No. 09-103310-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

TIMOTHY J. COULTER, individually and as representative plaintiff on behalf of persons or companies similarly situated,

Plaintiffs/Appellees,

vs.

ANADARKO PETROLEUM CORPORATION,

Defendant/Appellee,

vs.

STAN R. BOLES,

Objector/Appellant.

BRIEF OF PLAINTIFFS/APPELLEES

Appeal from the District Court of Stevens County
Hon. Tom R. Smith and Clinton B. Peterson, Judges
District Court Case No. 98-CV-40

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ORAL ARGUMENT: 30 Minutes

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NATURE OF THE CASE

This case closely resembles an appeal previously before the Court, *Opal Littell, et al. v. OXY USA, Inc. v. Wallace B. Roderick Revocable Trust*, Appeal No. 08-100349-S, where a single objector sought to spoil a court-approved settlement of a nearly identical class action by means of an appeal. This Court dismissed the *Littell* case on January 22, 2009, following oral argument and at the Objector's reqeust. The sole objector in this case is represented by the same counsel as the sole objector in *Littell*, and advances the same arguments that were briefed and argued in that appeal.

ISSUES ON APPEAL

1. Whether the trial court abused its discretion when it found that Class Counsel were "adequate" to represent a class of natural gas royalty owners under K.S.A. 60-223(a)(4)?

2. Whether the trial court abused its discretion when it approved the class action settlement agreement?

STATEMENT OF FACTS

Appellant/Objector Stan R. Boles ("Objector") avoids setting forth the evidence upon which the trial court based its findings of fact, which he does not challenge on appeal. Instead, Objector interlards his brief with off-handed recitals of opinions given by his expert as to the "value" of his self-styled "non-gathering" claims, which the trial court found were not supported by the evidence or grounded in the law.

I.
THE SETTLEMENT AGREEMENT

Plaintiffs[1] filed this action against Anadarko Petroleum Corporation ("Anadarko") on October 7, 1998, challenging the manner in which Anadarko paid royalties on its natural gas production in the Kansas Hugoton Field. (R. Vol. 1, p. 26). More than 10 years later, in June of 2009, the parties executed a Stipulation of Settlement (the "Agreement"). (R. Vol. 12, p. 2488). The Agreement resolved all outstanding issues between the parties and

[1] The original plaintiffs/class representatives were Gilbert H. Coulter and Elizabeth S. Leighnor, both of whom died while the action was pending. Timothy J. Coulter. the son of Gilbert Coulter, was substituted as plaintiff and class representative on June 9, 2009 (R. Vol. 9, p. 2075) and fulfilled that role throughout the negotiations that led to the execution of the Agreement. Some district court documents, as well as orders that have been issued by this Court, have incorrectly retained the names of the original plaintiffs.

established the method to be used by Anadarko to calculate, report and pay royalties to the Settlement Class (hereafter "Plaintiff Class") in the future on gas that it produces from its Kansas leases and sells to an affiliate.

A. Anadarko's Commitment to Pay $33 Million to Settle Damage Claims

In exchange for a release of all claims associated with the manner in which it calculated, reported and paid royalties to the Plaintiff Class from October of 1993 to January 1, 2009, Anadarko agreed to pay $33 million. (R. Vol. 12, p. 2496 ¶ 2.1). This fund is to be divided among class members based upon their pro-rata share of all deductions taken by Anadarko from all of its royalty owners for what are commonly referred to as "gathering" expenses, during the period in question. (R. Vol. 12, pp. 2494 ¶ 1.22, 2497 ¶ 2.3, 2620). These deductions included a share of the fuel consumed in compressors located on the gathering systems and other costs associated with the installation, operation and maintenance of the gathering lines that connect the individual wells to the processing plants located in or near the Kansas Hugoton Field, where natural gas liquids ("NGL's") are removed and the residue gas that exits the "tailgate" of the plants is ready for delivery into an interstate transmission pipeline. The total amount of those deductions, which are listed on Exhibit C to the Agreement, was $37,613,026. (R. Vol. 12, pp. 2545-54).

B. Anadarko's Commitment to Pay Interest for Six Months

The $33 million settlement fund includes interest for six months, which was "the period of time estimated to complete the settlement approval process in the event there is no objection to the Settlement or no appeals of any order of the Court approving the Settlement." (R. Vol. 12, p. 2496 ¶ 2.1). That six-month period expired in November of 2009. In this manner, Anadarko effectively shifted the risk associated with the time value

of money to members of the Plaintiff Class, who must wait until this appeal is resolved to receive what they are owed under the Settlement.

C. Anadarko's Commitment to Change its Method of Calculating Royalties

As of January 1, 2009, Anadarko will calculate and pay royalties to members of the Plaintiff Class and their successors on the following basis:

1. Hydrocarbons

a. Anadarko Will Use Price Received in First Arms-Length Sale

For all MMBtu's of gas produced from each well measured at the "Wellhead Measurement Point," Anadarko will pay 97% of the "weighted average sales price" (hereafter "WASP") received by its affiliate for processed gas or unprocessed gas that is otherwise "placed in condition to enter the applicable interstate pipeline," less "the cost of transporting" such gas from the tailgate of the processing plant or the point at which it is ready to enter the interstate pipeline to the "point(s) of sale." (R. Vol. 12, pp. 2503-06 ¶¶ 4.4, 4.5, 4.6).

The "Wellhead Measurement Point" captures the heating value of all natural gas liquids ("NGL's") and condensate entrained in the gas stream as it emerges from the well. (R. Vol. 12, p. 2495 ¶ 1.34). The presence of these hydrocarbons in the gas stream raises the Btu value of the gas and thereby increases the volume of MMBtu's produced from each well, which are then multiplied by the WASP. (R. Vol. 12, pp. 2504-05 ¶ 4.5) (agreeing that as long as Anadarko pays for these hydrocarbons, as reflected in the "wellhead volumes of gas," it "shall have no obligation to pay royalty on natural gas liquids or other products extracted" from the gas stream).

b. Anadarko Will Reduce its Gathering Charge to 31 Cents

After plaintiffs filed this action, Anadarko "froze" its gathering rate at 36 cents per MMBtu. (R. Vol. 71, p. 12). By 2008 its actual gathering costs had increased to 61 cents,

and class counsel believed that if they had lost this case, that charge could have increased to as much as 90 cents per Mcf during the next few years. (R. Vol. 71, pp. 12, 15). By fixing the amount that Anadarko can deduct in the future for gathering expenses at 31 cents per MMBtu, the Agreement saves the Plaintiff Class between 30 cents and 59 cents per MMBtu, depending on what Anadarko's costs would have been, assuming Anadarko had won the case. (R. Vol. 71, pp. 13-14).

c. Anadarko Will Cease In-Kind Deductions for Fuel and Line Loss

By agreeing to pay royalties on the volumes of MMBtu's measured at the wellhead, Anadarko will no longer be able to charge its royalty owners for fuel that is used to operate the compressors on the gathering system or for gas that is lost after it enters the gathering system. (R. Vol. 71, pp. 14-15).

d. Limitations Placed on the Implied Covenant to Market

In exchange for being paid on the basis of the per MMBtu price received by Anadarko for gas at a location downstream of the point at which it has been placed in marketable condition (*i.e.*, after it has entered the interstate pipeline system), plaintiffs agreed to release Anadarko from any claim that it should have obtained "a higher price for the gas" than reflected in the WASP and stipulated that it would have no "implied duties relating to the sales of gas that are to be used in the calculation of the WASP . . . ." (R. Vol. 12, p. 2504 ¶ 4.4). Anadarko is, however, required to act "in good faith" when making such sales. *Id.* All other implied covenants, including the duty to develop and the duty to avoid drainage, as well as other features of the implied covenant to market, such as the duty to find a market for the gas, remain fully in force.

2. Non-Hydrocarbons

Royalties "payable by [Anadarko] . . . on helium and other non-hydrocarbon components of the gas stream produced in Kansas" are to be "calculated and paid" when Anadarko or an affiliate "actually receives monetary proceeds for the sale" thereof "in an arms length sale to a buyer that is not an affiliate of [Anadarko]" and are to be equal to the product of "100% of the proceeds actually received . . . multiplied by the owner's decimal ownership interest in such volumes . . . ." (R. Vol. 12, p. 2507 ¶ 4.7(a) and (b)). The proceeds received for the helium or other non-hydrocarbon component "shall be the net proceeds received, after reduction for the charges of processing and/or other costs," including retention of volumes of such products in lieu of a monetary charge. (*Id.* at ¶ 4.7(b)). In other words, Anadarko guarantees its royalty owners that they will receive their proportionate share of whatever Anadarko itself receives for helium and other non-hydrocarbon products extracted from the natural gas stream.

In exchange for being assured that they will be paid royalties on the net benefits generated by non-hydrocarbons, plaintiffs agreed that Anadarko would "have no liability . . . for any alleged failure to obtain a higher price . . . or for any other acts or omissions relating to the extraction, marketing or sale" thereof. (R. Vol. 12, p. 2508 ¶ 4.4 and 4.7(c)). Plaintiffs also agreed that Anadarko would have "no implied duties associated with the production, extraction, marketing or sale" of such products. (*Id.* at ¶ 4.7(d)).

D. Anadarko's Commitment to Include Certain Data on Its Check Stubs

The Agreement delineates 11 different types of data that Anadarko is required to put on the stubs that accompany its monthly checks for payment of royalties on natural gas. (R. Vol. 12, p. 2509 ¶ 4.9(a) and (b)). Likewise, the Agreement sets forth three categories of

data that Anadarko is required to disclose on its check stubs with regard to helium or other non-hydrocarbon components of the gas stream. (R. Vol. 12, pp. 2509-10 ¶ 4.9(b)). In exchange for Anadarko making those disclosures, plaintiffs agreed that they would not claim that the check stubs fail to comply "with current Kansas statutory requirements found in K.S.A. 55-1620 . . . ." (R. Vol. 12, p. 2510 ¶ 4.9(c)).

E. Plaintiff's Commitment to Release Claims

1. For the Period prior to January 1, 2009

In exchange for its payment of $33 million, plaintiffs agreed to release Anadarko and related parties (as defined in ¶ 1.17 of the Agreement) from all claims "to the extent such claims arise out of or relate to (a) payment or calculation of royalties on [Anadarko]'s working interest share of gas, including but not limited to any hydrocarbon components of the gas stream such as natural gas liquids, that was produced prior to January 1, 2009 . . . or (b) any claims for or relating to helium or other non-hydrocarbon components of the gas stream . . . ." (R. Vol. 12, pp. 2500-01 ¶ 3.1).

2. For the Period Beginning January 1, 2009

With regard to "gas (including any hydrocarbon components of the gas stream), helium, and other non-hydrocarbon components of the gas stream produced on or after January 1, 2009," plaintiffs agreed to release "all claims . . . relating to royalty payments made in conformity with the future royalty payment methodology" outlined above. (R. Vol. 12, p. 2501 ¶ 3.2).

3. Individual Issues Are Not Precluded

As set forth in paragraph 3.3 of the Agreement, nothing contained therein is intended to affect Anadarko's "right or obligation to make routine prior period adjustments for clerical

or administrative errors concerning prices actually received, volumes actually sold or produced, or decimal interests of the type that historically have been addressed by Anadarko by way of prior period adjustments." (R. Vol. 12, p. 2501 ¶ 3.3). Such prior period adjustments would include errors involving only individual class members, whose claims would not be released, since they could not have been asserted in a class action. Nor would the release apply to individual issues such as surface damage or an alleged failure to develop or to keep a lease in effect by producing gas in paying quantities or to find a market for the gas, none of which would implicate the royalty payment methodology. (R. Vol. 12, pp. 2500-01 ¶¶ 3.1-3.4, 2578).

F. The Agreement Only Applies to Gas Sold to an Affiliate

On or after January 1, 2009, if Anadarko does not sell gas to "an Affiliate," as defined in paragraph 1.3 of the Agreement, the future royalty payment methodology agreed to by the parties "shall not apply to such production." (R. Vol. 12, p. 2511 ¶ 4.11). In such event, Anadarko and the members of the Plaintiff Class "shall be free to act in what they deem to be their best interests with regard to such production, including litigation." (R. Vol. 12, p. 2511 ¶ 4.11).

G. Anadarko's Commitment to Resolve Disputes Arising Under the Agreement

1. Informal Dispute Resolution

In the event of "any discrepancy or dispute" concerning whether Anadarko has calculated and paid royalties or disclosed information on its check stubs in the manner required by the Agreement, Anadarko has agreed to "respond to reasonable requests by Plaintiff or a Participating Settlement Class Member for pertinent information in an effort to promptly and efficiently resolve the discrepancy or dispute." (R. Vol. 12, p. 2511 ¶ 4.13).

2. Arbitration

If the "informal process" for resolving any such dispute does not succeed, "the parties will arbitrate the dispute in binding arbitration . . . according to procedures and expertise appropriate to accomplish the arbitration ***quickly and inexpensively***." (R. Vol. 12, pp. 2511-12 ¶ 4.13 (emphasis added)). The arbitration clause does not cover any issue other than whether Anadarko has calculated royalties in accordance with the royalty payment methodology and made the required disclosures on its check stubs, all as expressly set forth in the Agreement. (R. Vol. 12, pp. 2511-12 ¶ 4.13).

H. The Agreement Benefits the Class and Resolves All Royalty Payment Issues

The Plaintiff Class will receive substantial benefits from the Agreement, which resolves all royalty payment issues associated with the disposition of the effluent stream (both hydrocarbons and non-hydrocarbons) emerging from each well.

With respect to the Anadarko's conduct before January 1, 2009, Anadarko agreed to pay a sum amounting to more than 88% of the "gathering" expenses subtracted from its royalty payments to the Plaintiff Class. (R. Vol. 71, pp. 12-13). Anadarko did not deduct any other expenses from its royalty payments on natural gas to the Plaintiff Class. (R. Vol. 42, p. 7; Vol. 45, pp. 30-31, 43, 61, 87-89, 107; Vol. 71, p. 37). This recovery for past damages, on a percentage basis, is ***better than*** any of the other three settlements approved by the same district court in similar class actions in the Hugoton Field.[2] (R. Vol. 71, p. 13).

[2] *Youngren v. Amoco Production Co.*, Case No. 89 CV 31 (Stevens Co. Dist. Ct. filed May 12, 1989); *Alford v. Pioneer Natural Resources USA, Inc.*, Case No. 93 CV 37 (Stevens Co. Dist. Ct. filed Nov. 22, 1993); *Littell v. OXY USA, Inc.*, 98 CV 51 (Stevens Co. Dist. Ct. filed Nov. 13, 1998).

By agreeing to pay on the basis of its WASP minus transportation costs, instead of the PEPL Index, after January 1, 2009, Anadarko will increase its royalty payments by one or two percent. (R. Vol. 12, p. 2493 ¶ 1.19; Vol. 71, p. 14). More significantly, by also agreeing to reduce and freeze the share of gathering expenses that it charges to its royalty owners (*i.e.*, to 31 cents per MMBtu), Anadarko will increase the royalty it pays by 25% on gas that it sells for $4 per MMBtu—over what it would have paid if it had continued using its existing method of paying royalties and unfrozen its gathering rate. (R. Vol. 71, pp. 13-14). As the price of gas increases, the Plaintiff Class will receive an even greater share of the proceeds of sale, since they are presently charged for fuel on the basis of the price of the residue gas and that charge is being eliminated in its entirety under the Settlement. (R. Vol. 71, pp. 12, 13-14, 20).

In comparison to the other class-action settlements identified above, the future payment methodology to be used by Anadarko under the Agreement is less favorable than what was obtained in one settlement, more favorable than what was received by the class in a second settlement, and about the same as what was achieved in the third settlement. (R. Vol. 71, p. 15).

In addition, Anadarko expressly ratified its ongoing obligation to pay royalties on helium in the same way it has in the past and, for the first time, agreed to extend such methodology to any other non-hydrocarbon components in the gas stream. (R. Vol. 12, pp. 2506-08 ¶ 4.7).

Anadarko will not implement the changes called for by the Agreement until the trial court's judgment becomes final, after which it will pay its royalty owners the difference between what it has paid them under its old methodology and what was due them under the Agreement. (R. Vol. 12, pp. 2491-92 ¶ 1.5 [defining "effective date"], 2508-09 ¶ 4.8).

I. Objector Misstates Basic Terms of the Agreement

To the slight extent he discusses the terms of the Agreement, Objector either misrepresents or misunderstands them. To begin with, he incorrectly asserts that "[Andarko] would pay nothing for Condensate, NGLs or any other product, except Helium on a 'net' basis as they had been." (Objector's Brief at 3). As explained above, Anadarko will continue to pay royalties on both condensate and NGL's, because they are included in the measurement of the BTU's in the gas stream as it emerges from the well. (*See* p. 4, *supra*).

Objector next declares that "[a]ll future disputes with royalty owners go to binding arbitration." (Objector's Brief at 3). This is also wrong. As discussed above, the scope of any arbitration is limited to disputes arising from the Agreement itself. Nothing else is covered. (*See* pp. 8-9, *supra*).

Objector again misrepresents the record by asserting that the Agreement does not provide for the payment of royalties on carbon dioxide or nitrogen and would allow Anadarko to "keep" argon "without payment to royalty owners," should any of these products be removed and sold in the future. (Objector's Brief at 37). To the contrary, as shown above, the Agreement provides that the Plaintiff Class will be paid royalties on the net amount realized by Anadarko, if it removes and sells any of these secondary non-hydrocarbon products in the future. (*See* p. 6, *supra*).

Objector mistakenly suggests that the Agreement dilutes whatever implied rights Anadarko's royalty owners may have in the event there is "another round of in-fill drilling" or there is "future unitization" or "tertiary recovery operations." (Objector's Brief at 38). To the contrary, the Agreement has no impact whatever on the implied covenants that would apply to such opportunities, since its scope is limited to the manner in which Anadarko will calculate, pay and report royalties in the future. (*See* pp. 5, 6, *supra*).

II.
HISTORY OF THIS LITIGATION

A. The Petition Covered All Issues Associated With the Payment of Royalties

In their Petition, the plaintiffs broadly alleged that the manner in which Anadarko was computing their royalties violated its express duty to produce gas at its own expense, its implied duty to place that gas in marketable condition, and its duty of good faith and fair dealing. (R. Vol. 1, pp. 29-30). Plaintiffs also alleged that the defendant "has breached its fiduciary duty by reducing royalty payments to members of the plaintiff class and by failing to disclose such reductions." (R. Vol. 1, p. 30).

The prayer included a request for declaratory relief prohibiting Anadarko from "unilaterally selecting an improperly lower price on which royalty payments are calculated" and an accounting of "all the consideration defendant and any related entity has received in connection with the sale or other disposition of the effluent stream (or any portion thereof) extracted from the lands subject to the leases described above," as well as "all reductions in royalty payments due to charges and expense" and "the manner in which all royalty payments in connection with any such disposition have been calculated." (R. Vol. 1, pp. 30-31).

By means of the above allegations and requests for relief, the Petition put in play all facts associated with Anadarko's production and sale of all constituents of the "effluent stream," including costs incurred, prices received, and royalties paid.

B. Plaintiffs' Discovery Included Pricing, Natural Gas Liquids and Helium

During discovery, plaintiffs determined exactly how Anadarko was paying royalties on the substances produced from the leases in question. At the Fairness Hearing, Class Counsel summarized the breadth of that discovery:

> Plaintiffs' class counsel were fully conversant in the facts regarding Anadarko's operations in the Kansas Hugoton field and the manner which it processed that gas, including natural gas liquids, helium, condensate, nitrogen that was rejected. . . . [C]ounsel fully looked into those facts and considered them in deciding what claims to pursue at the time of trial of this case, and that we remained fully conversant and informed regarding those matters and could consider them in connection with the settlement that was finally achieved with Anadarko.

(R. Vol. 71, pp. 212-13). This representation is amply supported by the record in this case. (*See, e.g.,* R. Vol. 7, p. 1497 [natural gas liquids]; Vol. 8, p. 1860 [natural gas liquids, condensate]; Vol. 17, pp. 10 [condensate], 11-12 [natural gas liquids]; Vol. 18, pp. 326 [helium, natural gas liquids], 604-05 [helium]; Vol. 41, p. 63 [condensate]; Vol. 45, pp. 25 [natural gas liquids], 149 [condensate]: Vol. 48, pp. 29-30 [natural gas liquids], 92-95 [condensate]; Vol. 61, pp. 137, 140, 180-81, 185 [natural gas liquids]; Vol. 63, pp. 138-40 [condensate]; Vol. 64, pp. 124 [condensate], 132-33 [natural gas liquids], 157 [natural gas liquids]; Vol. 18, pp. 318-19 [beginning "price" for royalty calculation]).

Based on that discovery, and for the legal reasons discussed in the next subsection, plaintiffs determined they had no grounds for challenging Anadarko's use of the PEPL Index price as the starting point for calculating royalties or its failure to pay royalties on NGL's after they had been extracted from the gas stream. That is why the Notice that was sent to the putative class on August 22, 2000, stated that the lawsuit would not be raising any claim that "Anadarko has not used the proper starting point for calculation of royalty payments" or "failed to make proper royalty payments in connection with any extracted liquid hydrocarbons." (R. Vol. 4, p. 711).

After engaging in similar discovery and the requisite legal analysis with regard to the manner in which Anadarko was paying royalties on helium, plaintiffs also determined not to pursue any claim against Anadarko in connection with that non-hydrocarbon.

C. Plaintiffs' Theory of Liability

After investigating Anadarko's royalty accounting methodology, plaintiffs winnowed their claims and took the position that the gas involved in this case was not in "marketable condition" until it met the specifications set forth in the tariffs published by the transmission pipelines, which transport the vast majority of the gas produced in the Hugoton Field from the tailgates of the processing plants to the distant markets where it is consumed. In particular, plaintiffs claimed that the raw gas had to be compressed to the high pressures at which the pipelines operate and also processed to remove NGL's, which would otherwise come out of suspension under those high pressures and interfere with the safe operation of the pipelines. (R. Vol. 7, p. 1500). But, since Anadarko was ***not*** charging the accounts of its royalty owners with any of the costs of removing the liquids, those expenses were ***not*** part of the damages plaintiffs were seeking to recover in this case.

Likewise, since the PEPL Index is based upon sales made by multiple buyers and sellers at markets located on the transmission pipeline, plaintiffs did not ask the trial court to require Anadarko to use the higher price it was obtaining for the gas further downstream (and closer to the consumers), which is referred to as its "WASP" in the Agreement. Anadarko's use of the PEPL Index was consistent with, and supported, plaintiffs' theory that the gas was not in marketable condition until it entered the transmission line.

D. The Trial Court Ruled Against Plaintiffs on Two Key Legal Issues

Before hearing the evidence in a bench trial, the trial court ruled against plaintiffs on the issue of whether Kansas law flatly prohibits lessees from deducting compression expenses, including fuel, incurred by them when they are gathering gas from wells. (R. Vol. 7, pp. 1478-79). These compression expenses comprise the lion's share of the "gathering"

deductions. The court ruled that the deductibility of these expenses turned on the issue of whether or not they were being incurred to put the gas in marketable condition or to produce the gas in a captive state, both of which were questions of fact that had to be resolved at a trial on the merits. (R. Vol. 7, p. 1481).

In a second ruling, the trial court refused to allow plaintiffs to assert a claim for punitive damages based upon Anadarko's alleged utilization of transactions with its affiliate to deprive the Plaintiff Class of the amounts deducted from their royalty payments, which it failed to disclose on its check stubs. (R. Vol. 7, p. 1490). The court found that plaintiffs had failed to meet the threshold test for asserting such a claim. (R. Vol. 7, pp. 1490-91).

E. The Trial Court Heard Conflicting Testimony

At trial, the parties presented expert testimony and documentary evidence regarding the point at which Anadarko had completed the steps necessary to put raw gas in marketable condition. Plaintiffs' evidence supported their claim that the gas was not marketable until it met the transmission pipeline specifications. (R. Vol. 8, pp. 1882-89). Defendant presented evidence that the raw gas was in marketable condition when it emerged from the well—even before it entered the gathering system. (R. Vol. 9, pp. 1916-18, 1920, 1927-42).

F. The Trial Court's Failure to Rule on the Merits

The district court conducted a bench trial in February, 2002. Following the trial, the parties submitted proposed findings of fact and conclusions of law, which were extensive. (R. Vol. 8, pp. 1860-1911; Vol. 9, pp. 1913-1977). After hearing oral argument and reviewing the record, which included a transcript of the trial and consisted of more than 9,000 pages, excluding trial exhibits, the trial court was unable to reach a decision, even after the case was re-argued in the summer of 2006. (R. Vol. 71, p. 17).

III.
EVENTS PRECEDING EXECUTION OF THE SETTLEMENT AGREEMENT

At the request of Anadarko, the parties participated in a mediation in Kansas City in early 2008. The parties were so far apart that plaintiffs "walked out" of the mediation. (R. Vol. 71, p. 30). They did not resume negotiations until the late summer of 2008, when newly-employed counsel for Anadarko contacted class counsel to request that the two sides renew their efforts to settle the case. (R. Vol. 71, pp. 49-50). The ensuing discussions dealt with both the past (underpayment of royalties) and the future (the manner in which royalties would be calculated after a date certain). Before the parties had reached any agreement with regard to the claim for gathering deductions, however, Anadarko stated that it would not be possible for it to conclude a settlement without having final resolution of all aspects of its royalty accounting methodology, including the manner in which it was dealing with both hydrocarbons and non-hydrocarbons. (R. Vol. 71, pp. 10-11).

In response to Anadarko's request that the negotiations resolve all aspects of the royalty payment transaction, plaintiffs requested that Anadarko make a series of representations upon which they could rely when determining what would constitute a fair and reasonable settlement. On December 18, 2008, Anadarko's counsel provided those representations to plaintiffs' counsel which are summarized as follows:

1. Anadarko has always paid royalties on the "full MMBtu wellhead volumes."

2. "There are no deductions or price adjustments relating to processing in determining the price applied to the wellhead MMBtu."

3. The "estimated additional net value . . . attributable to the plant liquids . . . over and above the value based on the MMBtu content of the gas at the well/lease, averaged 3.25% of the PEPL Index" during the period from 1996 through 2005. For the enitre period from 1996 through 2007, this net uplift averaged 4.7%.

4. Under its contract with "the National Helium Plant, which processed the majority of the gas that is at issue in this case," Anadarko's affiliate is paid for the liquids "based on a formula, which uses a percentage of the amounts realized by the processor in arms length sales or OPIS pricing less applicable transportation and fractionation fees." The affiliate also has "had the right to take liquids in kind, which it has done form time to time."

5. Anadarko "pays royalty on all of the amounts paid by the processors for helium" under contracts which "generally provide that the processor will pay a percentage of the net value . . . received for the crude helium."

6. Although its affiliate's records "do not break down . . . net revenues" which are "realized from the sale of gas at Kansas pooling points" for gas "produced from wells that are at issue in this case," Anadarko agrees with the estimate that such revenues (as reflected in its WASP) reflect an increase by "1% of index."

7. Anadarko prepared and submitted to class counsel a spreadsheet setting forth its "best estimate of the gathering and fuel that you claim to represent improper 'deductions in the lawsuit' for the period from October 1993 through December 2008."

(R. Vol. 99, pp. 1381-82) ("the Representations").

Negotiations continued for another six months. Finally, in June 2009, the parties reached agreement on a settlement, subject to the approval of the court pursuant to K.S.A. 60-223(e). The court-approved Notice mailed to the Plaintiff Class described the lawsuit and the terms of the Agreement. (R. Vo. 12, pp. 2572-83). The Notice also provided each member of the Plaintiff Class the opportunity to exclude themselves from the Settlement. (R. Vol. 12, p. 2583). Of over 6,400 class members, 39 elected to opt out. (R. Vol. 71, p. 6). Only one, the appellant, declined to exclude himself and stayed in the class for the purpose of opposing the Settlement.[3]

[3] Objector incorrectly describes himself as "Stan R. Boles, on behalf of himself and all similarly situated royalty owners." ("Brief of Appellants [sic]"; Docketing Statement, p. 1). Objector has not been appointed to represent the Plaintiff Class or any members thereof.

IV.
THE FAIRNESS HEARING

The Fairness Hearing took place on September 11, 2009. Approximately 20 days before the Hearing, Anadarko provided Objector with copies of all correspondence and e-mails between plaintiffs' counsel and Anadarko's present counsel. (R. Vol. 10, pp. 2234, 2364). In advance of the hearing, Objector submitted extensive designations of deposition testimony and trial testimony, as well as exhibits. (R. Vol. 11, pp. 2381, 2393, 2418). Objector also filed a 91-page brief in opposition to the Settlement and actively participated in the Hearing. (R. Vol. 16, p. 3347).

Objector's sole basis for opposing the Settlement was (and is) his contention that the release of "non-gathering" claims did not receive adequate consideration under his interpretation of the Marketable Condition Rule. Under Objector's unique version of this rule, the implied covenant to market ***gas*** requires a producer to divide the effluent stream into its constituents and then put each of them into marketable condition, free of cost to royalty owners. In other words, Objector claims that Anadarko will not be complying with Kansas law, until it pays royalties separately on residue gas, NGL's, condensate, helium and other non-hydrocarbons, ***all without charge to its royalty owners***.

Objector's reading of Kansas law is at odds with that of Class Counsel, who have concluded that the implied covenant to market gas is (1) limited to and applies only to "gas" and (2) does not require a lessee to do anything more than put such gas in marketable condition at its own expense.

At the Hearing, Objector attacked the adequacy of Class Counsel to represent the Plaintiff Class, saying they had failed to vigorously pursue the non-gathering claims. (R. Vol.

71, pp. 230-31). In response, Class Counsel testified that they are not aware of any case in the United States that supports Objector's attempt to expand the implied covenant beyond the gas itself:

> We have spent a substantial portion of our legal careers advocating the adoption of the Marketable Condition Rule and have been deeply involved in the application of this rule to the practices of producers in three different major gas fields in the United States. In those states which have adopted and applied this rule, we know of no case which has required a producer to account to its royalty owner for anything other than gas that has been placed in marketable condition. To our knowledge, the rule has never been interpreted to require a producer to pay royalties on enhancements which it elects to perform on marketable gas, such as by extracting natural gas liquids or transporting it to downstream markets. In other words, under the lease and under the implied covenant to market, the producer's duty is to place the gas in marketable condition without charging the royalty owners with such costs. That does not mean that the producer is obligated to then proceed to extract liquids and pay royalties on those or to transport the gas downstream of the point of marketability and pay additional royalties on any additional value realized as a result of that transaction.

(R. Vol. 71, pp. 20-22).

When Anadarko insisted that any settlement had to resolve all possible claims arising from its calculation of royalties, the non-gathering claims became one of many subjects of negotiation between the parties, beginning with Class Counsel's demand for (and receipt of) the Representations. (R. Vol. 71, p. 18; Vol. 99, pp. 1381-82). Notwithstanding their opinion that such claims had no viable foundation in the law, Class Counsel obtained substantial value for their release by securing a sizeable increase in the ***percentage of the gathering deductions*** that Anadarko would have otherwise been willing to pay to settle this case. (R. Vol. 71, pp. 18-20).

Based on the foregoing legal analysis and evidence, Class Counsel testified that the Agreement was "fair and reasonable." (R. Vol. 71, pp. 17-18).

V.
THE JUDGMENT ENTERED BY THE TRIAL COURT

A. The Trial Court Certified the Settlement Class

The district court found that Objector's opposition to certification was "based only upon K.S.A. 60-223(a), the adequacy of representative counsel." (R. Vol. 12, p. 2479). The court also determined that the "Objector appears to only oppose certification of the new class as to the proposed class counsel, because the class counsel are in favor of, and promote this settlement." (R. Vol. 12, p. 2479).

> Unquestionably, the proposed class counsel are preeminent in the field of royalty owner litigation against oil and gas companies and have appeared as class counsel for royalty owners in several states. There is no question as to their adequacy, competency, and abilities to aggressively represent a class of royalty owners against an oil and gas company. The mere fact that the proposed class counsel proposed, and endorse, this settlement does not mean they are not adequate.

(R. Vol. 12, p. 2479).

The trial court then held that "differences of opinion between counsel and in particular this issue of settlement in the instant case" were not sufficient to disqualify class counsel. (R. Vol. 12, p. 2479). "Just because the proposed class counsel promote the settlement simply does not mean they are inadequate or unworthy to represent the class." (R. Vol. 12, p. 2479). In so ruling, the court refused to find that class counsel's unfavorable assessment of the merits of the non-gathering claims created a conflict that precluded them from representing the Plaintiff Class.

B. The Trial Court Found the Outcome of the Trial Was in Serious Doubt

Although the trial court observed that it was precluded from "deciding the merits of the controversy," it found "that there exist serious questions of law and fact which place the

ultimate outcome of this litigation in doubt and that, while the Settlement Class might possibly ultimately receive more, if the case was to prosecuted to its ultimate conclusion, it is also possible that there would be no recovery." (R. Vol. 12, p. 2476).

The trial court's findings and conclusions reflect how uncertain it was regarding the "ultimate conclusion" of the bench trial that it had conducted on the merits. After emphasizing that it "understands, and is knowledgeable of the underlying facts that were litigated between the Plaintiff Class and Anadarko" (R. Vol. 12, p. 2480), the court identified many issues associated with the "gathering claim" which remained unresolved in its mind**.** (R. Vol. 12, pp. 2476 ¶ 13, 2482-84). The court noted that the Objector "***assume[s]*** that those gathering fees charged against royalty owners and the use of gas for fuel without payment to the royalty owners are wrongful." (R. Vol. 12, p. 2483). In this manner, the court rejected Objector's implication that the fairness of the Settlement should be evaluated on the premise that the plaintiffs ***were going to prevail*** on the gathering claim.

C. The Trial Court Found Objector's Evidence Not to be Credible

The trial court made multiple findings with regard to the evidence submitted by Objector covering a wide variety of possible claims against Anadarko, including affiliate pricing, pre-judgment interest, condensate, NGL's, helium, and nitrogen**.** (R. Vol. 12, pp. 2479-88). The court stated that it had "paid particular attention to the expert, [Reineke], called by the Objector as to how he obtained the various values that the Objector is setting forth." (R. Vol. 12, p. 2482). These findings support the court's ultimate determination that the "value . . . of $149 million" placed on the settled claims by Objector's expert "is unrealistic." (R. Vol. 12, p. 2484).

D. The Trial Court Also Found Objector Acted Inconsistently

The trial court found that Objector's claim that Class Counsel had failed to litigate the non-gathering claims with sufficient vigor was inconsistent with his own actions in another case. In *Boles v. Anadarko Petroleum Corporation*, Case No. 08-1049-MLB (D. Kan.) ("*Boles*"), which Objector filed on January 7, 2008, and was thereafter removed to federal court, Objector ***did not assert*** any of those claims in his petition. (R. Vol. 12, pp. 2484-84). It was only ***after*** being notified of the Settlement reached in the present case that Objector filed a motion to amend his complaint to include them. (R. Vol. 12, pp. 2484-85; Vol. 71, pp. 203-05).

E. The Trial Court Approved the Settlement

Based upon the evidence adduced at the Fairness Hearing, the trial court approved the Settlement as being "fair, reasonable, bona fide and adequate to the Settlement Class as required by K.S.A. 60-223." (R. Vol. 12, p. 2478).

ARGUMENT AND AUTHORITIES

I.
STANDARD OF REVIEW

The test for determining whether the trial court committed error when it found that Class Counsel could adequately represent the Settlement Class, as required by K.S.A. 60-223(a)(4), is abuse of discretion. *Dragon v. Vanguard Indus., Inc.*, 282 Kan. 349, 354, 144 P.3d 1279 (2006) (applying abuse of discretion standard to district court's decision regarding class certification).

Likewise, a judgment approving a class action settlement is reviewed to determine whether there was an abuse of discretion. *See, e.g., City Partnership Co. v. Atlantic*

Acquisition L.P., 100 F.3d 1041, 1045 (1st Cir. 1996); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *In re Warfarin Sodium Antitrust Lit.*, 391 F.3d 516, 535 (3d Cir. 2004); *Scardelletti v. Debarr*, 43 Fed. Appx. 525, 528 (4th Cir. 2002); *Newby v. Enron Corp.*, 394 F.3d 296, 300 (5th Cir. 2004); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *Mirfasihi v. Fleet Mort. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006); *In re Wireless Telephone Federal Cost Recovery Fees Lit.*, 396 F.3d 922, 932 (8th Cir.), *cert. denied*, 546 U.S. 822 (2005); *Azizian v. Federated Dept. Stores, Inc.*, 243 Fed. Appx. 311, 312 (9th Cir. 2007); *In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1266 (10th Cir. 2004); *Strube v. American Equity Invest. Life Ins. Co.*, 158 Fed. Appx. 198, 201 (11th Cir. 2005), *cert. denied*, 549 U.S.882 (2006); *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir.), *cert. denied*, 525 U.S. 1033 (1998).

The appellant bears the burden of showing that the district court abused its discretion. *Miller v. Glacier Development Co., L.L.C.*, 284 Kan. 476, 498, 161 P.3d 730 (2007), *cert. denied*, —U.S.—, 128 S.Ct. 1657, 170 L.Ed.2d 355 (2008). Abuse of discretion is "an extraordinarily high standard," *Production Credit Ass'n of South Central Kansas v. Mater*, 27 Kan. App. 2d 700, 711, 8 P.3d 1274 (2000), which this Court has previously defined as follows:

> Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

In re Adoption of B.G.J., 281 Kan. 552, 564, 133 P.3d 1 (2006) (citation omitted).

Findings of fact made by a trial court when exercising its discretion will not be set aside unless the appellant can show they were "against . . . reason and evidence" and that the

court's weighing and examination of the evidence was arbitrary, rather than fair. *Saucedo v. Winger*, 252 Kan. 718, 729-32, 850 P.2d 908 (1993); *see also Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 281 Kan. 1287, 1307, 136 P.3d 428 (2006) (appellate court must defer to trial court's findings of fact unless they are clearly erroneous); *Rush v. King Oil Co.*, 220 Kan. 616, 624, 556 P.2d 431 (1976) (findings with regard to disputed questions of fact carry presumption that court determined every corollary fact necessary to sustain them); *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008) (negative findings cannot be disturbed unless lower court arbitrarily disregarded undisputed evidence or decision was tainted by some extrinsic consideration such as passion, bias, or prejudice). Here, the trial court made a negative finding when it concluded that the value which Objector placed on the settled claims was "unrealistic." (R. Vol. 12, p. 2484).

Fully aware that he has no grounds for setting aside the trial court's findings of fact or otherwise showing an abuse of discretion, Objector has simply ignored what the trial court did and, instead, launched an attack on Class Counsel and the Settlement itself—as if the evidence he offered at trial were somehow binding on this Court, when the opposite is true.

Having elected not to challenge the trial court's findings, the only basis upon which Objector can possibly thwart the Settlement is to establish that the trial court acted contrary to established law when it entered the judgment below. To show the trial court abused its discretion in connection with a question of law, Objector must demonstrate that the trial court has "gone outside the framework of legal standards" determined by the substantive law the putative class action will invoke. *Dragon v. Vanguard Indus., Inc.*, 277 Kan. 776, 779, 89 P.3d 908 (2004); *see also Citifinancial Mort. Co., Inc. v. Clark*, 39 Kan. App. 2d 149, 151, 177 P.3d 986 (2008).

In truth, Objector's appeal is founded upon a misreading of the law of the implied covenant to market and a misguided attempt to change the rules that trial courts follow when deciding whether to approve a class action settlement.

II.
THE TRIAL COURT CORRECTLY CONCLUDED REPRESENTATION WAS ADEQUATE

A. Objector Has Not Shown Any Abuse of Discretion

Ignoring the trial court's findings as to the adequacy of representation, Objector bombards this Court with the assertions that Class Counsel somehow lacked knowledge of the facts upon which the non-gathering claims were based. (Objector's Brief at 7 ["By comparison to the vigorous litigation of the gathering claims, nothing was done on the Non-Gathering Claims."], 23 ["Of course, in *Coulte*r, Non-Gathering evidence was not carefully considered, there was no discovery, and there were no summary judgment motions."]). Objector does not bother to support any of these declarations with record references. That is because the record shows that Class Counsel thoroughly investigated the non-gathering claims at the beginning and at the end of this litigation. (See pp. 12-14, *supra*).

Objector next implies that neither Class Counsel nor the trial court understood the law upon which he was basing his valuation of the non-gathering claims. (Objector's Brief at 6 ["Coulter counsel, however, cited no Kansas statute or case law . . . that held the Non-Gathering Claims were legally barred."]; 6-7 ["Likewise, Judge Smith in the Journal Entry approving the settlement cited no cases to support any conclusion that the Non-Gathering Claims were legally barred."]; 27 ["(K)nowledge of the law is required. . . . Coulter counsel has refused to apply the Marketable Product Rule. . . . "]). If Objector knows of any authority to support his interpretation of the Marketable Condition Rule, he has not shared it with the Court in his brief.

Class Counsel testified that they were not aware of any case in the United States that supports Objector's attempt to extend the Marketable Condition Rule to the non-gathering claims. (R. Vol. 71, pp. 18, 20-21). More important, the Kansas Supreme Court has never suggested that the implied covenant to market ***gas*** extends to other constituents of the natural gas stream, such as NGL's, or to inert contents of that stream, such as helium. To the contrary, it has only spoken in terms of the natural gas itself. Thus, in *Cline v. Angle*, 216 Kan. 328, 336, 532 P.2d 1093 (1975), the Court stated:

> It has been held that where ***gas*** and oil ***produced*** under a lease agreement has an established market value at the wellhead, royalties paid to a lessor should be based on that value, ***not the value of products refined by the producer*** in a plant constructed at his own expense.

(emphasis added).

The holding in *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788 (1995), is entirely consistent with the statement of the law in *Cline*:

> The lessee under an oil and gas lease has the duty to produce a marketable product, and the lessee alone bears the expense in making the product marketable.
>
> Under a ***natural gas lease***, once a marketable product is obtained, reasonable costs incurred to transport or enhance the value of the ***marketable gas*** may be charged against nonworking interest owners. The lessee has the burden of proving the reasonableness of the costs. Absent a contract providing to the contrary, a nonworking interest owner is not obligated to bear any share of production expense, such as compressing, transporting, and processing, undertaken to ***transform gas into a marketable product***.

257 Kan. at 315, Syl. ¶¶ 2-3 (emphasis added).

Sternberger dealt exclusively with the implied duty of the producer to place gas in marketable condition. Nothing in the opinion requires a producer to manufacture the raw gas into separately marketable products and then pay royalties on them, as well as on the residue

gas, to its royalty owner. All it holds is that ***if*** the producer enhances the value of the marketable gas by transporting it to the point of sale and ***if*** it pays royalties based on the price received for the gas at that location, then it can charge the royalty owner with a pro-rata share of such transportation costs.

Historically, producers in Kansas have paid royalties on NGL's in one of two ways. Three of the five major producers in the Hugoton Field (BP/Amoco, OXY and Mobil/Exxon) pay royalties on the NGL's after they have been removed from the gas stream at a processing plant. In exchange, the royalty owners pay their pro-rata share of the processing costs. (R. Vol. 71, pp. 143, 185). The other two (Pioneer and Anadarko) pay royalties on the value of the NGL's included in the MMBtu's measured at the wellhead. (R. Vol. 71, p. 21). These two producers do not charge their royalty owners with any of the processing costs, since they are being incurred to place the gas in the condition required by the transmission pipelines and the royalty owners are not being paid separately for the extracted liquids.[4] (R. Vol. 71, p. 21**)** Under both approaches, the royalty owners ***are being paid*** for the NGL's.

As the trial court noted, Kansas law does not permit royalty owners to share in the liquids without sharing in the cost of extracting them. (R. Vol. 12, pp. 2481-82). Class Counsel agree with the trial court, as reflected in their law firms' representation of royalty owners in a series of cases in which the question was not whether such deductions were

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[4] Objector implies that Anadarko is charging its royalty owners with a pro-rata share of the costs it incurs in the processing plants: "No evidence was ever adduced that the gas conditioning costs summarized factually by the expert were not incurred by [Anadarko] or charged by [Anadarko], directly or indirectly, to its royalty owners." (Objector's Brief at 11-12). To the contrary, it is undisputed that the only deductions being taken by Anadarko are for expenses that it incurs between the wellhead and the entry into a processing facility. (R. Vol. 42, p. 7; Vol. 45, pp. 30-31, 43, 61, 87-89, 107).

permissible but how they should be computed. *See, e.g., Matzen v. Hugoton Production Co.*, 182 Kan. 456, 321 P.2d 576 (1958); *Larrabee v. Mesa Petroleum Co.*, Case No. 4950, (Stevens Co. Dist. Ct. filed Oct. 18, 1970)*; Alford v. Pioneer Natural Resources USA, Inc.*, Case No. 93 CV 37 (Stevens Co. Dist. Ct. filed Nov. 22, 1993). The royalty owners in those cases did not contest the producer's right to charge them with a pro-rata share of the costs or removing NGL's (as opposed to gas treatment costs), because their counsel understood that the implied covenant to market applies to gas, not to by-products of the gas stream.

Finally, there is nothing in Kansas case law to support Objector's claim that he is entitled to be paid for helium free of charge or after it has been placed in a different form. The manner in which the Settlement Class has been paid (and will continue to be paid) for helium is consistent with Kansas law, which the law firms employed as Class Counsel helped to shape. *See Northern Natural Gas Co. v. Grounds*, 292 F.Supp. 619 (D. Kan. 1968), *aff'd in part, rev'd in part*, 441 F.2d 704 (10th Cir. 1971), *cert. denied* 404 U.S. 1063 (1974), *on remand,* 393 F.Supp. 949 (D. Kan. 1974).

As this discussion shows, the trial court's finding that the Settlement is fair and reasonable was based on a reasonable interpretation of the implied covenant to market gas. Objector's assault on the Settlement, on the other hand, is derived from an unreasonable interpretation of that covenant which has not been adopted by any court.

B. Objector Misstates the Test for Determining Adequacy of Counsel

Objector seems to think that he can use these proceedings to second-guess the litigation strategy and legal opinions of Class Counsel and that this Court is required to rule on the validity of the non-gathering claims before it can determine whether representation was adequate. That is not the law. Two inquiries are relevant when analyzing the adequacy

of representation: "'1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation; and 2) whether the representative's claims are sufficiently interrelated to and not antagonistic with the class's claims as to ensure fair and adequate representation.'"*Emig v. American. Tobacco Co., Inc.,* 184 F.R.D. 379, 387 (D. Kan.1998) (citation omitted).

One hallmark of adequacy of representation is the ability of counsel to assemble the facts, review the law and make judgments as to which claims to pursue and which to discard. *Cleary v. Phillip Morris USA, Inc.,* —F. Supp. 2d—, 2010 WL 181625, at *7 (N.D. Ill. Jan. 3, 2010) ("Class counsel must make 'considered judgment[s]' about how best to proceed with litigation; such tactical decisions do not render their representation inadequate even if later plaintiffs believe the earlier decisions were wrong"); *Baron v. Commercial & Industrial Bank of Memphis*, No. 75-CIV-1274, 1979 WL 1422, at *11 (S.D.N.Y. April 11, 1979) ("We fail to see why the selection of a litigation strategy makes [class counsel] inadequate . . . . In the course of complex, multiparty litigation, every counsel must make choices which by their very nature foreclose other arguments."); *Int'l Union v. Ford Motor Co.*, No. 05-74730, 2006 WL 1984363, at *31 (E.D. Mich. July 13, 2006) ("The fact that some class members would prefer to litigate claims rather than compromise them, or would 'press for more drastic relief,' raises no issue of inadequate representation."); *cf. Bollinger v. Nuss*, 202 Kan. 326, 340, 449 P.2d 502 (1969) ("An attorney must be given considerable leeway in trying a lawsuit, and ordinarily the matter of trial strategy must be left in his hands . . . .").

A lawyer does not discharge his or her professional responsibility by pursuing all possible claims, but by deciding which ones are in the best interest of his client to pursue. An equivalent principle is found in criminal law:

> The defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Strickland [v. Washington],* 466 U.S. [668] at 690-91, 104 S.Ct. 2052 [1984]. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052. The defendant bears the burden of demonstrating that trial counsel's alleged deficiencies were not the result of strategy. *Ferguson v. State,* 276 Kan. 428, 446, 78 P.3d 40 (2003).

State v. Gleason, 277 Kan. 624, 644, 88 P.3d 218 (2004).

In the class action context, "adequate representation of a particular claim is determined by the alignment of interests of class members, ***not proof of vigorous pursuit of that claim***." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 113 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005) (emphasis added). Here, there is no question that the interests of Class Counsel and class members are fully aligned. Objector cannot destroy that alignment by suggesting that Class Counsel had some sort of conflict with the Plaintiff Class because "they did not believe in" the non-gathering claims. (Objector's Brief at p. 28). If this were the test, it would be impossible for any responsible lawyer to represent a class, since he or she would be subject to disqualification upon deciding which claims to pursue and which claims not to pursue. *See Cleary*, 2010 WL 181625, at *7; *Baron*, 1979 WL 1422, at *11. Indeed, if class counsel in any case were to behave the way Objector believes they should, their conduct ***would*** raise serious questions about the adequacy of representation.

III.
THE TRIAL COURT CORRECTLY CONCLUDED THE SETTLEMENT WAS REASONABLE

A. Objector Has Not Shown Any Abuse of Discretion

Objector has not attempted to show that the trial court abused its discretion by finding that the Settlement was "fair, reasonable, bona fide, and adequate." Nor has Objector asked

this Court to reverse the trial court's finding that the opinion of his expert with regard to the value of the non-gathering claims was "unrealistic." Instead, as with his claim that Class Counsel were not adequate representatives of the Settlement Class, Objector wants this Court to change the legal rules that guided the trial court's decision. Obviously, a trial court cannot be guilty of an abuse of discretion because it followed existing law. *See Dragon v. Vanguard Indus., Inc.*, 277 Kan. 776, 779, 89 P.3d 908 (2004).

B. The Trial Court Applied the Proper Standard: Reasonableness

K.S.A. 60-223(e) does not set forth any standard to be followed by the trial court when deciding whether to approve a settlement:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs.

Objector concedes that the appropriate standard for approval of a class action settlement in Kansas is whether "the settlement is fair reasonable, and adequate." (Objector's Brief at 14). Consistent therewith, the Notice of Settlement advised members of the Plaintiff Class that the court would determine "whether the proposed Settlement is fair, reasonable, and adequate and in the best interests of the Plaintiff Class and should be approved by the Court." (R. Vol. 12, p. 2580). The Journal Entry of Judgment shows that the court applied this standard (R. Vol. 12, pp. 2476 ¶ 13, p. 2481) and found that it had been satisfied. (R. Vol. 12, pp. 2477 ¶ 17, 2478 ¶ 2, 2485).

Rule 23(e) of the Federal Rules of Civil Procedure was amended in 2003 to expressly provide that when considering a settlement of a class action that would bind class members, "the court may approve it only after a hearing and on finding that it is fair, reasonable and

adequate." FED. R. CIV. P. 23 (e)(1)(c) (2006).[5] This amendment codified the standard already being utilized by the federal courts.[6] The Kansas Legislature has not yet followed suit, but our courts have utilized the same standard for decades. Thus, for example, in *Chance v. U.S. Tobacco Co.*, No. 05-CV-112, 2006 WL 1390382 (Seward Co. Kan. Dist. Ct. March 8, 2006), where counsel for Objector was one of the attorneys for the plaintiff class in a tobacco antitrust case, the parties asked Judge Kim R. Schroeder to approve a settlement to which four individual class members, as well as the attorneys general of Kansas and New York, had objected. The court utilized the standard of reasonableness:

> 8. The court having reviewed the submissions from Plaintiffs and Defendants finds that the overall proposed settlement is fair, reasonable, and adequate, was the result of arm's-length negotiations, and that its approval would be in the best interests of the class members.
>
> * * *
>
> 22. The Settlement embodied in the Agreement is fair, reasonable and adequate and is hereby approved in all respects, and the Settling Parties are hereby directed to consummate and perform its terms.

2006 WL 1390382, at *3, *5.

Objector's counsel also discussed the *Chance* case in the Kansas chapter of the SURVEY OF STATE CLASS ACTION LAW 2009-2010: A REPORT OF THE STATE LAWS SUBCOMMITTEE OF THE CLASS ACTIONS AND DERIVATIVE SUITS COMMITTEE, at pp. 293-305 (Thomson West 2009), published by the American Bar Association Section of Litigation.

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[5] Following a December 2007 restyling amendment, this provision now appears at FED. R. CIV. P. 23(e)(2).

[6] The Advisory Committee Notes to the 2003 Amendment to Rule 23 include the following: "Subdivision (e)(1)(c) states the standard for approving a proposed settlement that would bind class members. ***The settlement must be fair, reasonable, and adequate***." (emphasis added).

In commenting on the *Chance* case, Objector's counsel wrote:

> Final Approval. *Chance v. U.S. Tobacco Co.*, 2006 WL 1390382 (Seward Co. Kan. Dist. Ct. March 8, 2006) set forth the ***usual standards*** adopted by federal courts for final approval of a class settlement for a two state class.

Id. at 298 (emphasis added).

Objector changes his mind later in his Brief and begins arguing that the lower court should have applied one or more multi-factor tests when analyzing the Settlement, even though he concedes there is no such requirement under Kansas law and urges this court to adopt one.[7] (Objector's Brief at p. 31). While complaining that the district court failed to cite any of these multi-factor cases, Objector's Brief fails to examine whether the multiple findings made by the trial court satisfied such requirements. For example, in *Williams Foods, Inc. v. Eastman Chemical Co.*, No. 99C16680, 2001 WL 1298887, at *2 (Johnson Co. Dist Ct. August 8, 2001) and *Jones v. Nuclear Pharmacy, Inc.,* 741 F.2d 322, 324 (10th Cir. 1984)—both of which are cited by Objector—the courts applied the following test: "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact 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."

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[7] In seeking to dismiss his appeal in the *Littell* case, Objector's counsel suggested that the Court should refer this issue "to the Judicial Council Advisory Committee on Civil Code for development of statutory standards that include the scope of release for non-litigated factual predicates in Kansas class actions." (Motion to Withdraw Objection/ Intervention and Appeal, at p. 2, n.1) (Attachment A hereto).

The trial court's analysis of the Settlement tracks closely with this four-factor test: (1) the settlement "was arrived at through arms-length and vigorous and extensive negotiations between Class Counsel and counsel for [Anadarko]" (R. Vol. 12, p. 2476), "conducted over a long time spanning years" (R. Vol. 12, pp. 2484-85); (2) "While this Court need not, and should not, decide the merits of the controversy, this Court notes that there exist serious questions of law and fact which place the ultimate outcome of this litigation in doubt and that, while the Settlement Class might possibly ultimately receive more, if the case was to be prosecuted to its ultimate conclusion, it is also possible that there would be no recovery." (R. Vol. 12, p. 2476 ¶ 13); (3) "The Court recognizes that if this Settlement as set forth in the Stipulation had not been reached, even if the Settlement Class had prevailed, any recovery would have been delayed for a lengthy period of time given the high probability of an appeal and, in the event of a reversal or modification, a further delay resulting from another lengthy trial." (R. Vol. 12, p. 2477 ¶ 16); and (4) the settlement 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." (R. Vol. 12, p. 2477 ¶ 15). Clearly, the trial court's analysis of the Settlement involved far more than a simple recital that the standard of reasonableness had been met.

Objector's insistence that the court must provide detailed calculations of the value of each claim being settled is also without merit. *Mirfasihi v. Fleet Mort. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004), does not support Objector's statement that "it simply is not enough to find that the 'outcome of the litigation was far from certain.'" (Objector's Brief at 32). No such statement appears in that case. Moreover, the case is readily distinguishable, as it involved a settlement of claims by two distinct groups whereby one, consisting of 1.4 million

members, "received absolutely nothing," while the 190,000 members of the other group received a total of $2.4 million. *Id*. at 783. Given that disparity of treatment of class members (which the court described as having "sold these 1.4 million claimants down the river"), the appellate court's concerns about valuation are understandable. *Id*. at 785. Such is not the case here, however, where all class members are being treated equally and will share proportionately in the recovery.

Objector's desire for detailed computations of precise values for specific claims is at odds with the principle that courts in class actions should not attempt to determine the merits of the case, except at trial. *See, e.g., TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) ("Approval of a settlement ***does not call for findings of fact regarding the claims to be compromised***. The court is concerned only with the likelihood of success or failure; the actual merits of the controversy are not to be determined." [emphasis added]).

Objector also fails to recognize that a comprehensive settlement necessarily entails the release of a bundle of claims in return for a lump sum:

> The release of [a particular] category of claims was one of a series of benefits conferred on the defendant by the class as part of the settlement. On the other side, defendant conferred benefits on the plaintiff class, including a monetary settlement, from which the plaintiff in this [related] case has benefitted, and a . . . procedure that could produce additional relief. No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. This is the way settlements usually work. It was the judgment of the class representative that [a particular category of claims], known and unknown, was a proper thing to give up to obtain the benefits offered by [the defendant] . . . . [W]e have no way to criticize the judgment of the class representative. Accordingly, we hold that the representation afforded was adequate, and that the provisions of Fed.R.Civ.P. 23 were fully met.

In re General Am. Life Ins. Co. Sales Practices Lit., 357 F.3d 800, 805 (8th Cir. 2004).

Finally, Class Counsel in this case did "value" all possible claims associated with Anadarko's calculation and payment of royalties and did obtain a settlement which the trial court found to be reasonable in light of risks which were quite real, as opposed to those which can be said to be "inherent" in almost any case.

C. A Claim Does Not Have to be "Litigated" Before It Can be Settled

For obvious reasons, Objector's claim that only "litigated" claims can be settled in a class action finds no support in case law. If this were the rule, the parties to a lawsuit would never be able to settle claims that had not yet been submitted to the court for disposition, thereby removing any incentive for them to avoid risk and cost by settling an action in its early stages. Even the cases cited by Objector (Objector's Brief at 18-19) squarely refute any notion that claims must be actually litigated in order to be covered by a class action settlement.

> We therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action ***even though the claim was not presented and might not have been presentable in the class action.***

TBK Partners, 675 F.2d at 460 (emphasis added). *Accord Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005) ("class action releases may include claims not presented and even those which could not have been presented"); *see also Int'l Union, United Auto, Aerospace, and Agricultural Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 636 (6th Cir. 2007) (approval of settlement does not require a trial on the merits); *cf. Cemex Inc. v. Los Angeles County*, 166 Fed. Appx. 306 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006) ("The whole point of

a consent decree is that the court need not adjudicate the merits . . . . [T]he district court acted well within its discretion in approving the settlement.").

The impossibility of implementing such a rule is highlighted by Objector's futile attempt to distinguish between his behavior in his suit against Anadarko, which he filed in 2008 and contained exactly the same claims that plaintiffs asserted in their action against Anadarko in 1998, from the behavior of plaintiffs in this case. Objector did not attempt to assert his non-gathering claims until after he learned of the Settlement. In fact, he has not yet been allowed to assert them in his lawsuit. Yet, he wants this Court to disapprove the Settlement on the specious ground that he has "litigated" such claims, while plaintiffs failed to do so. (Objector's Brief at 18). Apparently, under his theory, a claim can be "litigated" when it has not been asserted. But, he simultaneously argues that plaintiffs' failure to assert the non-gathering claims until the end of the case means they did not "litigate" them.

Objector begins his Brief by falsely claiming that he had included non-gathering claims in his suit against Anadarko in 2008. (Objector's Brief at 1). This misrepresentation then becomes the basis for his assertion that "*Coulter* Litigated Only The Gathering Deduction Claims," while "*Boles* Vigorously Litigated the Non-Gathering Factual Claims." (Objector's Brief at 4, 6 [section headings]). In the final analysis, Objector is really equating "litigated" with some degree of discovery or investigation, since the non-gathering claims were not the subject of any motions or trial on the merits in either case. If this is his definition, then it is far too vague to have any meaning, since the amount of investigation will be dictated by the judgment of class counsel, who must learn enough about a claim to be sure that its inclusion in a settlement is fair and reasonable.

D. Kansas Has Not Adopted the "Identical Factual Predicate Rule"

1. The Class Received Notice That They Were Releasing All Claims

Objector invokes the "Identical Factual Predicate Rule" and argues that the Settlement does not meet its requirements. (Objector's Brief at 18-22). The "identical factual predicate rule" is a device used by some courts to justify extending a release of claims in a class action to include claims that could not have been asserted because they were outside the subject matter jurisdiction of the court. *See, e.g., TBK Partners,* 675 F.2d at 460. Kansas has not adopted the "identical factual predicate rule" urged by Objector. Nor has the Tenth Circuit. The Fifth Circuit has upheld the release of extra-jurisdictional claims in a class action without applying that rule. *In re Corrugated Container Antitrust Lit.*, 643 F.2d 195, 221-22 (5th Cir. 1981). *See also In re General Am. Life Ins. Co. Sales Practices Lit.*, 357 F.3d 800, 805 (8th Cir. 2004) ("There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this."). Again, it is incongruous to accuse a trial court of abusing its discretion by failing to utilize a legal standard that has not yet been approved in this state.

When the "identical factual predicate rule" was first articulated in *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), the court expressly limited its holding to the facts before it. In *Super Spuds*, the original claims were based on ***liquidated*** long positions in potato futures, whereas the release was expanded to include claims based on ***unliquidated*** contracts that were the subject of a pending state court action, ***and*** that expansion did not occur until ***after*** class members' opportunity to opt out had expired, so the class did not have adequate notice of the scope of the release. *Id*. at 16 ("the

last day for opting out was January 29, 1979, long before the settlement was concluded"); *id.* at 17 ("The notice subsequently sent to class members likewise referred only to claims based on liquidated contracts; it gave no indication that the action would concern any other claims."). *See also Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 513 U.S. 986 (1994) (distinguishing *Super Spuds*); *Froeber v. Liberty Mut. Ins. Co.*, 193 P.3d 999, 1007 & n. 11 (Or. App. 2008) (same). The footnoted remark of the *Super Spuds* court as to what might constitute a proper release was, therefore, merely dicta. 660 F.2d at 18 n.7 ("This is not such a case.").

In view of the abuse that gave rise to the "identical factual predicate rule," it appears unlikely that Kansas would ever apply it to a K.S.A. 60-223(b)(3) case such as this, where the class was given the opportunity to opt out ***after*** receiving notice that they were releasing any and all claims associated with the manner in which Anadarko had calculated their royalties. (R. Vol. 12, p. 2580). The inclusion of the non-gathering claims in the Amendment and Supplement to Petition provided an extra measure of protection to the class, since the trial court was required to review and approve their assertion in this case. (R. Vol. 10, p. 2209). Objector's appearance and participation in the Fairness Hearing demonstrates the effectiveness of such notice, as well as the propriety of expressly including the non-gathering claims in the case prior to the hearing.

2. The Settlement Complied with the Identical Factual Predicate Rule

Even if the trial court had been required to determine whether the Settlement complied with the "identical factual predicate rule," it would have met that test because ***all of the settled claims*** arose from the same facts: Anadarko's royalty payment practices under its Kansas oil and gas leases. Although Objector repeatedly tries to distinguish between

"gathering" and "non-gathering" claims in his brief, he fails to advise the Court that the Agreement itself draws no such distinction. The only differentiation in the Agreement is between "hydrocarbons" and "non-hydrocarbons," both of which are "gathered" together in the same pipelines and sent to the same processing plants. Objector's proposed distinction is not viable precisely because all of the claims arise from the same factual predicate.

That is the holding of *Roderick v. XTO Energy, Inc.*, —F. Supp. 2d—, 2010 WL 126171 (D. Kan. Jan. 12, 2010), where the plaintiff (represented by counsel for Objector herein) relied upon the "identical factual predicate rule" when resisting the defendant's claim that his royalty underpayment clams were barred by the releases set forth in prior class action settlements. The court rejected the plaintiff's argument that his claims for "'failure to pay for NGLs, condensate, helium and nitrogen' or for 'affiliate pricing'" were not released in those prior settlements, because they had not been "pled or litigated" in the underlying actions. *Id.* at *20 (citing *Wal-Mart*, 396 F.3d at 108). The court stated:

> The factual predicate here—the claimed underpayment of royalties allegedly owed by XTO under oil and gas leases—is identical to that in [the prior cases]. The same leases underlie all of the royalty owners' claims. The nature of those leases and the obligations of XTO as the lessee were the heart of the action in [the prior cases], and they are the heart of this action.

Id.

As in *Roderick*, the very same nucleus of fact—the producer's royalty payment obligations under its oil and gas leases—is at the heart of both the gathering and non-gathering claims. *Cf. Super Spuds,* 660 F.2d at 18 (rejecting proposed settlement, because claims under a completely ***different*** set of contracts would be also be released, as to which the class was not given notice).

3. Witnesses and Proof Do Not Have to Be "Identical"

Dissatisfied with the outcome in *Roderick*, Objector attempts to graft onto the "identical factual predicate rule" a requirement that all claims released must have "identical witnesses and proof." (Objector's Brief at 19). In so doing, Objector distorts and conflates the "identical factual predicate rule" and the requirements of *res judicata*. Objector cites no case law in support of his claim that releases set forth in class-action settlements must meet the test for claim preclusion before they can be approved under Rule 23.

Objector cites *Rhoten v. Dickson*, —Kan—, 223 P.3d 786 (2010), for the proposition that *res judicata* requires that "the witnesses and proof needed in both actions are identical." (Objector's Brief at 19). Although *Rhoten* dealt with claim preclusion, it was not a class action, but involved only a single automobile accident. *Id*. at 790. Moreover, nothing in the opinion requires that "witnesses and proof" must be identical before *res judicata* can occur. In fact, the Supreme Court in *Rhoten* was merely quoting the observation by the Court of Appeals that "Rhoten's statement of facts in her federal complaint and state petition discloses the witnesses and proof needed in both actions are identical." *Id*. at 793.

At most, overlap of witnesses and proof are merely factors that can be considered in determining whether a matter was or could have been litigated in a prior case. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. b (1980) ("Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and . . . how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first."); *see also Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388, 401, 949 P.2d 602 (1997), *cert. denied*, 525 U.S. 831 (1998) (citing Restatement).

Objector overreaches by attempting to convert the "identical factual predicate rule" into an "identical witnesses and proof" test. Objector cites no case applying such a test to the question of whether a settlement of a class action should be approved. Indeed, the "identical factual predicate" is a significantly more lenient standard.

> ***[A]n "identical factual predicate" requires only a common nucleus of operative fact.*** *Adams*,[*v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276 (11th Cir. 2007)], at 1289 ("Claim preclusion applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.") (citation and quotation marks omitted). In determining whether claims share the "same operative nucleus of fact," ***we consider whether the "primary right and duty are the same.***" *Id*. at 1289 (quoting *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir.1992)).

Thomas v. Blue Cross and Blue Shield Ass'n, 333 Fed.Appx. 414, 417-18 (11th Cir. 2009) (emphasis added). *Accord, e.g.*, *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992). "As *Wal-Mart* makes clear, '[a] court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged ***by reason of or in connection with*** any matter or fact set forth or referred to in the complaint.'" *In re Adelphia Comm. Corp. Securities & Derivative Lit.*, 272 Fed. Appx. 9, 13 (2d Cir. 2008) (emphasis added) (quoting *Wal-Mart*, 396 F.3d at 108).

As demonstrated above, all of the claims included in the Settlement are bound by a common nucleus of operative facts. The "primary right and duty" are identical: Anadarko's obligation to pay, and plaintiffs' right to receive, royalties in accordance with Kansas law. The release satisfies the identical factual predicate test.

4. Predetermination of Preclusive Effects Is Not Permitted

The United States Supreme Court has cautioned that "[a] court conducting an action cannot predetermine the *res judicata* effect of the judgment; that effect can be tested only in

a subsequent action." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 396 (1996) (citing 7B C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1789, p. 245 (2d ed.1986)). *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 806 (1985) ("[A] court adjudicating a dispute may not be able to predetermine the *res judicata* effect of its own judgment").

> The thrust of the doctrine [against attempting to predetermine preclusive effect] is that the *res judicata* effect of a judgment can only be determined in a subsequent proceeding insofar as the elements of *res judicata* in the class action context (compliance with Federal Rule of Civil Procedure 23 and due process – *see* 3 Herbert B. Newberg, Newberg on Class Actions §§ 16.21 and 16.24 (3rd ed. 1992)) can, logically, be raised only after the first proceeding has concluded and judgment has been entered.

Thompson v. Edward D. Jones & Co., 992 F.2d 187, 190 (8th Cir. 1993).

Because the "identical factual predicate rule" relied upon by Objector permits a court to approve a release of claims that ***could <u>not</u> have been litigated***, the inability of that court to predetermine the preclusive effect of its judgment under that rule is even more obvious. Under Kansas law, *res judicata* provides a bar only on "all matters which were actually litigated . . . [and] . . . on all matters which ***could have been litigated*** by the parties or their privies in that action." *Stanfield*, 263 Kan. at 388, Syl. ¶¶ 3-4 (emphasis added). Accordingly, courts have held that a ruling approving a settlement of a class action does not determine the *res judicata* effect of the settlement. *See, e.g., In re Lease Oil Antitrust Lit. (No. II)*, 200 F.3d 317, 320-21 (5th Cir. 2000), *cert. denied*, 530 U.S. 1263 (2000) ("Given current Alabama law requiring jurisdictional competency as a condition to the preclusive bite of *res judicata*, the Alabama judgment approving the settlement entered by its state court . . . does not bar the federal action under that doctrine."). *Cf. Stanfield*, 263 Kan. at 400 (final judgment by "a court of competent jurisdiction" on the merits of an action is conclusive).

In *Littell*, Objector's counsel sought to "withdraw" his appeal when he finally realized the difference between the issue of whether the settlement in that case should have been approved and *res judicata*:

> This Court's questioning at oral argument evidenced concern with the posture of this case on direct appeal. . . . Collateral attack allows the validity and scope of the release . . .to be challenged. . . . . As most of the cases cited by the parties on the Identical Factual Predicate Rule demonstrate, the validity and scope of a release is generally tested by collateral attack, not direct appeal.

(Motion to Withdraw Objection/Intervention and Appeal, p. 3).

In his zeal to upset the Settlement, Objector has made the same mistake again.

IV.
THE SETTLING PARTIES WERE ADVERSARIES

Relying on law review articles that seek to change the procedure for approving a settlement of claims that have not been "litigated,"[8] Objector baldly asserts that the "lack of adverseness makes settlement of [the "Non-Gathering Claims"] unconstitutional." (Objector's Brief at p. 17). In effect, Objector and the academic writers upon which he relies are not satisfied with the traditional standard for determining whether a settlement should be approved: the absence of any evidence of collusion. *See, e.g., Grant v. Bethlehem Steel Corp*., 823 F.2d 20, 22, 24 (2d Cir.1987). Objector effectively concedes this point when he later asserts that "Class Counsel here admitted that [Anadarko] provided only unverified 'net' revenue figures on Non-Gathering Claims at the tail-end of settlement negotiations ***in a cooperative effort to gain settlement approval***." (Objector's Brief at 25) (emphasis added).

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[8] Most of these articles deal with "prepackaged" class action settlements, where the settling parties simultaneously file a complaint and a proposed settlement agreement. (Objector's Brief at 17, 24, 26, 27, 29). The apparent abuse of this practice was what sparked the ire of Judge Posner in *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277(7th Cir. 2002).

There is no evidence that Class Counsel and Anadarko engaged in any collusion with respect to the non-gathering claims. The opposite is true, beginning with the fact that Class Counsel took advantage of Anadarko's desire to settle the non-gathering claims by negotiating a better settlement for the Plaintiff Class than would have otherwise been possible. (R. Vol. 71, pp. 18-20).

The record below amply demonstrates the hard-fought nature of this lawsuit, including removal and remand, motions to compel discovery, cross-motions for summary judgment, trial to the court, a motion to decertify the class, proposed findings of fact and conclusions of law, oral argument, and re-argument on the merits. (R. Vol. 1, pp. 34, 89; Vol. 4, p. 926; Vol. 5, p. 929; Vol. 7, p. 1647; Vol. 8, pp. 1858, 1860; Vol. 9, pp. 1913, 2066). The trial court found that the settlement "was arrived at through arms-length and vigorous and extensive negotiations between Class Counsel and counsel for [Anadarko]" (R. Vol. 12, p. 2476 ¶ 14), that the negotiations were "conducted over a long time spanning years" (R. Vol. 12, pp. 2484-85), and that it 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." (R. Vol. 12, p. 2477 ¶ 15). The court specifically found that the amount paid by Anadarko "provides adequate consideration for dismissal with prejudice of the Action" (R. Vol. 12, p. 2477 ¶ 18) and that "based upon the future savings and future income to the royalty owners, along with their proposed payout of $33,000,000.00 is fair, just, adequate, and reasonable." (R. Vol. 12, p. 2485). By failing to argue that these findings constitute an abuse of discretion, Objector has effectively waived any claim that the Settlement was the result of collusion.

Finally, Objector's participation in the Fairness Hearing eliminated the concern expressed in the articles he cites—that courts being asked to approve settlements never hear

from lawyers who might have grounds for opposing it. (Objector's Brief at 15, 17, 24, 26, 27, 29).

V.
THE ARBITRATION CLAUSE IS CONSTITUTIONAL

Objector devotes a substantial portion of his brief to attacking the arbitration provisions of the Settlement Agreement, substituting hyperbole for the facts. (Objector's Brief at 38, 43) (claiming that the Settlement Agreement has "lock[ed] royalty owners out of court forever" and "eviscerated all future rights and remedies from the royalty owners," before concluding by prophesying that "[r]oyalty owners will be denied access to justice" while "[Anadarko] 'engage[s] in unchecked market behavior'" and enjoys "immunity for [its] future conduct.").

Contrary to Objector's description, the arbitration clause covers only two discrete issues: (1) whether Anadarko has abided by the royalty payment methodology set forth in the Agreement; and (2) whether Anadarko's check stubs make the required disclosures. (R. Vol. 12, p. 2501 ¶ 3.4, 2511-12 ¶ 4.13). All express and implied covenants in the leases remain intact, and class members are free to pursue relief from any perceived violations of their rights in whatever manner they choose.

Objector cites no authority of any kind for his claim that the parties were precluded from agreeing to arbitrate any disputes arising from implementation of the Agreement. Courts have readily approved and enforced such provisions. *See, e.g., Shell Oil Co. v. CO2 Committee, Inc.*, 589 F.3d 1105, 1109 (10th Cir. 2009) (enforcing arbitration provisions in class action settlement agreement, which required arbitration of all disputes "arising from or relating in any way to" the agreement); *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 669-70

(S.D. Fla. 2006) (approving settlement containing arbitration provisions for future claims). *cf. In re Prudential Ins. Co. America Sales Practice Lit. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (finding fair, adequate, and reasonable a settlement agreement containing provisions prescribing alternative dispute resolution on a going-forward basis). Moreover, arbitration is, and has long been, favored in Kansas. *Hemphill v. Ford Motor Co.*, 41 Kan. App.2d 726, 735, 206 P.3d 1 (2009) ("Kansas has . . . recognized a strong public policy in enforcing arbitration agreements . . . ."); *Clark v. Goit*, 1 Kan. App. 345, 41 P. 214 (1895) ("It is a wellknown rule that arbitrations are favored by the courts . . . .").

The law review articles and other authorities cited by Objector (Objector's Brief at 42-43) instead focus their criticism upon boilerplate arbitration provisions in consumer contracts such as automotive leases, cell phone contracts, computer sales contracts, and payday loan agreements, which are used by defendants to avoid class actions altogether.

Objector's assertion that the arbitration clause prohibits class-wide relief is also incorrect. The Agreement provides, without limitation, that class members may resort to arbitration to settle their disputes, and no reasonable construction of the clause could possibly result in a prohibition of class-wide relief, especially when its purpose is to facilitate enforcement of a class action settlement. 1 MCLAUGHLIN ON CLASS ACTIONS § 2:13, p. 3 (6th ed. 2010) (noting that the "vast majority" of arbitration clauses that are "silent" on the question of whether class arbitration relief is permitted have been construed to allow such relief). AAA rules governing class arbitration proceedings, like K.S.A. 60-223, closely track the provisions of FED. R. CIV. P. 23. *Id.*

Arbitration clauses do not "close the courthouse doors" to members of a class. Key determinations in the certification process are subject to judicial review. MCLAUGHLIN, *supra*, at § 2:13, p. 4. Moreover, any award against Anadarko would be enforceable in Kansas courts. *See* K.S.A. 5-411 (prescribing procedure for confirming an arbitration award as a judgment). Even in the absence of class-wide arbitration, it would be absurd for Anadarko to refuse to conform its royalty payment practices in Kansas to a court order obtained by just one class member.

Contrary to Objector's allegations (Objector's Brief at 38), the Notice sent to class members described the Agreement in substantial detail, including the arbitration provisions**.** (R. Vol. 12, pp. 2577-78). As noted previously, class action settlement agreements providing for future arbitration have been found fair, just, and reasonable. *See, e.g., Shell Oil Co.*, 589 F.3d 1105; *Borcea*, 238 F.R.D. at 669-70. Objector's opinions regarding the arbitration clause reflect his personal animosity toward the Settlement, not a violation of due process. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) ("The fact that [objectors] do not approve of settlement terms does not . . . demonstrate that . . . class counsel provided inadequate representation.").

VI.
THE TRIAL COURT DID NOT "REWRITE" LEASES OR "USURP" THE LEGISLATURE

Objector is unable to distinguish between traditional rules of contract construction and interpretation and the role played by a court when it is deciding whether to approve a settlement under K.S.A. 60-223(e)**.** (Objector's Brief at 35). Virtually any contract may be modified by the parties thereto. *Frets v. Capitol Fed. Sav. & Loan Ass'n*, 238 Kan. 614, 620, 712 P.2d 1270 (1986). Oil and gas leases are contracts, which can be modified by other

instruments. *See, e.g., Towel v. Fluharty*, 110 Kan. 260, 203 P. 703 (1922) (oil and gas lease held modified by subsequent agreements). Such instruments can include a class action settlement agreement. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir. 2003) (although court-approved, a class action settlement agreement is a negotiated private contract).

Class action settlements have been used to amend contracts between a plaintiff class and a defendant whose obligations thereunder are the subject of the litigation. *See, e.g., In re Prudential Ins. Co. America Sales Practice Lit. Agent Actions*, 148 F.3d 283, 324 n.77 (3d Cir. 1998)*, cert. denied*, 525 U.S. 1114 (1999) (approving settlement agreement which had the effect of modifying all contracts of a certain type entered into since 1982 in class of 8 million). Such modifications frequently deal with the future conduct of private parties, as is always the case with executory contracts. *Wagstaff v. Peters*, 203 Kan. 108, 113, 453 P.2d 120 (1969). Here, the trial court was simply deciding whether to approve a settlement negotiated by private parties. It was not being asked to rewrite the leases and did not have the power to change the Settlement itself. *In re Sprint Corp. ERISA Litigation*, 443 F. Supp. 2d 1249, 1265 (D. Kan. 2006) (reviewing court must approve or disapprove of a class action settlement in its entirety, and may not modify the agreement). Nor was it being requested to usurp the authority of the legislature. To the contrary, the court did exactly what the Kansas Legislature instructed it to do in K.S.A. 60-223(e).

The cases cited by Objector recite the well-established rule that a court construing an unambiguous contract cannot read into it a term that is not there or which is inconsistent with the agreement as a whole. (Objector's Brief at 34-36). In *Leverso v. Lieberman*, 18 F.3d 1527 (11th Cir. 1994), the court relied on this principle when it found the trial court had

abused its discretion by approving a settlement that directly contravened the express provisions of the original contract (the governing trust indenture). Based on the glaring conflict between the underlying contract and the terms of the agreement reached during the litigation, the court determined that the settlement was unreasonable as a matter of law. *Id*. at 1531. There, it was the parties who were found to be acting unfairly to the class when deciding how to settle the case. Here, no conflict exists between the Settlement and the terms of the leases. Instead, the parties have resolved a long-standing dispute regarding how Anadarko should calculate and pay royalties under those leases.

CONCLUSION

Objector has made no showing that the trial court abused its discretion when it found that the Settlement Class was being adequately represented and that the Settlement was fair and reasonable. Instead, in a confusing, rambling, and often contradictory discourse, he claims that the lower court used the wrong legal standards when exercising its discretion. At the same time, however, he does not argue that the trial court failed to follow existing Kansas law when it made these two decisions. That should be the end of his appeal, since a trial court cannot be guilty of an abuse of discretion if it reaches its decision within the framework of existing legal principles. *Dragon v. Vanguard Indus., Inc.*, 277 Kan. 776, 779, 89 P.3d 908 (2004).

As the undisputed facts clearly demonstrate, the existing procedures and standards for the negotiation, notification and approval of class-action settlements worked quite well in this case. The only reason Objector wants to change these procedures and standards is that he is not satisfied with the results.

The judgment of the trial court should be affirmed.

Respectfully submitted this 26th day of March, 2010.

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ATTACHMENT

Opal Littell, et al. v. OXY USA, Inc. v. Wallace B. Roderick Revocable Trust,
Appeal No. 08-100349-S
(Kan. Sup. Ct. docketed April 23, 2008)

Motion to Withdraw Objection/Intervention and Appeal