Logistics USA, Inc.*, No. 2:13-CV-01321-TLN, 2015 WL 4730176, at *8 (E.D. Cal. Aug. 10, 2015) (referring to "case law surveys" and noting that fee awards of 30-50 percent are "commonly" awarded "in cases in which the common fund is relatively small").

Even as a percentage of the cash available through this settlement, the requested amount is in line with other cases in which courts have considered the total economic value of the settlement. *See Bennett v. SimplexGrinnell LP*, No. 11-1854, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (taking into account future value, awarding fee equal to 38.8% of the cash component); *Anderson v. Merit Energy Co.*, 07-916, 2009 WL 3378526, at *1 (D. Colo. Oct. 20, 2009) (awarding 26 percent of common fund including future economic benefit, or 45 percent of immediate cash component); *Chieftain Royalty Co. v. XTO Ener. Inc.*, No. 11-29, 2018 WL 2296588, at *4 (E.D. Okla. Mar. 27, 2018) (awarding fee equal to 40% of the cash component in settlement also prospective changes to royalty calculation); *In re Checking Account Overdraft Litig.*, No. 09-2036, 2013 WL 11319243, at *13-14 (S.D. Fla. Aug. 2, 2013) (awarding fee equal to 38% of cash component in settlement also mandating changes to how transactions are posted for purposes of assessing overdraft fees).

2. A Cross-Check with the *Johnson* Factors Confirms the Reasonableness of the Requested Fee.

As noted above, courts in this circuit can also look to the "*Johnson* factors" to determine the reasonableness of the fee. *See, e.g., Union Asset*, 669 F.3d at 644. Applying the *Johnson* factors, courts look to: (i) the time and labor required; (ii) whether the case presented novel and difficult issues; (iii) the skill required to effectively litigate this case; (iv) the preclusion from taking other work as a result of the case; (v) the customary fee; (vi) whether the fee was fixed or contingent; (vii) time limitations imposed by the client or the circumstances; (viii) the results obtained; (ix) the experience, reputation, and ability of the attorneys; (x) whether the case would be viewed as "undesirable" within the community; (xi) the nature and length of the relationship with the client; and (xii) awards in similar cases. *See Johnson*, 488 F.2d at 717-20.

A review of the relevant *Johnson* factors again confirms the reasonableness of the requested fee.

Time and labor required. Bringing this case to a successful resolution required a huge investment of time on the part of Class Counsel and counsel for the Burkett-Intervenors. Class Counsel began investigating this case in 2012, filed it in 2013, and have seen it through and around every obstacle, including Chesapeake's bankruptcy and the Attorney General's initial objections. They joined with counsel for the Burkett-Intervenors in 2014 and have pressed forward on behalf of the Settlement Class together since then. In all, these attorneys have devoted 8,483.8 hours to this litigation (*see* Moffett Decl. ¶¶ 31-33), a substantial commitment by any measure.

Complexity and novelty of the issues and skill required. This case presented complex issues of both fact and law, and reasonable resolution required the skill and expertise that Class Counsel brought to the case, particularly in gas royalty litigation. *See* Moffett Decl. ¶¶ 5-6; Seltz Decl. ¶ 3. Factually, the case involves questions of gas marketability that would require expert testimony, both concerning the physical composition of the gas and the presence of a market for the gas. The case also raised threshold procedural issues relating to arbitration, as well as challenges relating to class certification in a case involving a large number of leases. Courts have recognized that "any class action presents complex and difficult legal and logistical issues which require substantial expertise and resources." *Stalcup v. Schlage Lock Co*., 505 F. Supp. 2d 704, 707 (D. Colo. 2007). Looming above these challenges was Chesapeake's deteriorating financial condition and the interests of other stakeholders, including the Attorney General. The sheer length of time this case took to resolve, and the number of mediation sessions required, is also indicative of its complexity. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir.

2005) (holding that where "the litigation took several years, and the stipulation of settlement came about only with the assistance of mediation," the matter could be called "complex"). The complexity of this case, in multiple facets, supports the fee request.

Contingent basis and preclusion of other work. Class Counsel have performed all of the above-described work on a contingent basis, with no payment for work that began in 2012. This factor supports the fee request as well. Courts typically look at this factor to determine whether an upward adjustment to the lodestar is warranted in light of the risk of nonpayment to the attorneys taking on a complex case. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 657 (E.D. La. 2010). Here, as described below, Class Counsel do not seek a positive multiplier on their lodestar; in fact, the requested fee results in a sharply negative lodestar multiplier.

Results achieved. As described above in Section IV(D), Class Counsel have negotiated a settlement that provides monetary relief for the thousands of Settlement Class Members whose claims were discharged in bankruptcy and would have received nothing without this settlement, and that provides innovative injunctive terms that will bring tangible and substantial benefits to Settlement Class Members going forward. The latter relief, as this Court pointed out, was not available as a litigated outcome. *See* Preliminary Approval Order, at 19. This is an excellent settlement achieved in the face of challenging circumstances, and warrants the requested fee.

Comparable cases. The requested fee here falls within the range of fees awarded in comparable cases. As set out in the preceding Section IV(E)(1), the requested fee represents a very low percentage of the total economic value of the settlement compared to the typical fee award. It is also within the range of fee award in other cases if only the cash component of the

settlement is considered, which as this Court and others have held, should not be considered in isolation from the overall settlement benefits.

In sum, the relevant *Johnson* factors confirm that the requested request for a $2 million fee is reasonable under the circumstances of this case.

3. A Lodestar Cross-Check Confirms the Reasonableness of the Request.

This Court has the discretion to utilize a lodestar cross-check to determine whether the fee arrived at through the percentage-of-the-fund method is reasonable. *See, e.g., Union Asset*, 669 F.3d at 644; *In re Vioxx Prod. Liab. Litig.*, No. 11-1546, 2013 WL 5295707, at *3 (E.D. La. Sept. 18, 2013). ("The lodestar analysis is not undertaken to calculate a specific fee, but only to provide a broad cross check on the reasonableness of the fee arrived at by the percentage method") (internal quotation, citation, and alteration omitted). Counsel's combined lodestar is $4,773,676 (of which $2,942,851 is attributable to Class Counsel and $1,830,825 to counsel for the Burkett-Intervenors). The requested fee would result in a negative multiplier of 0.42. As courts have held that there is a "strong presumption that the lodestar represents a reasonable fee," *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-cv-1152, 2018 WL 1942227, at *13 (N.D. Tex. Apr. 25, 2018) (citation omitted), the negative multiplier here confirms the reasonableness of the requested fee.

G. The Requested Costs Are Reasonable.

"Typically, class action counsel who create a common fund for the benefit of the class are entitled to reimbursement of reasonable litigation expenses from that fund." *In re Drywall*, 424 F. Supp. 3d at 504 (internal quotation, citation, and alteration omitted).

Here, Class Counsel seek reimbursement of $141,749.83, and counsel for the Burkett-Intervenors seek reimbursement of $150,612.50. The declarations of counsel attest that these costs were reasonable and necessary to further the case, including fees for multiple days of

mediation, expert fees, and limited travel. These costs are commensurate with the length and complexity of the litigation, and also demonstrate counsel's commitment to the litigation. *See Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) ("Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent.")

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order granting final approval to the proposed MEC settlement, and an Order awarding fees and costs in the requested amounts.

Respectfully submitted,

Dated: June 21, 2021

/s/ Daniel E. Seltz

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Class Counsel for MEC Class

CERTIFICATE OF SERVICE

I certify that I have caused to be served a true and correct copy of the foregoing on counsel of record via electronic case filing.

Executed on this the 21st day of June, 2021.

/s/ Daniel E. Seltz
Daniel E. Seltz