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IN THE TWENTY-SIXTH JUDICIAL
DISTRICT COURT, STEVENS COUNTY, KANSAS
CIVIL DEPARTMENT

WILLIE JEAN FARRAR and KEITH)
FARRAH, as co-Trustees of the Keith)
Farrar Revocable Trust, dated October)
22, 1999 and JOHN ELDON GREGG)
and KEITH THOMAS GREGG, as)
Co-Trustees of the Marie Gregg Trust u/A)
dated April 26, 1979, as amended, and)
THOMAS L. AND PATRICIA A.)
LAHEY, individually and jointly)
)
Plaintiffs,)
)
vs.)
)
MOBIL OIL CORPORATION,)
)
Defendant.)
_____)

COPY

FAX FILED

Case No. 01 CV 12

REPLY IN SUPPORT OF MOBIL'S MOTION TO ALTER AND AMEND

Defendant ExxonMobil Oil Corporation (f/k/a Mobil Oil Corporation) ("Mobil") has moved, pursuant to K.S.A. 60-252(c), that the Court alter and amend its August 18, 2009 Journal Entry of Decision of Court Certifying Class ("Certification Order"). Plaintiffs oppose the motion. This reply responds to plaintiffs' arguments.

The Court has the Responsibility to Consider and Decide Mobil's Motion

Plaintiffs imply Mobil's motion should be ignored because it is "precautionary," "designed to avoid any perceived risk of inadvertent waiver of any issues on appeal." Plaintiffs' Memorandum in Opposition to Mobil's Motion to Alter and Amend (Plaintiffs' Brief), p. 1. They also claim Mobil "wastes the Court's time." *Id.*, p. 4. This position invites error.

It is true that generally a litigant must object to inadequate findings of fact and conclusions of law before the district court to preserve the issue for appeal. *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006); *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 402, 77 P.3d 130 (2003). In contrast, objection is not necessary to question the sufficiency of the evidence on appeal. *In re Marriage of Williams*, 32 Kan. App. 2d 842, 853, 90 P.3d 365 (2004). Thus, from Mobil's perspective, its motion may be viewed as precautionary. But Mobil's perspective is not at issue.

It is not rational to conclude that the appellate courts want the district court to ignore a motion to alter and amend. This would frustrate the rule that "[m]eaningful appellate review is precluded where a trial court's findings of fact and conclusions of law are inadequate to disclose the controlling facts or basis for the court's findings." *Ed Bozarth Chevrolet, Inc. v. Black*, 32 Kan. App. 2d 874 876 96 P.3d 272 (2003). The appellate courts impose the obligation on a litigant to object to give the district court the opportunity to correct error. This provides the trial court with an opportunity to correct the findings and conclusions. *In Matter of the Marriage of Sandhu v. Sandhu*, 41 Kan. App. 2d 97, 207 P.3d 1067, 1071 (2009); *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).¹ The district court has the responsibility to

¹ Plaintiffs' read *Moll v. State*, 41 Kan. App. 2d 677, 685-86, 204 P.3d 659 (2009), and *Stewart v. State*, 30 Kan. App. 2d 380, 382, 42 P.3d 205 (2002), too narrowly. The decisions discuss the insufficiency of findings in the context of habeas corpus motions. However, requirements imposed by K.S.A. 60-252 and Supreme Court Rule 165

correct an error in the sufficiency of its findings and conclusions if it finds error.

Present circumstances emphasize that the Court should consider and decide Mobil's motion. Should an appellate court conclude that the Court's findings and conclusions are insufficient, it will remand the case for additional findings and conclusions. *E.g., Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 189 P.3d 526 (2006) (remand for rigorous analysis of impact of choice-of-law issues on class certification). However, given your honor's retirement, the district court would then have to conduct a complete rehearing of the class certification motion.

If the concern is best use of resources, the Court should grant Mobil's motion. The appellate court can then weigh whether class certification is proper on the current record and avoid a remand if Mobil's interlocutory appeal is accepted and the Court's findings are found insufficient. Multiple appeals can potentially be avoided. One ground for the interlocutory appeal can be mooted.

The Certification Order Does Not Address Mobil's Motion

Plaintiffs claim "Mobil's motion to alter and amend is simply a rehash and reargument of items previously presented to, and considered and rejected by, the Court." Plaintiffs' Brief, p. 2. If this is true, the Court needs to expressly state that conclusion.

The Certification Order says nothing about the "Requested Additional Findings of Fact From Defendant's Proposed Findings."² It does not say the facts were considered. It does not say the proposed findings were rejected. It does not explain why, if the evidence supporting the

that the district court make sufficient findings of fact and conclusion of law apply to all litigation, both criminal and civil. *E.g., State v. Thomas*, 288 Kan. 157, 159-60, 199 P.3d 1265 (2009); *State v. Mell*, 39 Kan. App. 2d 471, 490, 185 P.3d 935 (2008). *Moll* and *Stewart* are simply instructive examples of where findings were held inadequate. Plaintiffs cite no authority that Supreme Court Rule 183(j), pertaining habeas corpus proceedings, requires greater detail in a district court's findings and conclusions.

² See Defendant's Motion to Alter and Amend, pp. 3-11.

proposed findings was considered and rejected. It is worth note that Plaintiffs do not claim any of the proposed findings are inaccurate with the exception of paragraphs 33a-c.³

The Certification Order is insufficient requiring Mobil's request for "Other Requested Additional Findings of Fact and Conclusions."⁴ Plaintiffs' opposition says nothing about this.

Some of the factual findings in the Certification Order are shown to be unsupported by evidence or the record necessitating Mobil's "Requested Amendments to Findings."⁵ Plaintiffs make no effort to justify the findings which the Court adopted from plaintiff's proposed findings and conclusions.

In summary, it is fair and practical that the Court considers, decides and grants Mobil's motion. The Court should "go on the line." *Brown v. Wichita State University, P.E.C., Inc.*, 217 Kan. 661, 664-65, 538 P.2d 713 (1975). If the certification positions advanced by Plaintiffs are correct and Class Certification is proper, there is no reason to deny Mobil's motion.

Respectfully submitted:



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³ Plaintiffs object to these findings on the grounds that they were not earlier submitted and are contrary to the record. Plaintiffs' Brief, p. 2. The first objection fails because Plaintiff and Mobil's proposed findings were submitted simultaneously. A motion to alter and amend was Mobil's first opportunity to request the findings after their importance first became apparent. The later objection fails because the express language of Memorandum Agreement, in question, does not address "deductions." Plaintiffs' contrary claim must be based upon a supposed ambiguity in the document. See Mobil's Proposed Findings ¶¶ 30-32 and Plaintiff's Exh. 50.

⁴ See Defendant's Motion to Alter and Amend, pp. 12-14.

⁵ See Defendant's Motion to Alter and Amend, pp. 14-19.

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CERTIFICATE OF SERVICE

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by regular mail, postage prepaid, on this the 10th day of September, 2009 to the following:

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