

of the subsections, Plaintiffs have concluded that this action should be certified under (b)(3), as opposed to either (b)(1) or (b)(2).

I.
**PLAINTIFFS' CLAIMS FOR MONETARY RELIEF INDICATE THAT
CERTIFICATION SHOULD OCCUR UNDER K.S.A. 60-223(b)(3)**

A. This action should not be certified under K.S.A. 60-223(b)(1).

K.S.A. 60-223(b)(1) provides that an action may be maintained as a class action when

The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

Plaintiffs' claims herein satisfy neither of the subsection of K.S.A. 60-223(b)(1). The express language of subsection (A) limits the scope of its application to "adjudications . . . which would establish incompatible standards of conduct for the party opposing the class." This subsection can only be satisfied "in a case in which the class seeks injunctive or declaratory relief to alter an ongoing course of conduct that is either legal or illegal as to all members of the class" and "does not apply to actions seeking damages." 5 MOORE'S FEDERAL PRACTICE § 23.41[2][a] (3d ed. 1999). Moreover, if any requested declaratory or injunctive relief "is only incidental to an action in which monetary claims are central and predominant", certification under (b)(1)(A) is not appropriate. *Id.* at § 23.41[5][c].

Subsection (B) of K.S.A. 60-223(b)(1) deals with the opposite side of the same coin. Whereas subsection (A) seeks to protect the party whose interests are aligned against the class being certified, subsection (B) is written to protect members of the putative class against prejudice that might arise from piecemeal litigation. *Id.* at § 23.42[1]. But, such prejudice does not include the possible *stare decisis* effect that an adjudication of one member's claim might have on the claims of other members of the putative class. Obviously, if that were the rule, subsection (B) would permit certification of any claim whose adjudication might establish or clarify a rule of law which would support or undermine the claim of another. *Id.* at § 23.42[3][b]. Rather, subsection (B) is usually used when recovery is restricted to a pool of assets which is insufficient to satisfy all of the claims asserted on behalf of the putative class. *Ortiz v. Fibreboard Corp.*, —U.S.—, 119 S.Ct. 2295, 2309, 144 L.Ed.2d 715, (1999).

This case does not fit within K.S.A. 60-223(b)(1)(A). Although plaintiff seek declaratory relief as to the manner in which defendant should be required to compute royalties in the future, this claim is dependent upon and subsumed by their claim that Anadarko is liable for damages for having failed to pay the correct amount of royalties on the gas which it has already produced from the wells in which members of the putative class have an interest. In other words, neither plaintiffs nor the class could possibly be entitled to injunctive relief with regard to Anadarko's future royalty payment practices unless and until plaintiffs establish that they are entitled to recover money damages based on Anadarko's past (and ongoing) method of accounting to class members.

Similarly, since the right of each individual class members to recover damages is not limited to a fixed pool of assets but, instead, is being asserted against all of the corporate assets of Anadarko, certification would not be appropriate under subsection (B).

This action does not satisfy the requirements of either subsection (A) or (B) of K.S.A. 60-223(b)(1).

B. This action should not be certified under K.S.A. 60-223(b)(2).

K.S.A. 60-223(b)(2) provides that an action may be maintained as a class action when

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

As the above language states, certification under (b)(2) is appropriate in actions where the final requested relief is declaratory or injunctive in nature. The case law clearly holds that only when a claim for money damages is merely incidental to the request for injunctive or declaratory relief can subsection (b)(2) be used. Thus, any such damage award must be concomitant with or enveloped by class-wide injunctive or declaratory relief, such as a back-pay award under Title VII of the Civil Rights Act of 1964. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (“The demand for back pay is not in the nature of damages, but rather is an integral part of the statutory equitable remedy.”)

In this case, the claim for damage relief is not concomitant with class-wide injunctive or declaratory relief, because plaintiffs could secure an award of damages without ever obtaining injunctive or declaratory relief. Moreover, as stated above in connection with subsection (b)(1), the damage relief sought by the plaintiff class is not merely incidental to the equitable relief, but is central to the lawsuit.

C. This action should be certified under K.S.A. 60-223(b)(3).

Kansas state courts have extensive experience in royalty owner class actions. Without exception, our state courts have certified such actions under K.S.A. 60-223(b)(3). *See, e.g., Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983), *cert. dismissed*, 472 U.S. 1023 (1985) (Sixteen consolidated class actions each certified under subsection (b)(3)); *Shutts v. Phillips Petroleum Co.*, 222 Kan.527, 567, 267 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); *Youngren v. Amoco Production Co.*, Case No. 89-C-34 (Stevens Co. Dist. Ct.). Moreover, the class in *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788 (1995), which articulates the legal basis upon which plaintiffs have founded their claims in this case, was also certified under (b)(3).

The practice of certifying claims under (b)(3) for the underpayment of royalty is so well established in Kansas that no appellate court, including the United States Supreme Court in *Shutts*, has ever reversed such a determination.

From the perspective of an absent class member, certification under (b)(3) is more advantageous than under (b)(1) or (b)(2). In contrast to (b)(1) or (b)(2) certifications, all absent members of (b)(3) class action are entitled to receive reasonable notice of the existence of the lawsuit and the opportunity to request exclusion therefrom. K.S.A. 60-223(c)(2). Indeed, such procedural safeguards may be constitutionally required when, as here, claims for monetary relief are being pursued on behalf of absent class members. *See Shutts v. Phillips Petroleum Co.*, 472 U.S. 797, 811-12 (1985); *see also Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (“Where substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt to.”).

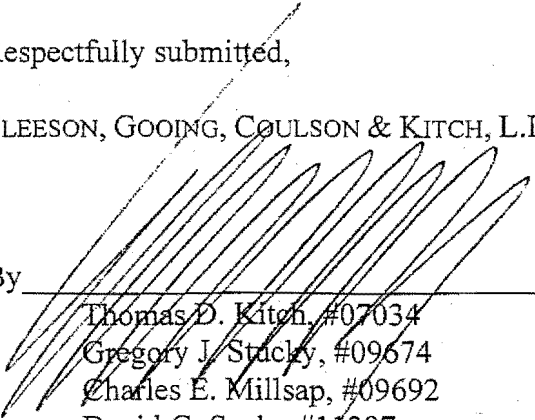
CONCLUSION

The Court should certify this action as a class action under K.S.A. 60-223(b)(3).

Respectfully submitted,

FLEESON, GOOING, COULSON & KITCH, L.L.C.

By



Thomas D. Kitch, #07034
Gregory J. Sticky, #09674
Charles E. Millsap, #09692
David G. Seely, #11397
125 North Market, Suite 1600
Wichita, Kansas 67202
Telephone: (316) 267-7361
FAX: (316) 267-1754

-and-

Bernard E. Nordling
Erick E. Nordling
KRAMER, NORDLING & NORDLING, L.L.C.
209 East Sixth Street
Hugoton, Kansas 67951
Telephone (316) 544-4333

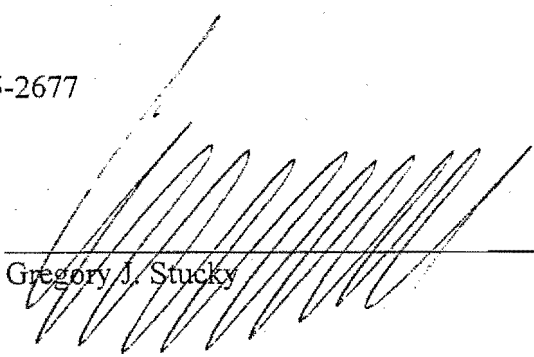
Attorneys for Plaintiffs and Plaintiff Class

CERTIFICATE OF SERVICE

I certify that on January 27, 2000, a copy of this **Memorandum in Support of Plaintiffs' Motion for Class Certification** was placed in the United States mail in Wichita, Kansas, first class postage prepaid, addressed to:

Robert J. O'Connor
David E. Bengston
MORRISON & HECKER
600 Commerce Bank Center
150 N. Main Street
Wichita, Kansas 67202-1320

Dan Diepenbrock
MILLER & DIEPENBROCK, P.A.
150 Plaza Drive
P. O. Box 2677
Liberal, Kansas 67905-2677



Gregory J. Stucky