SHARP, McQUEEN, McKINLEY,
DREILING & TATE, P.A.
419 N. Kansas - P.O. Box 2619
Liberal, KS 67905-2619
(316) 624-2548

- and-

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

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

OPAL LITTELL and CHERRY RIDER, co-trustee of the Opal Littell Family Trust, and BONNIE BEELMAN, individually and as representative plaintiffs on behalf of persons or concerns similarly situated,	)	
Plaintiffs,	)	
v.	)	
OXY USA INC.,	)	
Defendant.	)	**Case No. 98-CV-51**

DEFENDANT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Defendant OXY USA Inc. ("OXY") respectfully submits this response to Plaintiffs' Supplemental Memorandum in Support of Motion For Class Certification.

2-26-01

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ARGUMENTS

Plaintiffs' assertion that Defendant OXY's Motion to Consolidate for a Limited Purpose is inconsistent with OXY's opposition to class certification is without merit. The principal focus of OXY's Motion to Consolidate is nothing more than to establish the factors and standards which this Court will apply to determine when natural gas is marketable, as such marketability bears on the deductibility of post-production costs under Sternberger v. Marathon Oil Co., 257 Kan. 315, 894 P.2d 788 (1995).

Sternberger holds that the lessee has the duty to produce a marketable product and alone bears the expense of making the product marketable, but once a marketable product is obtained, reasonable costs incurred to transport or enhance the value of marketable gas may be charged against royalty owners. Id. Thus, marketability of the gas, and the point in which marketability is attained, is a core issue in determining the propriety of post-production cost deductions in each of the Anadarko, Amoco and OXY cases. However, the fact that under Sternberger this issue will be relevant to the propriety of such deductions does not suggest the presence of the "common questions" required to support class certification. To the contrary there is a significant difference between a legal issue which is common in the sense that it pertains to all royalty owners, and a "common question" within the meaning of KSA § 60-223(a).

A question is a "common question" for the purposes of the Kansas class action statute only if it presents an issue for which the proof for any one of the class members simultaneously establishes that same issue for all other class members. Deutschman v. Beneficial Corp., 132 F.R.D. 359, 365 (D. Del. 1990); Industrial Gas Antitrust Litigation, 100 F.R.D. 280, 288 (N.D. Ill. 1986). If the issue is not one that can be established by common proof such that the evidence which

establishes the matter with respect to one class member, *ipso facto*, establishes that matter with respect to all class members, the question cannot be "common." Van Vels v. Premier Athletic Center of Plainfield, Inc., 182 F.R.D. 500, 507 (W.D. Mich. 1998).

As demonstrated in OXY's Brief In Opposition To Plaintiffs' Motion and Memorandum In Support of Class Certification, marketability of OXY's natural gas presents issues which are individual to each well, and each separate gas stream. OXY's Brief at 27-34. Thus, marketability issues will not supply the required common questions. The fact that the standards and factors to determine marketability may be the same in the broad, legal sense does not determine the existence of a "common question." The existence of a common question turns on whether the application of those standards and factors to the gas produced from any particular well yields the same result as to marketability with respect to all other wells. The only evidence in the record on this point is that they do not. See Affidavit of Douglas L. Burton, Exhibit 10 to OXY's Class Hearing Exhibits (filed in open court November 11, 2000) at 11 - 14.

More importantly, questions such as those posed by OXY, which merely ask for a statement of the law cannot serve as common questions. Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 675 (N.D. Ohio 1995). Courts have been quite clear that a legal issue applicable to all purported class members does not present a common question for purposes of the class action statute if resolution of that issue is dependent upon factual determinations that will be different for each purported class member. See Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 76 (D.N.J. 1993); Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 56 (S.D. Fla. 1990). To hold otherwise would lead to the absurd result of requiring the certification of every proposed class, merely because the law applicable to the named plaintiff's claim is the same for all putative class members.

Finally, even if the Court should tentatively consider marketability factors and standards as a common question for purposes of the class certification statute, that alone would not entitle Plaintiffs to class certification. In order for a class to be certified, not only must Plaintiffs demonstrate the existence of the four (4) requirements of KSA § 60-223(a), but they must also establish the existence of one of the requirements of KSA § 60-223(b). In this case, Plaintiffs have asserted the applicability of KSA § 60-223(b)(3) requiring that common questions predominate over questions which are individual to the class members. This Court's consideration of the issues raised by OXY's motion does not supply the required predominance. "[T]he predominance criterion is far more demanding than the commonality requirement. . . ." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997). The test for predominance is whether individual or common issues will be the object of most of the efforts of the litigants and the court. Republic Nat'l Bank of Dallas v. Denton & Anderson Co., 68 F.R.D. 208, 215 (N.D. Tex. 1975); Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 432 (Tex. 2000).[1] The identification of the factors and standards of marketability prior to trial will not take up the time and attention of this Court at any trial in any of the three cases.[2] Instead, this Court's time and effort will be devoted to a myriad of individual

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[1]When certification is grounded on Section 223(b)(3), as here, a plaintiff must demonstrate why common questions predominate over individual ones in the context of how the case would actually be tried. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). See Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998). This requires the Court to go beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." Castano v. American Tobbaco Co., 84 F.3d 734, 744 (5th Cir. 1996) (emphasis added).

[2]In fact, class action law requires that the Court do exactly what OXY has requested in its Motion to Consolidate for a Limited Purpose and "initially identify the substantive law issues which will control the outcome of the litigation." State of Ala. v. Blue Bird Body Co., Inc., 573 F.2d 309, 316 (5th Cir. 1978).

issues, including the application of these standards and factors to the particular circumstances of each well in the Hugoton Field in which the particular defendant has an interest. Indeed, the decision by this Court in response to the summary judgment motions of OXY, Amoco and Anadarko will settle, for the purpose of trial, the question posed. As a result of this Court's decision on marketability standards and factors, that issue – if it ever was a question for purposes of KSA § 60-223(a)(2) – will cease to be a question[3] and, therefore, it will be unable to serve as a "common question" within the meaning of KSA § 60-223(a). See Sprague, 133 F.3d at 397-98 (matters which at an earlier stage of the proceedings were in controversy but which, by the time of trial, have ceased to be in controversy can no longer serve as common questions).

CONCLUSION

The pending Motion to Consolidate for a Limited Purpose does nothing to change the fact that the actual proofs at trial of plaintiffs' claims and OXY's defenses will be individual and not common. Plaintiffs' attempt to ignore the law of class actions in this regard is fatally flawed and should be ignored by the Court. For the reasons set out here, and more fully in OXY's Brief in Opposition to Plaintiffs' Motion and Memorandum in Support of Class Certification, class certification remains improper and should be denied.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

James C. T. Hardwick, OBA #3845
Donald L. Kahl, OBA #4855
T. Lane Wilson, OBA #16343

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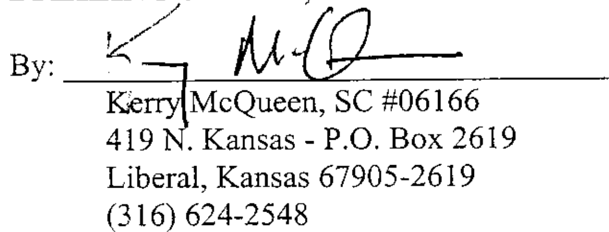
[3]"Question" is defined as "something in controversy." Question, 74 C.J.S., p. 4. Once a matter ceases to be in controversy, it is no longer a question.

320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

-and-

SHARP, McQUEEN, McKINLEY, DREILING & TATE, P.A.



By: ______________________
Kerry McQueen, SC #06166
419 N. Kansas - P.O. Box 2619
Liberal, Kansas 67905-2619
(316) 624-2548

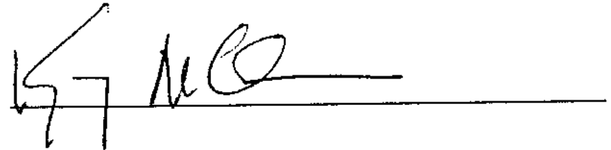
ATTORNEYS FOR DEFENDANT OXY USA INC.

CERTIFICATE OF MAILING

I, the undersigned do hereby certify that on the 23 day of February, 2001, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Thomas D. Kitch
Gregory J. Stucky
Charles E. Millsap
David G. Seely
Fleeson, Gooing, Coulson & Kitch, L.L.C.
125 North Market, Ste. 1600
P.O. Box 997
Wichita, Kansas 67201

Bernard E. Nordling
Erick E. Nordling
Kramer, Nordling & Nordling
209 East Sixth Street
Hugoton, Kansas 67951



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