

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

- (1) Hitch Enterprises, Inc.;)
- (2) David D. Duncan; and)
- (3) Sagacity Inc., on behalf of themselves)
and all others similarly situated,)

Plaintiffs,)

vs.)

Civil Action No. CIV-11-13-W

- (1) Cimarex Energy Co.;)
- (2) Key Production Company, Inc.;)
- (3) Magnum Hunter Production, Inc.;)
- (4) Prize Energy Resources, L.P.; and)
- (5) Gruy Petroleum Management)
Company (n/k/a Cimarex Energy)
Company of Colorado),)

Defendants.)

DECLARATION OF LAYN R. PHILLIPS

I, LAYN R. PHILLIPS, declare as follows:

1. I was selected by the parties to mediate the above-entitled action and did so as an independent mediator. The mediation resulted in a settlement.

2. While the mediation process is confidential, the parties have authorized me to inform the Court of the procedural and substantive mediation matters set forth below in this declaration to be used in support of Plaintiffs’ Motion for Preliminary Approval and for the anticipated motion for Final Approval of Class Settlement.

3. My statements and those of the parties during the mediation are subject to a confidentiality agreement, and I do not intend to waive that agreement. I make this Declaration based on personal knowledge and am competent to so testify.

QUALIFICATIONS

4. I am a former United States Attorney and served as a United States District Judge for the Western District of Oklahoma for years, presiding over more than 140 federal trials. I am currently a litigation partner in the Newport Beach office of Irell & Manella LLP, where I have practiced complex civil litigation, internal investigations, and alternative dispute resolution since 1991.

5. For over 20 years, I have successfully mediated high-stakes civil disputes for Fortune 500 companies nationwide and am considered one of the leading mediators in the resolution of multi-party matters, some involving as many as 150 parties. I have mediated hundreds of disputes referred by private parties and courts, and have been appointed a Special Master by various federal courts in complex civil proceedings. I serve as a Fellow in the American College of Trial Lawyers. In addition, I have been nationally recognized as a mediator by the Center for Public Resources Institute for Dispute Resolution (CPR), serving on CPR's National Panel of Distinguished Neutrals. I am also a Diplomat Member of the California Academy of Distinguished Neutrals.

6. I have successfully mediated a number of royalty owner class actions involving the alleged failure to pay royalty on gas conditioning service costs, such as gathering fees, gathering fuel, lost and unaccounted for gas, compression, dehydration, treatment, processing fees, processing plant fuel, raw make NGL transportation and fractionation, and other charges, as well as the alleged failure to pay or pay completely for natural gas, NGLs, Helium, Drip Condensate, Nitrogen, and other products from oil and gas wells, such as what was involved in this case.

7. I am also quite familiar with Cimarex Energy Co. and its operations, having successfully mediated a prior dispute between Kansas royalty owners and Cimarex.

8. A true and correct copy of my curriculum vitae is attached hereto as Exhibit A.

THE SETTLEMENT PROCESS WAS THOROUGH, FAIR, AND ARM'S LENGTH

9. Before the mediation, the parties provided to me extensive legal briefing of the class certification and merits issues, supported by substantial factual, expert, and backup data. The parties exchanged those mediation briefs, and responded to one another's mediation brief to clarify and refine the arguments. Cimarex provided additional data to Plaintiffs and Plaintiffs' experts to analyze, which was done before the mediation. Finally, on substantive matters, I submitted lengthy and detailed questions to both sides to expose their strengths and weaknesses, as well as to clarify where substantial disputes on class certification, liability, damages, and statute of limitations still existed. Both parties responded to those questions at or before attending the mediation.

10. It was apparent to me from the submissions and presentations made by Class Counsel before and at the mediation that Class Counsel performed a thorough examination of the factual discovery and, with the aid of experts, analyzed it to determine appropriate case valuations. Legal research and analysis of Oklahoma law, federal law, and the law of other states was provided by Class Counsel, who was current and well informed on the law. It was also apparent to me that considerable work was done by Class Counsel to prepare the case for mediation. It appeared that the Defendants were cooperative in producing massive confidential information to enable Class Counsel to assess the case.

11. On December 11, 2012, the parties participated in a mediation before me in my office in Newport Beach, California. Plaintiffs attended in-person with its putative class representatives Chris Hitch, President and CEO of Hitch Enterprises, Inc. and Dan Little, President of Sagacity, Inc., along with outside counsel Rex A. Sharp and Jon K. Parsley, and attending by telephone was a well-respected oil and gas engineering and accounting expert with whom I have dealt with many times, Dan Reineke, and the other putative class representative, David Duncan. Defendants attended through their Executive Vice President, Stephen P. Bell, along with Cimarex's Chief Litigation Counsel, Adam Vela, and outside counsel, Nathan Davis.

12. After lengthy mediation discussions with the parties both together and separate, the parties reached an agreement in principle to settle this action, and reduced the salient terms to writing, signed by the parties before they left my office.

13. After presiding over the mediation process in this case, I am convinced that the parties' settlement is the product of vigorous and independent advocacy and arm's-length negotiation conducted in good faith. There was no collusion between the parties.

THE SETTLEMENT AMOUNT OF \$16.4 MILLION WAS FAIR, REASONABLE AND ADEQUATE

14. The parties exchanged massive amounts of data, much of it digital, for the experts to analyze. Doing so resolved many factual disputes between the parties. However, considerable differences continued to exist between the parties on liability, damages, and statute of limitations.

15. The liability, and class certification itself, was complicated by a split of opinion among my former colleagues on the United States District Court for the Western District of Oklahoma. The parties did not believe that the Honorable Lee R. West had decided the class certification issue within a royalty underpayment case, but recognized that some had denied class certification in similar cases resulting in no recovery for the putative class. The damage calculation was broken down by the parties as within the five year statute of limitations and outside that range. Plaintiffs estimated damages at approximately \$30 million within the statute of limitations; whereas, Defendants estimated only \$24.9 million. The parties estimated another \$6.9 - \$9 million in damages outside the statute of limitations. The parties disputed the strength of the statute of limitations tolling law and the strength of the tort claims that would have supported a discovery rule issue.

16. After the usual give and take of the parties during the mediation process, the parties agreed to settle the case for \$16.4 million.

17. I developed a complete understanding of the full range of the dispute, the respective positions of the parties, and the relative strengths and weaknesses of those positions, as well as the risks, rewards, and costs of continued litigation and inevitable appeal.

18. Based on my knowledge of the issues in dispute, my review of the substantial factual and legal materials presented before and at the mediation, the rigor of the negotiations, the relative strengths and weaknesses of the parties' positions, and the benefits achieved in the settlement, I believe that the terms of the \$16.4 million settlement are fair, adequate, reasonable and in the best interests of the Settlement Class.

19. It is apparent from the submissions and presentations made by Class Counsel before and during the mediation session, as well as from my numerous discussions with them, that Class Counsel performed a thorough examination of the documents and data produced in this litigation. It is also my opinion that substantial work and effort was performed by Class Counsel in preparing their case for mediation and in presenting their claims in such a way to produce a valuable settlement for the Class. Based upon my experience as a former federal judge in the Western District of Oklahoma and as a mediator, it is my opinion that a request by, and award to, Class Counsel for an attorneys' fee in the range of 33 $\frac{1}{3}$ -40% of the \$16.4 million settlement fund along with the value attributable to claims administration and for reimbursement of actual litigation expenses would be reasonable and appropriate given the complexity of this matter and the significant relief recovered by Class Counsel. It is also my opinion that a fee award in that range is in line with the amounts approved by courts in the Western District of Oklahoma and the Tenth Circuit as being fair and reasonable in contingent fee class action litigation such as this. Finally, I understand that Class Counsel intends to only request a 33 $\frac{1}{3}$ % fee, which is imminently reasonable under the circumstances.

On December 17, 2012, I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.



LAYN R. PHILLIPS
Former United States District Court Judge

Layn R. Phillips is a partner with the Los Angeles law firm of Irell & Manella. He is a former United States District Judge and United States Attorney, and founder of the Irell and Manella Alternative Dispute Resolution Center.

Judge Phillips was born and raised in Oklahoma. He attended undergraduate school and law school at the University of Tulsa in Tulsa, Oklahoma and Georgetown University Law Center in Washington D.C. In 1977 he joined the Federal Trade Commission's Honors Program and was assigned to the Bureau of Competition in Washington, D.C., where for the next three years he investigated and litigated civil antitrust cases involving mergers and monopolization claims. In 1980, he joined the United States Attorney's office in Los Angeles as an Assistant United States Attorney, serving as a federal prosecutor in the Central District of California until 1984. During the Reagan Administration, he returned to Oklahoma where he was appointed by the President to serve as the United States Attorney in Tulsa, Oklahoma.

In 1986, he was nominated by the President to serve as a United States District Judge for the Western District of Oklahoma in Oklahoma City. During his tenure on the bench he presided over approximately 150 federal civil and criminal trials in various districts within the Tenth Circuit. In 1990, Judge Phillips was also designated by the Chief Justice of the United States Supreme Court to preside over cases in the Fifth Circuit in the Northern District of Texas, Dallas Division.

Judge Phillips also sat by designation on the United States Court of Appeals for the Tenth Circuit in Denver, Colorado, where he participated in numerous panel decisions and published several opinions in the field of civil rights, business litigation, environmental law, and summary judgment practice. In July 1991, he resigned from the federal bench and joined Irell & Manella as a litigation partner.

As an advocate, Judge Phillips has more than 50 trials to his credit. These trials span several substantive areas of the law, including allegations of unfair competition, environmental contamination, securities fraud, public corruption, money laundering, bank fraud, mail fraud, merger violations, professional malpractice, tax evasion, narcotics trafficking prosecutions, and transgressions of the RICO and Continuing Criminal Enterprise statutes. As a result of his trial work, he has been elected into, and now serves, as a Fellow in the American College of Trial Lawyers.

While serving as a federal judge, he also gained extensive experience in the realm of settlement negotiations and mediation, presiding over dozens of settlement conferences in complex business disputes and class actions. Judge Phillips has mediated hundreds of disputes referred by private parties and courts, and has been appointed a Special Master by numerous federal courts in complex civil proceedings. He has also been designated as special counsel to various boards and corporations, conducting internal investigations on sensitive issues. He has been nationally recognized as a mediator by the International Institute for Conflict Prevention and Resolution, serving on its National Panel of Distinguished Neutrals.

Judge Phillips has also been active in a variety of bar association activities, as well as continuing legal education presentations. During 2001, he served as the President of the Federal Bar Association in Orange County, California, and served on the Orange County Bar Association Board of Directors and Judiciary Committee. Judge Phillips has also served as the President of two American Inns of Court, and maintains the status of Master Emeritus in three separate Inns. He is a member of the California, Oklahoma, Texas, and District of Columbia bar associations.

Judge Phillips is a Fellow of the American Bar Foundation. In 2004-2005 he served as the Co-Chair of the Central District of California Lawyer Representatives to the Ninth Circuit Judicial Conference. In 2005 Judge Phillips was selected by the Central District of California federal judiciary to serve as the Chairman of the Magistrate Judge Merit Selection Panel, a position he still holds. He was also a 2006 Co-Chair for the ABA's Litigation Section's Annual Meeting in Los Angeles.

As an undergraduate student, Judge Phillips graduated with highest honors as an economics major, receiving his college's Wall Street Journal Award for the Outstanding Economics graduate. He attended the University of Tulsa on a NCAA tennis scholarship, serving as the team's captain and winning the Missouri Valley Conference Championship at #1 singles. He also received an NCAA post-graduate scholarship, and was inducted into the University of Tulsa Athletic Hall of Fame. Judge Phillips also graduated from law school with highest honors, finishing second in his class at the University of Tulsa. He then pursued an additional two years of graduate law studies at Georgetown University to complement his work in the field of economic regulation of industry.

For his years of commitment to public service, in 1989 he was named as one of the 10 Outstanding Young Americans by the U.S. Junior Chamber of Commerce. In 1991, he resigned from the federal bench and joined Irell & Manella, where he specializes in complex civil litigation, internal investigations, and alternative dispute resolution. He has the dual honor of being named by *LawDragon Magazine* in 2006 as one of the "Leading Judges in America" and as one of the "Leading Litigation Attorneys in America." *The Los Angeles Daily Journal* named Mr. Phillips as one of California's 100 most influential lawyers in 2008. In addition, Mr. Phillips was also again selected for inclusion in *The Best Lawyers in America* for 2009.

Judge Phillips lives in Orange County, California with his wife, Kathryn. He has three children, Amanda, Parker, and Graham.