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KATHLEEN JOSEKABEL
CLERK OF THE DIST. COURT

STEVENS CO. KS

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,)
v.)
)
OXY USA INC.,)
)
Defendant.)
_____)

Case No. 98-CV-51

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

OXY begins its brief by telling the Court that there is "a significant difference" between the meaning of "common issue" in the consolidation statute, K.S.A. 60-242(a), and in the class actions statute, K.S.A. 60-223(a). Response Brief, p. 2. Instead of explaining that difference,¹ however, OXY spends the rest of its brief arguing that it is really seeking what amounts to an advisory opinion

¹ In fact, in footnote 2 at page 4 of its brief, OXY appears to concede that there is no difference. Both statutes use exactly the same terminology, and require the existence of a "common issue of law or fact."

from the Court² with regard to the “standards and factors to determine marketability” and that “merely ask[ing] for a statement of the law” does not create a common question for purposes of our class action statute. Response Brief, p. 3. In the process, OXY distorts both the grounds upon which plaintiffs are seeking certification and the law upon which they are relying.

OXY begins its argument by suggesting a legal standard for “commonality” that its own cases (none of which is from Kansas) do not support. It suggests that a “common question” for class certification requires “proof for any one of the class members simultaneously establishes the same issue for all other class members,” citing *Deutschman v. Beneficial Corp*, 132 F.R.D. 359 (D. Del. 1990). (Page 2 of OXY’s Brief.) *Deutschman* does not stand for such a constricted interpretation of Rule 23:

The [commonality] requirement is satisfied by a showing that “the questions of law or fact linking the class members are substantially related to the resolution of the litigation, even though the individuals are not identically situated” (citations omitted)

132 F.R.D. at 372.

In reality, OXY wants this Court to revise the Kansas class action statute along the lines proposed in House Bill 2258, which is attached hereto and is presently pending in the Kansas Legislature. That bill would amend the existing “commonality” requirement to read as follows: “(2) there are questions of law or fact ~~common to the class~~, *as to which the court or jury could reasonably reach conclusions or findings applicable to all class members.*” To date, the Legislature has not made that change. The fact that such a change is being sought directly contradicts OXY’s explanation of Kansas law to this Court.

OXY tries to raise dust about the “lack” of any facts common to the class, by asserting that “marketability” must be determined on a well-by-well basis. Even if such argument were legitimate,

²As plaintiffs will explain in their brief in opposition to consolidation, K.S.A. 60-242 does not give the Court authority to issue advisory opinions.

which plaintiffs vehemently dispute,³ OXY is necessarily conceding that the factors to be considered when determining the issue of “marketability” present many “question[s] of law. . . common to the class.” K.S.A. 60-223(a)(2).⁴

OXY attempts to temper its admission that common questions of law exist by arguing that these questions will be “settled” prior to trial and that the trial itself will dissolve into a series of individual hearings in which such factors are applied.⁵ Response Brief, pp. 3-4. In so doing, OXY is making two assumptions that are prohibited by Rule 23. First, it is assuming that it will prevail on the merits—that the Court will rule that marketability must be determined on a well-by-well basis, even though OXY itself has refused to draw any such distinctions when accounting to its royalty owners and will base its “common” defense of such uniform practices on the factual assertion that

³OXY argues that “only” evidence in the record on the issue of marketability is that it must be determined on a well-by-well basis. (Page 3 of OXY’s Brief). That is false. The affidavit of plaintiffs’ expert B.J. White addresses that precise issue. For example, in that affidavit he states:

When calculating royalty deductions, I understand that OXY has made no distinction whatever with respect to (1) the composition of the gaseous streams emerging from the wells (except for MMBTU adjustments); the reservoir pressures; (3) the volumes of gas produced from the wells; (4) the reserves associated with particular wells or (5) any other possible factor that might vary from wells to well. OXY’s decision to treat each member of the putative class in exactly the same manner can only mean one thing: that there are common questions of law or fact present in this litigation and those questions would predominate over any individual questions.

¶19 of Affidavit of B.J. White, attached as Exhibit 9 to Plaintiffs’ Reply in Support of Their Motion for Class Certification, filed October 5, 2000.

⁴At the top of page 4 of its brief, OXY acknowledges that the “marketability factors and standards” may well constitute “common questions” for purposes of certification.

⁵In effect, OXY is urging the Court to bifurcate the case by deciding all of the common issues first and then denying class certification on the grounds that there are no common issues left for trial.

all of the gas involved in this case is “marketable” at the wellhead.⁶ Second, it admittedly seeks to obtain such a ruling on the merits prior to certification.

OXY cannot ask the Court to assume the validity of its position in order to defeat class certification. As defendant’s own authority states, “[i]t is axiomatic that the court should not conduct a preliminary hearing on the merits in order to determine whether the suit may be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 [1974]. . . .” *Deutschman v. Beneficial Corp.* 132 F.R.D. 356, 365 (D.Del. 1990). In fact, by pressing for consolidation—in which the Court would make substantive rulings before class certification has been decided, OXY actually is urging the Court to violate this basic principle.

CONCLUSION

OXY continues to ignore the manner in which it actually markets the gas in favor of hypothetical scenarios which it uses to argue that marketability must be determined on a well-by-well basis. OXY has been caught taking inconsistent positions—in its class certification filings claiming that no “common” issues exist and in its consolidation motion claiming that “common” issues indeed do exist. OXY attempts to mask its inconsistent behavior with flights of rhetoric which are devoid of legal or factual substance. OXY is simply playing semantic games with the Court.

⁶As this Court found in its order entered on February 28, 2001, granting plaintiffs’ motion to certify the class in *Youngren v. Amoco*, Case No. 89-C-22:

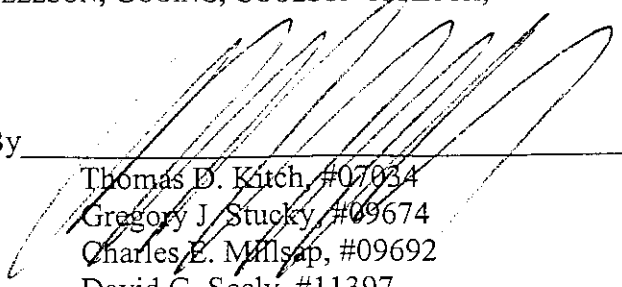
Since the Defendant engages in a uniform practice of allocating a prorata share of expenses to all of its royalty owners on the basis of volumes of gas produced from each well during each accounting period, it seems clear to this Court the Plaintiffs are presenting a common claim on behalf of all of the members of its proposed class and to which the Defendant is mounting a common defense that its expenses are proper deductions.

This Court should forthwith grant plaintiffs' motion for class certification.

Respectfully submitted,

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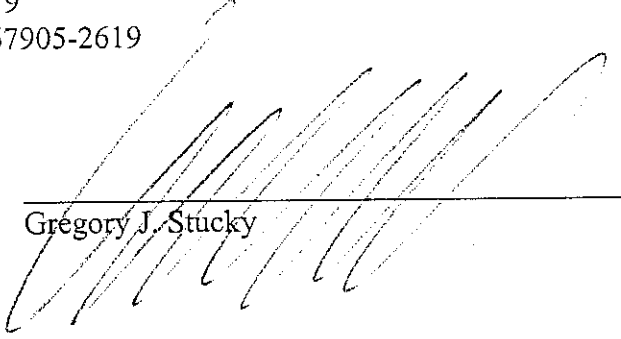
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2001, I served a copy of the foregoing Plaintiffs' Reply in Support of their Plaintiffs' Reply to Defendant's Response to Plaintiffs' Supplemental Memorandum in Support of Motion for Class Certification by mailing same, postage prepaid and properly addressed to:

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Gregory J. Stucky

HOUSE BILL No. 2258

By Committee on Federal and State Affairs

2-1

AN ACT concerning civil procedure; relating to class actions; amending K.S.A. 2000 Supp. 60-223 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) If a class action has been certified pursuant to K.S.A. 60-223, and amendments thereto, the judge, on the judge's own motion, on motion of a party or on motion of any person, may allow representation of the class to be bid upon by any attorney licensed to practice law in the state of Kansas or law firm. When reviewing the bids, the judge shall consider demonstrated competence and qualifications, including the attorney or law firm's experience with similar litigation, expertise generally and size, if firm size is a relevant factor with respect to the proposed class action, and such other factors as the judge deems necessary. Further, the judge shall take into account the estimated value of the services to be rendered and the scope and complexity thereof.

(b) Nothing in this section shall require a judge to open the bidding process for representation of the class.

(c) If an attorney or firm is selected to represent the class who did not originally file the action, such original attorney or firm shall receive reasonable attorney fees for work product completed prior to the representation of the class by the selected attorney or firm. Such reasonable fees shall be set by the judge.

(d) Out of state law firms may bid to represent the class provided such firm has an attorney licensed to practice law in the state of Kansas as counsel.

(e) The supreme court of this state shall adopt rules to govern the open and competitive bidding process established pursuant to this section.

Sec. 2. K.S.A. 2000 Supp. 60-223 is hereby amended to read as follows: 60-223. (a) *Prerequisites to a class action.* One or more members of a class of residents of the state of Kansas 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, as to which

1 the court or jury could reasonably reach conclusions or findings appli-
2 ble to all class members;

3 (3) the claims or defenses of the representative parties are typical of
4 the claims or defenses of the class; ~~and;~~

5 (4) the representative parties will fairly and adequately protect the
6 interests of the class; *and*

7 (5) *the class is defined so as to permit the identification of class mem-*
8 *bers before any merits adjudication occur.*

9 (b) *Class actions maintainable.* An action may be maintained as a class
10 action if the prerequisites of subdivision (a) are satisfied, and in addition:

11 (1) The prosecution of separate actions by or against individual mem-
12 bers of the class would create a risk of:

13 (A) Inconsistent or varying adjudications with respect to individual
14 members of the class which would establish incompatible standards of
15 conduct for the party opposing the class; or

16 (B) adjudications with respect to individual members of the class
17 which would as a practical matter be dispositive of the interests of the
18 other members not parties to the adjudications or substantially impair or
19 impede their ability to protect their interests; or

20 (2) *the party seeking to maintain the class action does not seek any*
21 *monetary relief and the party opposing the class has acted or refused to*
22 *act on grounds generally applicable to the class, thereby making appro-*
23 *priate final injunctive relief or corresponding declaratory relief with re-*
24 *spect to the class as a whole; or*

25 (3) the court finds:

26 (A) That the questions of law or fact ~~common to the members of the~~
27 ~~class as to which the court or jury reasonably could reach conclusions or~~
28 ~~findings applicable to all class members~~ predominate over any questions
29 affecting only individual members; ~~and;~~

30 (B) *that the evidence likely to be admitted at trial regarding the ele-*
31 *ments of the claims for which certification is sought and of the defenses*
32 *thereto is substantially the same as to all class members; and*

33 (C) that a class action is superior to other available methods for the
34 fair and efficient adjudication of the controversy.

35 (4) the matters pertinent to the findings include:

36 (A) The interest of members of the class in ~~prosecuting or defending~~
37 ~~individually controlling the prosecution or defense of~~ separate actions;

38 (B) the extent, maturity and nature of any litigation concerning the
39 controversy already begun by or against members of the class;

40 (C) ~~the appropriate place for maintaining, and the procedural meas-~~
41 ~~ures which may be needed in conducting, a class action whether it is~~
42 ~~probable that the amount which may be recovered by individual class~~
43 ~~members will be large enough in relation to the expense and effort of~~

1 administering the action to justify maintaining the case as a class action;
2 (D) the desirability or undesirability of concentrating the litigation of
3 claims in the particular forum;
4 (E) the difficulties likely to be encountered in the management of a
5 class action; and

6 (F) the extent to which the allegations at issue are subject to the ju-
7 risdiction of federal or state regulatory agencies.

8 (c) Determination by order whether class action to be maintained;
9 judgment; actions conducted partially as class actions. (1) As soon as prac-
10 ticable after the commencement and before the decision on the merits
11 of an action brought as a class action, the court, after hearing, shall de-
12 termine by order whether it is to be maintained as such. Where necessary
13 for the protection of a party or of absent persons, the court, upon motion
14 or on its own initiative at any time before the decision on the merits of
15 an action brought as a nonclass action, may order that it be maintained
16 as a class action. An order under this subdivision may be conditional, and
17 subsection may be altered or, amended or withdrawn at any time before
18 the decision on the merits.

19 (2) If the court finds that the action should be maintained as a class
20 action, it shall certify the action accordingly on the basis of a written
21 decision setting forth all reasons why the action may be maintained as a
22 class action and describing all evidence in support of the determination.

23 (3) A court shall not certify that an action may be maintained as a
24 class action unless, on the basis of a full record on the relevant issues, the
25 proponents proffer clear and convincing evidence that the action complies
26 with all requirements for such certification. Any doubt as to whether this
27 burden has been met shall be resolved in favor of denying class certifi-
28 cation. The court shall decertify a class action upon any showing that an
29 action has ceased to satisfy the applicable prerequisites for maintaining
30 the case as a class action.

31 (4) There shall be a rebuttable presumption against the maintenance
32 of a class action as to claims for which class members would have to prove
33 knowledge, reliance or causation on an individual basis.

34 (5) The determination that an action may be maintained as a class
35 action shall not relieve any member of the class from the burden of proving
36 all elements of the member's cause of action, including individual injury
37 and the amount of damages.

38 (6) In any class action maintained under subsection (b)(3), the
39 court shall direct to the members of the class the best notice practicable
40 under the circumstances, including individual notice to all members who
41 can be identified through reasonable effort. The notice shall advise each
42 member that: (A) The court will exclude the member from the class if
43 the member so requests by a specified date, (B) include:

1 (A) A general description of the action, including the relief sought,
2 and the names of the representative parties;

3 (B) a statement of the right of a member of the class to be excluded
4 from the action by submitting an election to be excluded, including the
5 manner and time for exercising the election;

6 (C) a description of possible financial consequences for the class;

7 (D) a general description of any counterclaim or notice of intent to
8 assert a counterclaim by or against members of the class, including the
9 relief sought;

10 (E) a statement that the judgment, whether favorable or not, will
11 include all members who do not request exclusion, and (G) bind members
12 of the class who are not excluded from the action;

13 (F) a statement that any member who does not request exclusion, if
14 the member desires, may enter an appearance through of the class may
15 intervene in the action and designate counsel;

16 (G) the address of counsel to whom members of the proposed class
17 may direct inquiries; and

18 (H) any other information that the court deems appropriate.

19 (7) The plaintiff shall bear the expense of the notification required by
20 paragraph (6). The court may require other parties to the litigation to
21 cooperate in securing the names and addresses of the persons within the
22 class for the purpose of providing individual notice, but any costs incurred
23 by the party in providing such cooperation shall be paid initially by the
24 party claiming the class action. Upon termination of the action, the court
25 may allow as taxable costs all or part of the expenses incurred by the
26 prevailing party.

27 ~~(8)~~ (8) The judgment in an action maintained as a class action under
28 subsection (b)(1) or (b)(2), whether or not favorable to the class, shall
29 include and describe those whom the court finds to be members of the
30 class. The judgment in an action maintained as a class action under sub-
31 section (b)(3), whether or not favorable to the class, shall include and
32 specify or describe those to whom the notice provided in subsection (c)(2)
33 was directed, and who have not requested exclusion, and whom the court
34 finds to be members of the class.

35 ~~(9)~~ (9) When appropriate ~~(A) an action may be brought or maintained~~
36 ~~as a class action with respect to particular issues such as the issue of~~
37 ~~liability, or (B), a class may be divided into subclasses and each subclass~~
38 ~~treated as a class, and the provisions of this section shall then be construed~~
39 ~~and applied accordingly.~~

40 (d) *Orders in conduct of actions.* In the conduct of actions to which
41 this section applies, the court may make appropriate orders:

42 (1) ~~Settling~~ Determining the course of proceedings or prescribing
43 measures to prevent undue repetition or complication in the presentation

1 of evidence or argument;

2 (2) requiring, for the protection of the members of the class or oth-
3 erwise for the fair conduct of the action, that notice be given in such
4 manner as the court may direct to some or all of the members of any step
5 in the action, or of the proposed ~~extent~~ entry of the judgment, or of the
6 opportunity of members to signify whether they consider the represen-
7 tation fair and adequate, to intervene and present claims or defenses, or
8 otherwise to come into the action;

9 (3) imposing conditions on the representative parties or on
10 intervenors;

11 (4) requiring that the pleadings be amended to eliminate therefrom
12 allegations as to representation of absent persons, ~~or to include such al-~~
13 ~~legations, and that the action in either case proceed accordingly. The~~
14 ~~orders may be combined with an order under K.S.A. 60-216 and amend-~~
15 ~~ments thereto, and may be altered or amended as may be desirable from~~
16 ~~time to time; and~~

17 (5) *dealing with similar procedural matters.*

18 (e) *Dismissal or compromise.* (1) A class action shall not be dismissed
19 or compromised without the approval of the court, ~~and~~ Notice of the
20 proposed dismissal or compromise shall be given to all members of the
21 class in such manner as the court directs.

22 (2) *Before approving the dismissal or a compromise of an action that*
23 *the court has determined may be maintained as a class action, the court*
24 *shall hold a hearing to determine whether the terms of the proposed dis-*
25 *missal or compromise are fair, reasonable and adequate for the class. At*
26 *such hearing, all parties to the action, including members of the class,*
27 *shall be permitted an opportunity to be heard as the court may direct.*

28 (f) *Representative parties and intervenors are subject to discovery in*
29 *the same manner as parties in other civil actions. Other class members*
30 *are subject to discovery in the same manner as persons who are not par-*
31 *ties, but may be required by the court to submit to discovery procedures*
32 *applicable to the representative parties and intervenors.*

33 (g) *The courts of appeals shall hear appeals from orders of district*
34 *courts granting or denying class action certification under this section if*
35 *a notice of appeal is filed within 10 days after entry of the order.*

36 (h) *This section shall be known and may be cited as the class action*
37 *improvement act.*

38 New Sec. 3. If any provision of this act or the application thereof to
39 any person or circumstance is held invalid, the invalidity does not affect
40 other provisions or applications of the act which can be given effect with-
41 out the invalid provision or application, and to this end the provisions of
42 this act are severable.

43 Sec. 4. K.S.A. 2000 Supp. 60-223 is hereby repealed.

1 Sec. 5. This act shall take effect and be in force from and after its
2 publication in the statute book.
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