No. 17A___

IN THE

Supreme Court of the United States

CHIEFTAIN ROYALTY COMPANY,

Applicant,

v.

CHARLES DAVID NUTLEY; DANNY GEORGE, PERSONALLY AND AS EXECUTOR OF THE ESTATE OF BEVERLY JOYCE GEORGE; ENERVEST ENERGY INSTITUTIONAL FUND XIII-A, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIB, L.P.; ENERVEST ENERGY INSTITUTIONAL FUND XIII-WIC, L.P.; ENERVEST OPERATING, L.L.C.; AND FOURPOINT ENERGY, LLC,

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT:

Under this Court's Rule 13.5, Chieftain Royalty Company respectfully requests a 30-day extension of time, to and including August 9, 2018, to file a petition for a writ of certiorari in this case. The court of appeals entered its judgment on July 3, 2017 (App. B); denied a timely filed petition for rehearing on April 11, 2018 (App. C); and issued a revised opinion on that date (App. A). Without an extension, a petition for certiorari would be due on July 10, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

1. For over a century, this Court "has recognized consistently that a … lawyer who recovers a common fund for … other[s] … is entitled to a reasonable attorney's fee from the fund." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980)

(citing cases). This entitlement "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched." *Id.* Federal courts award common-fund fees in the exercise of their inherent equitable powers. *See, e.g.*, *Alyeska Pipeline Services Co.* v. *Wilderness Society*, 421 U.S. 240, 257 (1975).

2. The plaintiffs in this diversity action claim that the defendants underpaid royalties on natural gas from Oklahoma wells. Op. (App. A) 3. After years of litigation, class counsel secured a $52 million cash settlement. *Id.* The district court awarded one-third of that recovery to class counsel as attorneys' fees. *Id.* at 4. The court calculated this award using the percentage-of-the-fund method—as opposed to a lodestar approach, in which the court would have multiplied counsel's hours worked by an hourly rate—on the view that awarding a percentage of the fund is "[t]he preferred approach for determining attorneys' fees in common fund cases." CAJA 525; *see, e.g.*, *Blum* v. *Stenson*, 465 U.S. 886, 900 n.16 (1984).

3. A two-judge panel of the Tenth Circuit reversed. (Then-Judge Gorsuch, the third member of the assigned panel, participated in the oral argument but not in the decision.) The panel held that under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny, state law governs the determination of common-fund fee awards in diversity cases, because such fees are "substantive" rather than "procedural"—that is, they are "'tied to the *outcome* of the litigation.'" Op. 8-9. In reaching that conclusion, the panel relied on cases concerning fee-shifting awards rather than common-fund awards, although the Tenth Circuit had previously recognized the sharp distinction between the two types of awards. *See, e.g.*, *Brown* v. *Phillips Petroleum Co.*, 838 F.2d

451, 454 (10th Cir. 1988). The panel further concluded that under Oklahoma law, common-fund awards must be determined using the lodestar method. Op. 14-15.

4. The Tenth Circuit's decision conflicts with precedents of this Court and other courts of appeals, in two ways. First, by resting its choice-of-law analysis on the view that common-fund fee awards are "substantive" rather than "procedural" because they are "'tied to the *outcome* of the litigation,'" Op. 8-9, the Tenth Circuit flouted decades of decisions in which this Court has explained how to determine which issues are governed by state law in diversity cases. The Court has emphasized that, although "'substance' and … 'procedure' are much talked about … as though they defined a great divide cutting across the … law," *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945), the dichotomy between rules related and unrelated to the outcome of litigation "must not be applied mechanically," *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996). Rather, the "application" of "the 'outcome-determination' test … must be guided by 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Id.* (quoting *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965)). The panel here entirely failed to inquire whether the choice of a method for calculating a common-fund award implicates those "'twin aims,'" *id.* Had it done so, it would have concluded that the "'twin aims'" are not implicated and thus that courts may properly apply federal law in calculating a common-fund award.

5. Second, the decision below conflicts with pre-*Erie* decisions of this Court and post-*Erie* decisions of other courts of appeals on the specific question whether state or federal law governs the determination of a common-fee award in a diversity case. In *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), a diversity action, this

Court applied the law of the forum state on one issue—but in addressing a common-fund award, the Court cited one of its prior decisions that arose from a *different* state. And in *Dodge* v. *Tulleys*, 144 U.S. 451 (1892), the Court held that a "solicitor's fee" could be awarded in a diversity case, even though a contractual stipulation for the award was "unauthorized" under state law, because state contract "law does not determine the procedure of courts of the United States sitting as courts of equity, … or control the discretion exercised in matters of [fee] allowances." *Id.* at 456-457. The Fifth Circuit followed *Dodge* well after *Erie* in *Ojeda* v. *Hackney*, 452 F.2d 947 (5th Cir. 1972) (per curiam), holding that "the district judge, as a federal chancellor, possesses an equitable discretion to award attorneys' fees in a class action suit despite the provisions of State legal restraints." *Id.* at 948; *see also, e.g.*, *Mercantile-Commerce Bank & Trust Co.* v. *Southeast Arkansas Levee District*, 106 F.2d 966, 970-972 (8th Cir. 1939) (following *Dodge* after discussing *Erie*).

6. Chieftain Royalty Company intends to petition for certiorari in light of the conflicts between the decision below and precedents of this Court and other courts of appeals. Given the considerable complexity of the issues—reflected by the fact that the Tenth Circuit considered Chieftain's rehearing petition for nearly eight months before denying it—counsel require additional time to prepare a petition that most effectively presents the issues to this Court. Additional time is also warranted in light of other demands on counsel's time. Counsel of record, for example, has a petition for certiorari due on June 14 (after an extension), a summary-judgment filing due on June 15, and depositions June 14 and 18.

7. Chieftain therefore respectfully requests a 30-day extension of time, to and including August 9, 2018, within which to file its petition for certiorari.

June 11, 2018

Respectfully submitted.

BRADLEY E. BECKWORTH
JEFFREY J. ANGELOVICH
SUSAN WHATLEY
NIX PATTERSON & ROACH LLP
205 Linda Dr.
Daingerfield, TX 75638

ROBERT N. BARNES
PATRANELL BRITTEN LEWIS
BARNES & LEWIS, LLP
720 N.W. 50th St., Suite 200B
Oklahoma City, OK 73118

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
DANIEL WINIK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com