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CLERK OF THE GRANT COUNTY DISTRICT COURT
CASE NUMBER: 2016-CV-000039

IN THE DISTRICT COURT OF GRANT COUNTY, KANSAS

COOPER CLARK FOUNDATION and PHILLIP FINK, on behalf of themselves and all others similarly situated,	Case No. 2016-CV-39 **LEAD CASE**
Plaintiffs, vs. Oxy USA Inc., Defendant.	**Consolidated with:** Case No. 2016-CV-17 (Haskell County) and Case No. 2016-CV-13 (Morton County) and Case No. 2017-CV-3 (Grant County)

(Pursuant to Chapter 60)

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Class Representatives Cooper Clark Foundation and Phillip Fink, on behalf of themselves and the Settlement Class, move the Court for an Order granting final approval of the proposed class action Settlement as fair, adequate, and reasonable and approving the Plan of Allocation and Distribution.[1] With no objections filed to date and with only two of the more than 2,000 class members electing to opt-out as of this filing, Class Representatives submit that the Settlement is fair, reasonable, and adequate and should be finally approved.

BACKGROUND

In the interest of brevity, Class Representatives will not again recite the entire background of this case. Rather, Class Representatives refer the Court to the Motion for Preliminary Approval, the Joint Declaration of Class Counsel ("Counsel Decl.") attached as **Exhibit 1**, the pleadings on

[1] Capitalized terms not otherwise defined shall have the meaning ascribed to them in the Settlement Agreement (attached as Exhibit 1 to Plaintiffs' Motion for Preliminary Approval).

file, and any other matters of which the Court may take judicial notice, all of which are incorporated as if fully set out in this memorandum.

On September 29, 2021, the Court entered its order preliminarily approving the Settlement, certifying the Settlement Class, approving the form and manner of notice, and setting a date of December 8, 2021, for the Settlement Fairness Hearing. Since preliminary approval, Notice of the Settlement was mailed, by first-class mail, to the Settlement Class members between October 12, 2021, to the present. **Exhibit 3**, Declaration of Settlement Administrator ("JND Decl.") at ¶¶ 7–9. And Notice was published on October 19, 2021, in *The Garden City Telegram* and the *Liberal Leader & Times*. *Id.* at ¶ 10.

The facts regarding certification haven't changed since the Court entered the Preliminary Approval Order—class certification remains proper. The Plan of Allocation and Distribution was described in the Notice sent to the Settlement Class members, along with the other material terms of the Settlement Agreement. *See* **Ex. 3**, JND Decl. at Ex. A. Consistent with the Plan of Allocation and Distribution, the Class Counsel has formulated the proposed distributions to each member of the Settlement Class. **Exhibit 2**, Declaration Regarding Summary Final Distribution Report ("Distribution Decl."), at ¶ 4; *id.* at Ex. 1, Summary Final Distribution Report.

Following mailing and publication of the Notices, members of the Settlement Class had five (5) weeks to request exclusion from the Settlement or file an objection. Only two requests for exclusion and zero objections have been received. Ex. 3, JND Decl. at ¶¶ 17–18. The small number of opt-outs from and no objections to the Settlement support the conclusion that the Settlement is fair, adequate, and reasonable, and in the best interests of the Settlement Class such that final approval should be granted.

ARGUMENT & AUTHORITY

The procedure for reviewing a proposed class action settlement is a well-established two-step process. First, the Court conducts a preliminary analysis to determine if the settlement should be preliminarily approved such that the class should be notified of the pendency of a proposed settlement. Manual for Complex Litigation § 21.632 (4th ed. 2004). Second, the class is notified and provided an opportunity to be heard at a fairness hearing before the settlement is finally approved. Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.25, at 38 (4th ed. 2002). The Court already carried out the first step with its Preliminary Approval Order, and notice was effectuated pursuant to the terms of the Settlement Agreement and in the form and manner approved by the Court. See Ex. 3, JND Decl. at ¶¶ 4–14. As to the final step, courts consider four factors when deciding whether to finally approve a class action settlement:

a. Whether the proposed settlement was fairly and honestly negotiated;
b. Whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
c. Whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
d. Whether, in the parties' judgment, the settlement is fair and reasonable.

See Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002); *Coulter v. Anadarko Petroleum Corp*., 296 Kan. 336, 358-59, 292 P.3d 289, 303-04 (2013) (applying federal factors to determine whether settlement was fair, reasonable, and adequate).

The Court has broad discretion in deciding whether to grant approval of a class action settlement. *Childs v. Unified Life Ins. Co.*, 10-CV-23-PJC, 2011 WL 6016486, at *10 (N.D. Okla. Dec. 2, 2011). Ultimately, the Court must determine whether it believes the settlement is "fair, reasonable and adequate." *Coulter*, 296 Kan. at 358, 292 P.3d at 303 (citing K.S.A. 60-233(e)(2)).

A. The Settlement is Fair, Reasonable, and Adequate.

Each of the four factors identified above weighs in favor of the Court approving the Settlement as fair, reasonable, and adequate:

1. The Settlement is the product of extensive arm's-length negotiations between experienced counsel.

The fact that the Settlement was fairly and honestly negotiated by qualified, experienced counsel supports final approval. *See Reed v. GM Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gain-said."). The fairness of the negotiation process is to be examined with reference to the experience of counsel, the vigor with which the case was prosecuted, and any coercion or collusion that may have affected the negotiations. *Childs*, 2011 WL 6016486, at *12.

Here, the Settlement is the product of extensive arm's-length negotiations between the Parties' experienced counsel after years of hotly contested litigation. *See* **Ex. 1**, Counsel Decl. at ¶¶ 10–16, 38. Class Counsel has unique experience with oil-and-gas class actions and has obtained significant settlements in such actions in state and federal courts in Kansas and other states. *See id.* at ¶¶ 1–2. Class Counsel's experience positioned them well to comprehensively examine the massive amount of information and data produced in this litigation, enabling the Parties to make informed decisions about the strengths and weaknesses of their respective cases. *See id.* at ¶¶ 12; *Childs*, 2011 WL 6016486, at *12. These facts demonstrate that the Settlement resulted from serious, informed, and non-collusive negotiations between skilled attorneys. The first factor supports final approval.

2. Serious questions of law and fact exist, placing the ultimate outcome in doubt.

The existence of serious questions of law and fact place the ultimate outcome of this Litigation in doubt, and such doubt "tips the balance in favor of settlement because settlement

creates a certainty of some recovery and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely v. Nat'l Mobile Health Care, LLC*, No. 07-CV-933-M, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008) (internal citations omitted).

As evidenced by the fact that the Litigation has already spawned two appeals, there are numerous factual and legal issues about which the Parties disagree—issues that would ultimately be decided by a court or jury. Despite Class Representatives' optimism regarding their chances at trial, the Parties vehemently disagree on numerous factual and legal issues, and Defendant denies any wrongdoing giving rise under Kansas law concerning its royalty payment practices. **Ex. 1**, Counsel Decl. at ¶ 34. Settlement renders the resolution of these issues unnecessary and provides a guaranteed recovery in the face of uncertainty. Because this Litigation presents serious questions of law and fact that place the ultimate outcome in doubt, the second factor supports final approval.

3. The value of immediate recovery outweighs the mere possibility of future relief after long and expensive litigation.

The complexity, uncertainty, expense, and likely duration of further litigation and appeals also support approval of the Settlement. The immediate value of the $7,500,000 cash recovery represents a significant portion of Class Counsel's overall damages model (and even exceeds some models) and outweighs the uncertainty, additional expense, and likely duration of further litigation. *See* **Ex. 1**, Counsel Decl. at ¶¶ 34–35. The Settlement Class is "better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *McNeely*, 2008 WL 4816510, at *13. The Settlement represents a meaningful recovery for the Settlement Class without the risk or additional expense of further litigation. When the risks, uncertainty, and expense of continuing the Litigation are compared to the immediate benefits of the Settlement, it is clear the Settlement is fair,

reasonable, and adequate, and that it is in the best interests of the Settlement Class. The third factor supports final approval.

4. The Parties agree that the Settlement is fair and reasonable.

The fact that Class Representatives and Defendant believe the Settlement is fair and reasonable supports final approval. Class Counsel and Class Representatives only agreed to settle the Litigation after considering the substantial benefits the Settlement Class will receive, the risks and uncertainties of continued litigation, and the desirability of proceeding under the terms of the Settlement Agreement.

Class Counsel's judgment as to the fairness of the Settlement also supports final approval. "Counsels' judgment as to the fairness of the [settlement] agreement is entitled to considerable weight." Childs, 2011 WL 6016486, at *14 (citation omitted). Class Counsel believes the terms and conditions of the Settlement are fair, reasonable, and adequate to the Settlement Class, and the Settlement is in the Settlement Class Members' best interests. **Ex. 1**, Counsel Decl. at ¶ 22. This last factor supports the Court's final approval. Indeed, all four factors support final approval of the Settlement.

B. The Notice Method Used was the Best Practicable Under the Circumstances and Should be Approved.

The Court should approve the Notice given to the Settlement Class. Notice of an order certifying a class under K.S.A. 60-223(b)(3) must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." K.S.A. 60-223(c)(2)(B). Further, in the context of a class settlement, the court is instructed to "direct notice in a reasonable manner to all class members who would be bound by the proposal." K.S.A. 60-233(e)(1). In terms of due process, a settlement notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

of the action and afford them an opportunity to present their objections." *Fager v. CenturyLink Comm'ns, LLC*, 854 F.3d 1167, 1171 (10th Cir. 2016) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). "The Supreme Court has consistently endorsed notice by first-class mail", holding "a fully descriptive notice … sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process." *Id.* at 1173.

In its Preliminary Approval Order, the Court preliminarily approved the form and manner of the Notice disseminated by the Settlement Administrator, finding the Notice and Publication Notice are "the best notice practicable under the circumstances, constitute due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfy the requirements of applicable laws, including due process and Kansas Rules of Civil Procedure (K.S.A. 60-2233)." Preliminary Approval Order at ¶ 5. The Court directed dissemination of the Notice in accordance with the Settlement Agreement and the Preliminary Approval Order. *Id.*

The Notice was mailed to the Settlement Class members and further diligence was conducted to ascertain proper mailing addresses. **Ex. 3**, JND Decl. at ¶¶ 7–9. Ultimately, the Notice mailing campaign achieved a 97% delivery rate. *Id.* at ¶ 9. In addition, the Court-approved Publication Notice was published on October 19, 2021, in two newspapers of local circulation, *The Garden City Telegram* and the *Liberal Leader & Times*, as directed in the Preliminary Approval Order. *Id.* at ¶ 10. The Notice informed Settlement Class members about the Litigation, the Settlement, and the facts needed to make informed decisions about their rights. Also, the Notice, along with other documents germane to the Settlement, were posted on the website created for and dedicated to this Litigation, www.cooper-oxy.com, beginning on October 11, 2021. *Id.* at ¶ 11. This website, which contains addition information regarding the Settlement, continues to be updated and maintained by the Settlement Administrator.

In sum, the form, manner, and content of the Notice campaign were the best practicable notice, and their contents were reasonably calculated to, and did, apprise the Settlement Class members of the pendency and nature of the Settlement and afford them an opportunity to opt out or object. Therefore, the Court should grant final approval of the Notice given to the Settlement Class.

C. The Plan of Allocation and Distribution Should be Approved.

The Court should also approve the proposed Plan of Allocation and Distribution. Like the settlement itself, a plan of allocation must also be approved as fair and reasonable. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d at 1262 (citing *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 462). Where, as here, a plan of allocation is formulated by competent and experienced class counsel, the plan need only have a reasonable, rational basis. *Id.* As a general rule, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable. *Id.*

Class Counsel have formulated a plan by which Settlement Class members will be reimbursed proportionately in relation to their individual claim for royalty underpayment. Importantly, this is not a claims-made settlement, nor is it a settlement where a class members must take further action to participate. Instead, every Settlement Class member who did not opt out of the Settlement will receive a check for their allocation of the Net Common Fund.

Specifically, as described in the Initial Plan of Allocation and Distribution (attached to the Settlement Agreement as Exhibit E) the Net Common Fund will be allocated to individual Settlement Class members based on their interest in the production from each well compared to the total production volume. Pursuant to the Settlement Agreement, the Plan of Allocation and Distribution assumes a reduction for Class Counsel Fees, Administration Expenses, Litigation

Expenses, and case contribution awards to the Class Representatives, which amounts will ultimately be determined by the Court at the Settlement Fairness Hearing. Class Counsel, with the assistance of the Settlement Class's expert and the Settlement Administrator, has prepared a Summary Final Distribution Report which shows the proposed distributions to each member of the Settlement Class if the Court awards the requested Class Counsel Fees, Administration Expenses, Litigation Expenses, and case contribution awards to the Class Representatives. **Ex. 2**, Distribution Decl. at ¶¶ 1–4; *id.* at Ex. 1, Summary Final Distribution Report. The Court should approve the methodology set forth in the Plan of Allocation and Distribution and implemented in the Summary Final Distribution Report.

Upon approval of the Settlement, and in accordance with the Plan of Allocation and Distribution, a check for each Settlement Class member's allocation will be mailed to each Settlement Class member's last known mailing address. Returned or stale-dated checks will be reissued as necessary to ensure delivery to the appropriate Settlement Class members using commercially reasonable methods.

Because the proposed Plan of Allocation and Distribution was formulated by competent and experienced counsel and is based on the type and extent of each Settlement Class member's particular loss, the Court should approve it as fair, reasonable, and adequate.

CONCLUSION

The law favors settlement of disputes. *Bright v. LSI Corp.,* 254 Kan. 853, 869 P.2d 686, Syl., 869 Kan. 686 (1994). "Therefore, once the court has given preliminary approval, an agreement is presumptively reasonable, and an individual who objects has a heavy burden of demonstrating that the settlement is unreasonable." *Freebird, Inc. v. Cimarex Energy Co.*, 46 Kan.

App. 2d 631, 637, 264 P.3d 500, 506 (2011) (internal quotation omitted). Here, there are no objections to the Settlement.

For the foregoing reasons, Class Representatives respectfully request that the Court grant final approval of the Settlement.

Respectfully submitted,

/s/ *Rex A. Sharp*

Rex A. Sharp KS#12350
Scott B. Goodger KS #26480
SHARP LAW, LLP
4820 W. 75th Street
Prairie Village, KS 66208
(913) 901-0505
(913) 901-0419 fax
rsharp@midwest-law.com
sgoodger@midwest-law.com

Attorneys for Plaintiffs and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December 2021, a true and correct copy of the above document was filed with the court's electronic filing system, which automatically serves all counsel of record.

/s/ *Rex A. Sharp*