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

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

OXY USA INC.'S BRIEF IN SUPPORT OF MOTION TO DECERTIFY CLASS

Defendant OXY USA Inc. ("OXY"), pursuant to Kan. Stat. Ann. § 60-223 ("Section 223"), respectfully submits this Brief in Support of its Motion to Decertify the Plaintiff Class.

INTRODUCTION

In this royalty interest owner's post-production costs action, the Court initially certified a class comprised of lessors under approximately 1,600 separate oil and gas leases containing

literally dozens of differing royalty payment provisions. The Kansas Supreme Court's recent decision in Smith v. Amoco Production Co., __ Kan. __, 31 P.3d 255 (2001), a case of first impression, dictates an entirely new approach which must be applied to the controlling legal issues in this case. The consequences of this new law are that the requirements for class certification are not, and cannot, be met here.

Plaintiffs' challenges in this case to the alleged "deductions" taken by OXY in determining royalty payments are based on interpretation of the implied covenant to market found in an oil and gas lease. The Smith decision holds that the implied marketing covenant in a Kansas oil and gas lease is a covenant implied in fact, not implied in law. The principles that govern whether such a covenant may be implied (principles unconnected to judicial attitudes of fairness, but instead requiring a determination of each of the contracting parties' intent) mandate that each lease, and the circumstances surrounding its execution and performance, be examined individually, making continued class certification improper because Plaintiffs can no longer meet the requirements of commonality, typicality and predominance.

FACTS

1. On March 13, 2001, the Court entered its Journal Entry of Decision by the Court and Order of the Court Certifying Class Nunc Pro Tunc (the "Class Certification Order"). In the Class Certification Order, the Court defined a plaintiff class consisting of:

> All persons or concerns owning mineral interest in lands located in the aerial confines of the Kansas Hugoton Gas Field, burdened by oil and gas leases owned in whole or in part by defendant with respect to gas production from above the base of the Panoma-Council Grove Field, whose royalty payments have been reduced by a "gathering/compression" deduction or a "marketing deduct" identified on the monthly gas revenue detail sent by defendant to each such member. Plaintiffs exclude from the plaintiffs' class the United States of America insofar as its mineral interests are managed by the Mineral Management Service but otherwise include the instrumentalities of the United States of America and

federally chartered corporations, including but not limited to, the Farm Credit Bank of Wichita and the Federal Land Bank.

Id. at 5.

2. In the Class Certification Order, the Court found that:

> [T]he questions of law or fact are common to the plaintiffs' proposed class and, therefore, the requirements of K.S.A. 60-223(a)(2) is met and, further, this Court finds the common questions among the proposed class predominate over issues unique to each class member and, therefore, the requirement of K.S.A. 60-223(b)(3) are met.

Id. at 2-3.

3. On September 21, 2001, the Supreme Court of the State of Kansas, in Smith, expressly ruled that: (a) a lessee's implied covenant to market is a covenant implied "in fact" rather than implied "in law;" (Id., __ Kan. at __, 31 P.3d at 257 syl.), (b) the lessee's "intent, conduct, and motives" both at the time of contracting, and at the time of the alleged breach of these implied covenants "are relevant in determining whether a breach of implied covenants occurred;" (Id., __ Kan. at __, 31 P.3d at 264), and (c) with respect to the implied covenant to market, the "lessee's activities are measured by the standard of a reasonably prudent operator and judged on the circumstances existing at the time of the alleged breach. The question of compliance with this standard is primarily a question of fact." Id., __ Kan. at __, 31 P.3d at 271.

ARGUMENTS

I. THE SMITH DECISION AND ITS IMPLICATIONS

In Smith, the Kansas Supreme Court first examined the nature of the lessee's implied duty to market under an oil and gas lease. Because Plaintiffs' claims here are fundamentally founded on this same implied covenant, the teachings of Smith are now controlling.

In Smith, royalty interest owner/lessors in the Hugoton and Panoma gas fields sought an equitable accounting based on claimed breaches of the implied covenant to market. Id. at 257.

In order to determine the statute of limitations applicable to plaintiffs' claims, the Kansas Supreme Court, for the first time, was called upon to determine whether the marketing covenant in oil and gas leases was "implied in fact," or "implied in law." The Court explained the difference between these two types of covenants stating:

> A contract implied in fact is one "inferred from the facts and circumstances of the case" but which is "not formally or explicitly stated in words." . . . It is the product of agreement, although it is not expressed in words. . . . A contract implied in law does not rest on actual agreement. It is a legal fiction created by the courts to ensure justice or to prevent unjust enrichment.

Id., 31 P.2d at 265 (quoting Atchison County Farmers Union Co-op Ass'n v. Turnbull, 241 Kan. 357, 363, 736 P.2d 917 (1987)).[1/] After analyzing the various authorities on this issue, the Court ultimately decided that: "We choose to join Oklahoma, Texas, and Montana in holding that the covenants are implied in fact."[2/] The Court's conclusion in Smith directly affects continued certification of the plaintiff class in this case because it dictates the evidentiary and analytical framework which this Court must now employ to determine whether the deductions at issue are proper.

Plaintiffs' challenges to the royalty payments made by OXY are based solely on what has been called the "marketable condition rule."[3/] The Kansas Supreme Court in Sternberger v. Marathon Oil Co., 257 Kan. 315, 894 P.2d 788 (1995) stated this rule to be that the lessee has a duty to produce marketable gas and alone bears the expense of making the product marketable.

[1/] The Court noted this same distinction was made by a noted oil and gas treatise: "A covenant is implied in fact when its existence is derived from the written agreement and the circumstances surrounding its execution. A covenant is implied in law when it is added to the contract by a court to promote fairness, justice and equity." Id., __ Kan. at __, 31 P.3d at 267 (citing 5 Williams & Meyers, § 803 at 18).

[2/] This, the Court explained, was consistent with "the early development of oil and gas law in Kansas." Id. (citing Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905); Howerton v. Gas Co., 81 Kan. 553, 106 P. 47 (1910)).

[3/] Plaintiffs also assert that the costs at issue may not be deducted because they label them "production costs." Plaintiffs have, however, **provided no Kansas authority** supporting their position that costs incurred with respect to gas once it has been severed from the ground by production at the wellhead may be relabeled a "production cost" and thereby serve as a basis for disallowance of post-production costs in determining royalties properly payable.

However, once a marketable product is obtained, reasonable costs incurred to transport or to enhance the value of the marketable gas may be charged against non-working interest owners. Sternberger, 257 Kan. at 315, 894 P.2d at 791, syl. 2, 3. This rule is derived from the Kansas Supreme Court's holdings in Gilmore v. Superior Oil. Co., 192 Kan. 388, 388 P.2d 602 (1964) and Schupbach v. Continental Oil Co., 193 Kan. 401, 394 P.2d 1 (1964), where the Court first created the rule as an extension of the traditional oil and gas lessee's implied covenant to market.[4/] Here, plaintiffs ask the Court to go further than any Kansas court has ever been willing to go, and to expand this rule to imply an obligation on OXY to compress the gas and to transport it to distant markets solely at OXY's expense. Because the sole basis of the marketable condition rule is that it is purportedly required by the implied duty to market, whether the covenant exists in any particular case and, if so, its breadth and scope as applied to any particular set of circumstances, are now governed by Smith, and the rules applicable to implied in fact covenants.[5/] These rules necessarily now preclude findings of commonality, typicality and predominance.

[4/] At the outset, the Smith decision undercuts this basis for the existence of the marketable condition rule and thus imperils its continued existence. Gilmore, the case first to hold that the implied marketing covenant governs the deductibility of post-production costs, relied solely on a statement by Professor Merrill in his treatise, Merrill on Covenants Implied in Oil and Gas Leases § 85 at 214 (2d ed.), where Merrill states, and the Gilmore court quoted:

> If it is the lessee's obligation to market the product, it seems necessarily to follow that his is the task also to prepare it for market, if it is unmerchantable in its natural form. No part of the cost of marketing or of preparation for sale is chargeable to the lessor. This is supported by the general current of authority.

Gilmore, 388 P.2d at 607. However, the Smith Court rejects Merrill, identifying him to be "the advocate for the implied in law approach." Id., 31 P.3d at 268. Because Merrill and the implied in law approach were unequivocally rejected in Smith, and because the implied in fact approach requires – as explained below – an analysis which neither Gilmore, Schupbach nor Sternberger undertook, Smith casts grave doubts on the continued viability of the marketable condition rule in Kansas under any circumstances. At a minimum, Smith requires a new and different analysis of this issue than has ever been required before. Any such implied obligation may no longer rest on Merrill and Gilmore. Its existence, if at all, must be determined using the criteria of Smith.

[5/] Examination of these issues in the context of determining the propriety of class certification is not a prohibited review of the merits, rather, it is an essential element of the "rigorous analysis" required to support certification. See Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996); C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1785 (1998 Supp.) ("Although that inquiry does require an examination of the elements of the claims and defenses, it does not result in an impermissible examination of the merits of the claims."). Id. at 15.

II. RULES APPLICABLE TO COVENANTS IMPLIED IN FACT RENDER CLAIMS BASED ON THE MARKETABLE CONDITION RULE UNSUITABLE FOR CLASS ADJUDICATION

Under Kansas law, as now defined by Smith, this Court cannot proceed on the Plaintiffs' challenges to OXY's royalty payments without applying the principles required to determine the existence of implied in fact covenants – principles which require an examination of each lease contract individually – an examination that may not be done on a class basis.

A covenant implied in fact is the product of the parties' agreement, even though not expressed in words, and it is to be "inferred from the facts and circumstances of the case." Smith, __ Kan. at __, 31 P.3d at 265. Among other authorities relied upon by the Court in Smith are those from Texas, which the Court found to be persuasive. In reviewing the Texas decisions, the Court focused on the Texas courts' conclusions that the covenants sought to be implied in fact must be the product of the parties' actual intent as reflected by the contract. Particularly, the Court cited with approval Danciger Oil & Ref. Co. v. Powell, 137 Tex. 484, 490-92, 154 S.W.2d 632 (1941) ("covenants will be implied in fact when necessary to give effect to the actual intention of the parties, as reflected by the contract . . .."); Smith, __ Kan. at __, 31 P.3d at 265. The Court also acknowledged Texas Pacific Co. & Oil Co. v. Stuard, 7 S.W.2d 878 (Tex. Civ. App. 1928) quoting from that case that the covenant to be implied must be "in the minds of the parties." Smith, __ Kan. at __, 31 P.3d at 265. This law is consistent with the preexisting law of Kansas. See Mai v. Youtsey, 231 Kan. 419, 646 P.2d 475, 479 (1982) ("A contract implied in fact arises from facts and circumstances showing **mutual intent** to contract.").

The Smith Court's heavy reliance on the cited Texas cases is especially important because they provide a road-map for the analysis which governs identification of the parties' intent, and thus, whether a particular obligation may be implied. In Danciger, the court explained that:

> An implied covenant must rest entirely in the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument.

Id., 154 S.W.2d at 635.[6/] The Danciger court further explained:

> It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole. However, covenants will be implied in fact when necessary to give effect to the actual intention of the parties as reflected by the contract or conveyance as construed in its entirety in light of the circumstances under which it was made and the purposes sought to be accomplished thereby.

Id. See HECI, 982 S.W.2d at 889. These principles may be referred to as the "Danciger Rule."

The recent decision of Union Pacific Resources Group, Inc. v. Neinast, __ S.W.3d __, 2001 W.L. 1098140 (Tex. Civ. App. 2001), petition for rehrg filed, also recognizes that claims grounded on breach of an implied oil and gas lease covenant are not properly certified for class adjudication because the inquiry and proof necessary to determine the existence of an implied term must be made on an individual, lease-by-lease basis.[7/] In Union Pacific, the court had before it the question of whether claims, that lessees had breached an implied covenant to reasonably market gas, could be addressed on a class basis. In determining that class adjudication was improper because no common questions of fact or law predominated, the court relied entirely on the Danciger Rule. The court emphasized that the existence of an implied covenant in a particular case is determined from "the presumed intentions of the parties as gathered from the whole instrument." The court went on to explain that "intent" was to be

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[6/] This principle has been embraced in numerous other decisions as well. Kingsley v. Western Natural Gas Co., 393 S.W.2d 345, 350-351 (Tex. Civ. App. 1965); Continental Potash, Inc. v. Freeport-McMoran, Inc., 115 N.M. 690, 704, 858 P.2d 66, 80 (1993); HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998).

[7/] For the Court's convenience, a copy of the court's opinion in Union Pacific Resources Group is attached as Exhibit "A."

determined after the examination of a myriad of factors including: (a) whether the lease contained provisions expressly covering the subject matter of the particular obligation asserted to be implied, (b) the circumstances under which the lease was made, (c) the purposes sought to be accomplished by the lease insofar as they pertain to the obligation sought to be implied, and (d) whether considering these factors, the covenant sought to be implied is necessary to give effect to the actual intention of the parties. These matters, the Union Pacific court found, were matters which inherently require a lease-by-lease examination thus rendering class adjudication improper. Id. So too are the issues here.

III. THE INDIVIDUAL DETERMINATIONS REQUIRED BY SMITH PRECLUDE FINDINGS OF COMMONALITY AND PREDOMINANCE

It is not Smith's mere classification of the duty to market as "implied in fact," that directly impacts certification here, it is the effect **on the proof** of any claims based on these implied covenants that controls. This impact is seen at several stages of the proof and precludes both commonality and predominance.

A. Virtually All Proof At Trial Will Be Individual And Not Common

At the outset, Smith requires an individualized analysis of **what implied obligation, if any**, is owed to each lessor. Contract analysis under Kansas law requires an initial review of each of the subject leases to determine the scope of the express obligations of OXY, i.e., "what does each contract say in the first instance."[8/] This analysis must begin with the admonition that

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[8/] In generally advising against class treatment for such issues, Professor Kuntz has said:

> The different types of royalty clauses are easily described and classified in the abstract, but it is frequently very difficult to make a proper classification of a specific clause. Because the royalty provisions vary as to type, a class action is not appropriate to recover deficiencies in payment of royalty under separate leases and units in separate fields.

Kuntz, Oil and Gas Law, § 40.4 at 323. This Court has similarly acknowledged that claims arising under a number of mineral deeds, alleged to contain common language, are not suitable for class treatment. See Journal Entry of Decision by the Court on Plaintiff's Motion for Class Certification in Smith v. Anadarko Petroleum Corp., Case No.

additional provisions will not be read into any instrument "unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole." Danciger, 154 S.W.2d at 635. Any such obligation is not a matter of public policy or even fairness. "It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly." Id. This analysis "must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself . . . ." Id. Moreover, the obligation sought to be implied must meet the fundamental test of one of two alternatives. "[I]t must appear that [the intent for this obligation] was so clearly within the contemplation of the parties that they deemed it unnecessary to express it . . . ." Id. Or "it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument." Id. In order to prevail, Plaintiffs must demonstrate that the implied obligation they seek to impose meets one of these tests, that is, they must show that the lease contains express terms from which an inference may be drawn of a mutual intent that OXY, **at its sole expense**, compress the gas and transport it to a distant pipeline, thereby increasing its value in the marketplace considerably.[9/] Further, Plaintiffs will have to demonstrate some provision of the lease which so clearly contemplates this obligation that the necessity to express it is eliminated. Alternatively, Plaintiffs will be required to show

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00-CV-2 (entered October 21, 2001). Thus, here, where the members of the class are parties to over 1,600 separate lease agreements, with numerous varying royalty payment provisions, an analysis of each of these lease provisions is impracticable and makes class action treatment unduly cumbersome and unworkable.

[9/] Plaintiffs have not presented, and OXY believes, Plaintiffs cannot present, **any** evidence showing that any party to the subject leases contemplated that OXY would be required to compress and transport gas to a distant pipeline at its sole expense.

that some contractual purpose requires such an obligation other than merely to pay Plaintiffs more money.[10/]

A second, independent stage of individual analyses must then be conducted, according to Smith, in order to determine the facts and circumstances surrounding each lease's execution, and the parties' performance thereunder. Quoting Williams & Meyers, Oil & Gas Law, the Smith Court explained:

> A covenant is implied in fact when its existence is derived from the written agreement **and the circumstances surrounding its execution.**

Id., __ Kan. at __, 31 P.2d at 267 (emphasis added). Because the circumstances surrounding the execution of each of over 1,600 leases must be individually examined under Smith, common issues cannot predominate. The Smith Court also confirmed its prior opinion in Robbins v. Chevron U.W.A., Inc. 246 Kan. 125, 785 P.2d 1010 (1990), quoting with approval:

> [A] lessee's activities are measured by the standard of a reasonably prudent operator and judged on the circumstances existing at the time of the alleged breach. The question of compliance with this standard is primarily a question of fact.

Id., 31 P.2d at 271.[11/] Again, these circumstances will vary on a lease-by-lease and time-by-time basis. When these multiple layers of uniquely individualized proofs are added to the multitude of other individual questions presented by Plaintiffs' claims, class certification is precluded.

[10/] Mere increased economic benefits alone cannot satisfy this requirement since the driving force behind the assertion of an implied obligation is always some increased economic benefit to the asserting party.

[11/] In Robbins v. Chevron USA, Inc., 246 Kan 125, 785 P.2d 1010 (1990), the Kansas Supreme Court explained:

> Whether a lessee has performed his duties under the expressed or implied covenants is a question of fact. . . . The standard by which both [lessee and lessor] are bound is what an experienced operator of ordinary prudence would do under **the same or similar circumstances**. . .

Id. at 1015 (emphasis added) (quoting Adolph v. Stearns, 235 Kan 622, 626, 684 P.2d 372, 376 (1984)).

B. The True Issue To Be Litigated Here Requires Individual Proof

Although Plaintiffs have attempted to make the focus of this suit their claim that OXY's alleged **deductions** for gathering are improper, to consider that question alone sidesteps the true legal issue here. A plaintiff may succeed against OXY **only if** OXY has paid that individual plaintiff less in royalty than is required by their specific lease terms. Merely focusing on a single component of that royalty calculation--the deductions utilized by OXY in computing its royalty payments--will not, in and of itself, determine whether the amounts ultimately paid to that specific royalty owner were proper. **Each plaintiff** must establish the amount of royalty to which he or she was entitled, **and** that the specific royalty owner received **less** than that amount. Absent such individualized proof, there can be no recovery.

Under Kansas law, the amounts due to any individual royalty owner as royalty is, in the first instance, dependent upon the express and implied terms of OXY's oil and gas leases. Lightcap, 221 Kan. at 456, 562 P.2d at 8. Thus, a review of the language of each separate lease will be required, since the obligation to pay royalties is derived from, and governed by, the lease contract. While there are dozens of differing lease forms and terms, the impropriety of class certification is clearly demonstrated by categorizing the universe of leases into two types: market value leases[12/] and proceeds leases.[13/]

[12/] A relative few of OXY's leases contain "market price" royalty clauses. "Market price" and "market value" leases are to be interpreted in the same manner, Lightcap, 221 Kan. at 452, 459, 562 P.2d at 9, and thus, the "market value" analysis here equally applies to "market price" leases.

[13/] One form of lease commonly encountered among OXY's royalty owners in the Kansas Hugoton field is the so-called "Waechter" lease discussed in detail in Waechter v. Amoco Production Co., 217 Kan. 489, 537 P.2d 228 (1975). Under this lease form, royalty is computed upon a stipulated percentage or fraction of the proceeds received by lessee if the gas is sold at the well, but if the gas is marketed off the lease premises, royalty is computed based upon the stipulated percentage or fraction of the market value at the well of the gas produced. Because Plaintiffs are not claiming improper royalty payments when the gas was sold at the well, the Waechter leases here are analytically identical to "market value" leases.

C. Market Value Leases Require Individual Treatment

Two issues necessarily impact any analysis of OXY's "market value" leases.

1. As a Matter of Law, There Is No Room For The Implied Terms Urged By Plaintiffs

A corollary to the "intent-seeking" principles governing the implication of covenants is that, where a lease contains **express** provisions that cover the subject matter of the covenant sought to be implied, no implied covenant may arise. Yzaguirre v. KCS Resources, Inc., 53 S.W.3d 368, 373 (Tex. 2001); Continental Potash, 858 P.2d at 80; Kingsley, 393 S.W.2d at 350. This same rule is a well-established part of Kansas law as well. See Connolly v. Samuelson, 671 F. Supp. 1312, 1318 (D. Kan. 1987) ("Courts will not imply covenants or terms, where the subject thereof is expressly covered by the contract . . ."); Williams v. Safeway Stores, Inc., 198 Kan. 331, syl.1, 424 P.2d 541 (1967) ("An express covenant in a lease on a given subject excludes the possibility of an implied covenant of a different or contradictory nature"). In fact, the Kansas Supreme Court has specifically admonished that:

> It is not within the province of a court to reform an instrument by rejecting words of clear and definite meaning and substituting others. . . .When a written instrument is complete, the court will not imply an additional term.

Havens v. Safeway Stores, 235 Kan. 226, 230-31, 678 P.2d 625, 629-30 (1984) (citing Campbell v. Fowler, 214 Kan. 491, 520 P.2d 1285 (1974; Burge v. Frey, 545 F. Supp. 1160 (D. Kan. 1982)).

This principle has significant consequences for the leases in this case containing market value royalty clauses—**the vast majority of leases here**. In Yzaguirre, the court rejected the claimed existence of an implied covenant to reasonably market production where lessor's leases provided for market value royalties. The court held that such an implied covenant could not

exist because the "plain language of the lease" provided "an objective basis for calculating royalties independent of the price the lessee actually obtains." Id. at 370, 374.[14/]

Kansas likewise holds that market value royalty clauses provide a basis for calculating royalty that is independent of the price actually obtained. See Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 7 (1977); Matzen v. Cities Service Oil Co., 233 Kan. 846, 851, 667 P.2d 337, 342 (1983); Holmes v. Kewanee Oil Co., 233 Kan. 544, 551, 664 P.2d 1335, 1341 (1983). Thus, no covenant can be implied here as well. Just as was rejected in Yzaguirre, plaintiffs here merely:

> [W]ish to use an implied marketing covenant to negate the express royalty provisions in the leases and transform the "market value" royalty into a "higher of market value or proceeds" royalty.

Id., 53 S.W.3d at 374.

2. If a Term Can Be Implied, Proof of Its Nature and Scope Is Individualized Not Common

When the royalty is based upon "market value" the proceeds actually received by the lessee are not determinative of the amount of royalty due. In such cases, market value is "the price which would be paid by a willing buyer to a willing seller in a free market." Holmes, 233 Kan. at 551, 664 P.2d at 1341; Smith, __ Kan. at __, 31 P.3d at 269.[15/] This "market value" may

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[14/] The Court explained: "The parties to these leases in **unambiguous term**, based the royalty on the amount realized for gas sales at the well and on market value for sales that occurred off the premises." Id., 53 S.W.3d at 372 (emphasis added).

[15/] In determining market value, "the law looks not to the particular transaction, but the theoretical one between the supposed free seller *vis-a-vis* the contemporary free buyer dealing freely at arm's length supposedly in relation to property which neither will ever own, buy or sell." Lightcap, 221 Kan. at 452, 562 P.2d at 5 (quoting J. M. Huber Corp. v. Denman, 367 F.2d 104, 109-10 (5th Cir. 1966)). "[A] 'market value' lease *on its face* calls for payment at the theoretical free market value." Lightcap, 221 Kan. at 453, 562 P.2d at 6.

be proved by any competent evidence.[16] Id. However, a hierarchy of three(s) methodologies generally exists to determine this market value.[17]

When possible, the best evidence of market value is the price at which the commodity is sold in an arm's length transaction at the point of valuation. Bruce M. Kramer, "Royalty Interests in the United States: Not Cut From the Same Cloth," 29 Tulsa L. J. 449, 460 (1994). Such sales must be contemporaneous with the time of valuation. Id. Thus, the starting point for determining market value will require an examination of arm's length sales at the well occurring month-to-month throughout the valuation period for the each of the specific well from which the gas is being valued.

If, for a particular well there are no arm's length wellhead sales of gas, then "comparable sales" may be examined. Holmes, 664 P.2d at 1341. A comparability determination is also highly individualistic for each well.[18] Thus, a well-by-well examination will be required as a determination of the market value from comparable sales for any one particular well will not determine market value for any other well.

Where there are no comparable sales from which market value can be determined, then and only then, courts will allow a "proceeds-less-expenses" method.[19] See Heritage Resources,

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[16] Generally, such evidence will be presented in the form of expert testimony. Id. at 551 (citing Weymouth v. Colorado Interstate Gas Company, 367 F.2d 84, 92-93; Exxon Corp. v. Middleton, 613 S.W. 2d 240, 249 (Tex. 1981)).

[17] To facilitate the payment of royalties, OXY has calculated royalties by deducting from its downstream price, those costs incurred in getting the gas to the point of sale. In doing so, OXY believes that it pays no less than "market value," and in some instances, has actually overpaid royalties, since OXY only sells gas downstream of the well if it can obtain a premium price over and above the gathering fees that it incurs.

[18] See Holmes, stating: "Comparable sales of gas are those comparable in time, quality, quantity and availability of marketing outlets." 664 P.2d at 1341 (quoting Exxon, 613 S.W.2d at 246-47) (Sales comparable in quality are those of similar physical properties such as sweet, sour, or casinghead gas . . . Sales comparable in quantity are those of similar volumes . . . To be comparable, the sales must be made from an area with marketing outlets similar to the gas in question.).

[19] The question of whether OXY properly deducted gathering costs in computing royalties becomes relevant to determining whether royalty owners with market value leases have been properly paid royalty **only** when the proceeds-less-expenses method must be utilized, i.e., if the Court finds no evidence supporting either of the other two valuation methods.

Inc. v. NationsBank, 939 S.W.2d 118, 122 (Tex. 1996); Montana Power Co. v. Kravik, 586 P.2d 298, 303-04 (Mont. 1978); Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225, 239 (5th Cir. 1982); Ashland Oil, Inc. v. Phillips Petroleum Co., 554 F.2d 381, 387 (10th Cir. 1975); Kramer, supra, at 460-61. Only if the first methodology is unavailable may the second be used, and only if the first and second are unavailable, may the third be used. In each instance, however, the primary focus is on individual well-by-well and time period-by-time period proof, not the "common proof" required by Section 223.

D. Proceeds Leases Require Individual Treatment

As to proceeds leases, each contains an express clause requiring the payment of royalty **on a proceeds basis**. Under these leases, the lessor is entitled to royalty on a stipulated percentage or fraction of the proceeds actually received by the lessee for the sale of gas. Lightcap, 221 Kan. at 460, 562 P.2d at 11; Waechter, 217 Kan. at 512, 537 P.2d at 249. When the gas is not sold at the well but at some location downstream from the well, the lessee under a proceeds lease is entitled to deduct expenses – such as gathering, processing and dehydration – incurred between the wellhead and the point of sale. Matzen v. Hugoton Production Co., 182 Kan. 456, 321 P.2d 576 (1958); Ashland Oil & Refining Co. v. Staats, Inc., 271 F. Supp. 571 (D. Kan. 1967).[20/] This express provision thus, leaves no room for an implied covenant. Indeed, to imply a provision requiring OXY to compress and transport the gas to a distant pipeline would fundamentally alter the economic requirements of a proceeds royalty clause, thus permitting an implied obligation to change the terms of an express obligation. This, the law does not allow. Yzaguirre, 53 S.W.3d at 374.

[20/] Both of these cases were cited with approval by the Kansas Supreme Court in Sternberger.

E. Even If An Implied Covenant Can Exist, Smith Now Requires Individualized Proof of its Obligations

Even if **after** application of the "express covenant rule,"[21/] this Court were to find that the express provisions of "market value" and "proceeds" royalty clauses do not, as a matter of law, foreclose the implication of a covenant requiring OXY to compress and transport gas to a distant pipeline at its sole expense, the existence and scope of such a covenant **still** depends upon whether the specific requirements and limitations for such a covenant, as dictated by Smith, can be met.[22/] These require that the Court determine the intent of the parties from the facts and circumstances surrounding the making of the lease. Utilizing the Danciger Rule, the Court must analyze the question in the context of whether imposing on OXY an obligation to bear all costs to compress the gas and transport it to a distant pipeline at its sole expense is fairly ascertainable from "the presumed intention of the parties as gathered from the terms actually expressed in the [lease] and . . . was so clearly within the contemplation of the parties that they deemed it unnecessary to express it . . . or it must appear that it is necessary to infer such [an obligation] in order to effectuate the full purposes of the [lease] as a whole . . . ." Danciger, 154 S.W.2d at 635. Because under Smith, this requires a search for the intent of the parties in light of the facts and circumstances under which the lease was executed, the issues here are individual to each lease and may not be adjudicated on a class basis.

[21/] "An express covenant in a lease on a given subject excludes the possibility of an implied covenant of a different or contradictory nature." Williams, 198 Kan. at 331, 424 P2d at 541, syl. 1.

[22/] Initially, the issue is not whether the **traditional** implied duty to market can exist, but whether that duty may be **extended** to imply an obligation to require the lessee to bear the expense to compress the gas and transport it to a distant pipeline. The traditional implied duty to market fits within the requirements of the covenant implied in fact principles laid down by Smith because the oil and gas lease contains no language requiring the lessee to produce or market the product. The obligation to produce and market the product is implied as necessary to fill the primary purpose of the oil and gas lease, which is to obtain production from which the lessor will be paid a royalty. However, once oil and gas is produced, the need for an implied covenant ceases and the express terms of the lease take-over – terms which fix the royalty to be paid to an amount based on either market value or a share of sales proceeds.

F. Sternberger Requires Individual Treatment

If, after the Court's rulings in Smith, Sternberger continues to have any part in the determination of the deductibility of certain post-production costs, its requirements of individualized proof also stand as a bar to class certification. Applying Sternberger in the context of this case, the question is whether costs to compress the gas and deliver it to a distant pipeline are transportation costs or costs incurred to enhance the value of an already marketable product, in either of which cases the costs are deductible. Id., 257 Kan at 315, 894 P.2d at 791, syl. 2, 3. Because Smith requires that any implied obligation have arisen based upon the intent of the parties determined in light of the particular facts and circumstances surrounding the execution of each lease, whether the particular obligation sought to be implied by Plaintiffs – compression and transportation at OXY's sole cost – should be based upon an examination of that very same intent upon which the Court in the first instance must have based a marketable product requirement. This again makes inescapable, determinations that are individual to each lease – not something that can be determined on a class-wide basis.

Moreover, a key question in this determination is whether, and at what point in time, the gas is a marketable product. That question requires an examination of a multitude of variables which are specific to each well.[23/] These factors will vary in time from sale-to-sale and well-to-well.

Additionally, because the marketable product rule involves identification of points in the marketing process at which the gas is in a condition to be sold in arm's length transactions, a marketability determination must analyze the significance of actual arm's length sales as well.

[23/] These variables include the physical characteristics of the gas, such as its: (a) quality, (b) quantity, (c) available volumes, (d) well capacity, (e) pressure, (f) BTU content, and (g) the amount of extractible hydrocarbons. Further, marketability may also require an examination of additional factors, such as: (h) the point in time of the sale, (i) the available and alternate markets, (j) available and alternate marketing facilities, (k) well location in respect to

This would entail particularized examination of the behavior of comparably situated arm's length parties. This, too, requires a highly detailed and individualized well-by-well investigation.[24/]

Finally, the necessity for individualized and specific fact findings on the various issues presented here has most recently been discussed by this Court in the parallel action of Coulter v. Anadarko Petroleum Corp., Case No. 98-C-40, In the District Court of Stevens County, Kansas. In denying cross-motions for partial summary judgment this Court pointed out:

> [1] This Court finds it is always a question of fact as to whether or not compression on a gas gathering line is in place for purposes of production or transportation or for the marketing of the gas. . .
>
> [2] It is a question of fact as to whether or not gas is marketable at the wellhead.
>
> [3] As to the ultimate issue . . . that being whether or not the Defendant is wrongfully deducting gathering expenses, a determination of fact as to whether or not the gas is marketable at the wellhead would first have to be made and then the trier of fact would have to determine as a matter of fact from the evidence whether or not compression was being utilized by the Defendant to produce gas from the wells which the Plaintiff class has a royalty interest or used to market the gas produced or used as transportation or to enhance the value of an already marketable gas.
>
> [4] It is a question of fact as to whether or not the gas in question in this case is acceptable for a commercial market.
>
> [5] If the trier of fact does not find that the gas stream in question is marketable at the wellhead, then the reasons for the costs deducted by the Defendant must be determined.

Journal Entry of Decision by the Court on Plaintiffs' Motion for Partial Summary Judgment at 3-5; Journal Entry of Decision by the Court on Defendant's Motion for Summary Judgment at 5-6 (each in Coulter v. Anadarko Petroleum Corp. Case No. 98-C-40 (filed November 20,

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available and alternate markets, (l) accessibility of markets and (m) industry custom and usage for gas of a particular characteristic or at a particular location.

[24/] As OXY's evidence will show, gas markets in the Kansas Hugoton field are not homogenous, but differ at various points in time by geographic areas, and thus, such an investigation would require a determination of whether the first point of sale was the consequence of a well's "marketability" attributes or alternatively, was it the result of the

2001)). Because each of these "questions of fact" will vary on a well-by-well, and a time-to-time bases, class treatment is not proper.

IV. PLAINTIFFS' PRIOR ARGUMENTS CANNOT SUSTAIN A SHOWING OF PREDOMINANCE IN LIGHT OF SMITH

When, as here, certification is grounded on "predominance of common questions over individual questions" under Section 223(b)(3), the plaintiff must demonstrate **why** common questions predominate over individual ones. Valentino, 97 F.3d at 1234. This demonstration must be made in the context of **how the case would actually be tried.**[25/] Otherwise, it would be "impossible for the court to know whether the common issues would be a significant portion of the individual trials." Castano, 84 F.3d at 745.

As explained by the Kansas federal District Court in Eddington v. R. G. Dickinson & Co., 139 F.R.D. 183 (D. Kan. 1991):

> [T]he court must discern what common legal and factual issues lie at the heart of the dispute. . . . "[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"

Id., 139 F.R.D. at 190 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)). Thus, the inquiry "begins with the elements of the alleged claim for relief . . . ." In re Sumitomo Copper Litigation, 182 F.R.D. 85, 89 (S.D.N.Y. 1998).

Courts have adopted a two-step process to identify the existence of the required common questions and to analyze whether they "predominate:"

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proper discretionary choice of a lessee's evaluation of multiple marketing points and opportunities to enhance the value of gas already marketable at the wellhead.

[25/] "[T]he court must determine which elements may be tried in 'common' fashion. An issue meets this standard when there exists generalized evidence that proves or disproves the element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member's individual position, and permits the suit to go forward in a truly representative manner. . . . [A]n issue is appropriately deemed 'common' when there would not 'be a substantial difference in the quantum or character of the requisite proof if the plaintiffs included all 20,000 in a class action or only the six named plaintiffs.'" In Re Industrial Gas Antitrust Litigation, 100 F.R.D. 280, 288 (N.D. Ill. 1983).

> First, [the court] will determine the substantive issues likely to arise at trial. Next, it will examine the type of proof necessary for the various elements and, in particular, whether the elements may be tried "in common" using generalized evidence that proves or disproves the element on a simultaneous, class-wide basis such that the suit may proceed in a representative manner . . . .

Deutschman v. Beneficial Corp., 132 F.R.D. 359, 365 (D. Del. 1990). See Eddington, 139 F.R.D. at 190 ("The question of predominance is answered only after conducting a pragmatic inquiry into whether the central issues of the suit are common to the class.").[26/] Thus, the test for determining whether common or individual questions predominate "is whether common or individual questions 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). This Court has also given its own guidelines in examining the issues of commonality and predominance. In Smith v. Anadarko, Case No. 00-CV-2, In the District Court of Grant County, Kansas, this Court refused to certify a class action purporting to cover claims under a variety of mineral deeds. The Court advised:

> The issue of predominance and/or superiority under K.S.A. 60-223(b)(3) requires for predominance, a common nucleus of operative facts relevant to the dispute, and whether or not those common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication . . . supra.
>
> When the Court considers the issue of superiority, the Court has to consider whether there are other procedures for disposing of the litigation and whether or not class certification would be the most effective means of handling the total controversy.

Id., Journal Entry of Decision By the Court Upon Plaintiff's Motion For Class Certification (filed Nov. 1, 2001) at 6-7 (citing Heartland Comm., Inc. v. Sprint Corp., 161 F.R.D. 111 (D. Kan.1995)).

[26/] Accord Simer v. Rios, 661 F.2d 655, 672 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982); Industrial Gas, 100 F.R.D. at 288.

Plaintiffs have argued that the existence of three "common questions" demonstrates "predominance." Plaintiffs claim these "common questions" to be: (a) the manner in which OXY should be required to account to the putative class members; (b) the purposes for which it is performing the activities underlying the deductions in question; and (c) whether Kansas law prohibits the deduction of such expenses if they are incurred for the purpose of producing and marketing gas. This Court initially agreed with plaintiffs in certifying a class. However, the consequences of Smith require reexamination of both the "commonality" and "predominance" requirements of Section 223.[27]

The first question, the manner in which OXY should be required to account to the putative class members, relates strictly to the implementation of a remedy (an accounting) if Plaintiffs should prevail as a class on the merits of their claims. Because this question has nothing to do with establishing **the right of recovery** of any class member, it cannot be considered in determining whether predominance is met.[28] Amchem, 521 U.S. at 607. Moreover, the purposes for which OXY is performing the activities underlying the deductions in question, and whether Kansas law prohibits the deduction of such expenses if incurred for

[27] At the outset, the issues identified by plaintiffs are not "common questions" **at all**. In order to qualify as a common question, a question **must** be such that it can be established by common proof, that is, proof such that when the issue is established with respect to one class member, it will, *ipso facto*, be established with respect to all members of the class. Industrial Gas, 100 F.R.D. at 288 (N.D. Ill. 1983); Deutschman, 132 F.R.D. at 365 (D. Del. 1990). Moreover, to be a "common question," it must be a matter which forms a material link or element necessary for recovery on the claim and which will be litigated by the parties. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 607, 117 S. Ct. 2231, 2242, 138 L. Ed. 2d 689, 712 (1997) (Common questions are those "legal or factual questions that qualify each class member's case as a genuine controversy. . . .").

[28] Nor can OXY's past accounting practices be considered a "common question." Here, OXY did, and still does, analyze each individual lease in the Hugoton Field. See Deposition of Kevin Moore at "E," p. 9, ln. 9 through p.11, ln. 5 to OXY's Appendix filed in conjunction with its original Brief in Opposition to Class Treatment. Moreover, Plaintiffs' assertion that OXY engages in uniform accounting or calculates its royalty payments in exactly the same way also is not a "question" for the purposes of Section 223(a)(2). That fact, even if true, is not a common question because it is not legally relevant to Plaintiffs' right to recover. To the contrary, whether OXY has fully paid its royalty owners and thus, any plaintiff's right to recover, will be dependent upon the terms of its oil and gas lease royalty clauses. Merely proving that OXY utilizes some consistent method of accounting to calculate royalties will not establish the amount of royalty to which any given plaintiff is entitled—the *sine qua non* of any recovery.

producing and marketing gas, are not "common questions" because the answers to those questions involve the multitude of individual issues previously discussed.[29/]

Finally, Plaintiffs' have argued that OXY ". . . produces, markets and accounts for the gas in question . . . ." in the same manner, as a justification for class certification. Here again, the issue is what proof establishes the amount of royalty to which each individual royalty owner is entitled. Evidence of marketing practices (whether common or not) is legally irrelevant to that determination.

Moreover, this purported "question" is nothing more than a broad, generalized statement composed by Plaintiffs to disguise the actual issues which would be involved in the trial of the claims that must be litigated. As such they cannot serve as common questions. Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998) ("At a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation."). If the rule were otherwise, the presence of a common question would depend only upon the skill of counsel to artfully phrase the question in a way so that it is stated in identical terms for all class members.

Thus, Plaintiffs' assertion that common questions of law and fact predominate and that there are no known issues which affect only individual Plaintiffs is erroneous. To the contrary, the issues are overwhelmingly, if not entirely, individual.

[29/] For example, the gas from OXY's wells utilizes at least five (5) gathering systems owned by five (5) different gathering companies. Moreover, OXY has available to it no less than eleven (11) gathering systems owned by eleven (11) different gathering companies for the purpose of delivering its gas. The factual existence of compression and dehydration as a part of any one of these systems is not a "common question" as required by Section 223(a)(2). A "question" is defined as "something in controversy." Question 74 C.J.S. at 4. The mere existence of activities occurring a gathering pipeline is not a **question** because the activity itself is not something in controversy. Moreover, OXY does not market its gas in a uniform manner, thus, also requiring individualized proof.

V. SMITH ALSO NOW PRECLUDES A FINDING OF TYPICALITY

The application of Smith to Plaintiffs' claims here further precludes a showing of typicality under Section 223. To satisfy the "typicality" requirement, "the named Plaintiff representatives must be able to establish the bulk of the elements of each class member's claim when they prove their own claims.... If proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims...." Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990).[30/] Common requests for relief . . . or common legal theories do not establish typicality when the facts required to prove the claims are markedly different among the class members . . . . Plaintiffs must establish that the underlying basis of their individual claims is significantly co-extensive with the claims of the class generally. Retired Chicago Police Ass'n v. City of Chicago, 141 F.R.D. 477, 486 (N.D. Ill. 1992).

Here, under the Smith guidelines, each lessor will be required to demonstrate that under the unique facts and circumstances of the execution of that lessor's single lease an implied in fact obligation was created that has been breached by OXY's payment of royalty to that plaintiff.[31/] Because the "implication process" is unique to each plaintiff, that plaintiff's claims cannot be typical of those of any other plaintiff.

[30/] The mere assertion of the same legal theory by the class representatives and the class members does not, without more, satisfy typicality. Liberty Lincoln Mercury v. Ford Marketing, 149 F.R.D. 65, 78 (D.N.J. 1993); Spencer v. Central States Pension Fund, 778 F. Supp. 985, 990 (N.D. Ill. 1991) (While having the same legal theory as all other class members is a necessary element of the typicality requirement, it is insufficient standing alone). See also Bailey v. Sabine River Authority, 54 F.R.D. 42, 43 (W.D. La. 1971). "The premise of typicality is simply states: as goes the claim of the named plaintiff, so goes the claims of the class." Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998). "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." In re American Medical Systems, 75 F.3d 1069, 1082 (6th Cir. 1996). In this respect, "the commonality and typicality requirements of Rule 23(a) tend to merge." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157, fn 13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

[31/] As this Court stated in Smith v. Anadarko in concluding there was no commonality or typicality, even where all of the subject instruments "have the same language, [it] does not mean that any ruling of this Court [on the Plaintiff representatives' claims] . . . could ever be applied identically to the proposed class members." Journal Entry of Decision By the Court Upon Plaintiff's Motion For Class Certification at 6.

VI. THIS COURT MUST NOW CONSIDER DECERTIFICATION OF THE PLAINTIFF CLASS

The prerequisites to the maintenance of a class action lawsuit in Kansas are set forth in Section 223 stating:

> One of more members of a class may sue or be sued as representative parties on behalf of all **only** if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> . . . .
>
> [**and**] the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id. (emphasis added).[32/]

Section 223 provides in part:

> As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. . . . **An order under this subdivision may be . . . altered or amended before a decision on the merits.**

Id. (emphasis added). The law on this aspect of class action practice is well-developed and virtually uniform. As explained in Boucher v. Syracuse University, 164 F.3d 113 (2d Cir. 1999):

> [U]nder Rule 23(c)(1), courts are "**required** to reassess their class rulings as the class develops." . . . Id. at 118 (emphasis added) (quoting Barnes v. The American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998)). "A district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a)." Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1145 (8th Cir. 1999), Id. at 1145 (citing Hervey v. City of Little Rock, 787 F.2d 1223, 1227 (8th Cir.

[32/] The law places the burden of demonstrating each of these prerequisites on Plaintiffs. See Matzen, 233 Kan. at 861, 667 P.2d at 348; East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); Rex v. Owens, 585 F.2d 432, 436 (10th Cir. 1978); Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974). If the party seeking class certification fails to meet this burden **as to even one of the requisite elements**, then certification by the trial court would be both improper and an abuse of discretion. Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 525 (N.D. Ill. 1998); Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996); Yazzie v. Ray Vicker's Special Cars, Inc., 180 F.R.D. 411, 414 (D. N.M. 1998).

1986)). See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982); Hum v. Derricks, 162 F.R.D. 628, 633 (D. Hawaii 1995) ("The court has an ongoing duty to insure compliance with Rule 23(a) even after certification. . . ."); Baldridge v Clinton, 139 F.R.D. 119, 126 (E.D. Ark. 1991). Upon review: . . . "the district judge must . . . decertify as appropriate in response to the progression of the case from assertion to facts." See Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir. 1985); Richardson v. Berg, 709 F.2d 1016, 1019 (5th Cir. 1983); Doe v. Kradzic, 192 F.R.D. 133, 136 (S.D.N.Y. 2000); Boucher, 164 F.3d at 118; In re Prudential Securities, Inc. Ltd. Partnerships, 158 F.R.D. 301, 304 (S.D.N.Y. 1994) ("decertification is appropriate if the class no longer satisfies the requirements for class certification under Rule 23."); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 572 (2d Cir.), cert. denied, 459 U.S. 838 (1982) ("A district court may decertify a class if it appears that the requirements of Rule 23 are not in fact met.").

When reviewing a motion to decertify: "A district court 'must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met.'" O'Connor v. Boeing North American, Inc., 197 F.R.D. 404, 409 (C.D. Cal. 2000) (quoting Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)). See In re American Medical Systems, 75 F.3d 1069 (6th Cir. 1996). The "rigorous analysis" of the Section 223 prerequisites requires examination of **how the case would actually be tried.**[33/] Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996); Sprague, 133 F.3d at 397 (6th Cir. 1998); Eddington, 139 F.R.D. at 188 (D. Kan. 1991). After conducting this "rigorous analysis," it has been held that: "a class may be decertified if later events demonstrate that the reasons for granting class certification no longer exist or never existed." Monaco v. Stone, 187 F.R.D. 50, 59 (E.D.N.Y. 1999). One such

"reason" has been recognized to be "changes . . . in the substantive or procedural law [that] necessitate reconsideration of the earlier order and the granting or denial of certification . . ." O'Connor, 197 F.R.D. at 410. See Cook v. Rockwell International Corp., 181 F.R.D. 473 (D. Colo. 1998). Just such a change in Kansas law has occurred here as a result of Smith.

CONCLUSION

Here, the Kansas Supreme Court, as a result of Smith, has now interpreted Kansas law in such a manner as to ensure that individual issues, and individual proof, will be the predominate focus of any trial of plaintiffs' claims. Thus, class certification, if ever proper, is not so now.[34/] Plaintiff cannot now demonstrate the criteria prerequisites for class treatment. The Plaintiff class should, therefore, be decertified.

[33/] "Rigorous analysis" 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, 84 F.3d at 744.

[34/] OXY continues to believe that the certification of plaintiffs' class in the first instance was inappropriate as set forth in OXY's original Brief in Opposition to Plaintiffs' Motion for Class Certification (filed September 13, 2000), the arguments and authorities in which are incorporated by reference here.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT OXY USA INC.

CERTIFICATE OF SERVICE

I, Kerry McQueen, hereby certify that I mailed on this 31st day of January, 2002, a true and correct copy of the above and foregoing by depositing the same in the United States Mail, properly addressed and postage prepaid to:

Thomas D. Kitch
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that the original of the above and foregoing was hand-delivered on this 31st day of January, 2002, to:

Clerk of the District Court
Stevens County Courthouse
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and a chamber copy was hand-delivered on this 31st day of January, 2002, to:

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THE ORIGINAL SIGNED
BY KERRY McQUEEN
Kerry McQueen, S.Ct. 06166