EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JOHN CECIL, on behalf of himself and all others similarly situated, Plaintiff, vs. BP AMERICA PRODUCTION COMPANY (f/k/a Amoco Production Company) (including BP Amoco Corporation, ARCO, BP Exploration, Inc., BP Corporation North America, Inc., and BP Energy Company), Defendant.	Civil Action No. 16-CV-00410-KEW

DECLARATION OF STEVEN S. GENSLER IN SUPPORT OF THE SETTLEMENT AGREEMENT, NOTICE OF THE PROPOSED SETTLEMENT, AND AWARD OF ATTORNEY'S FEES

I, Steven S. Gensler, declare as follows:

1. I am the Gene and Elaine Edwards Family Chair at the University of Oklahoma College of Law, where I teach Civil Procedure and related classes. I am the author of a leading treatise on federal procedure, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY (Thomson Reuters), and a wide range of articles on federal practice and procedure. I served as a member of the Advisory Committee on Civil Rules from 2005 to 2011, and currently serve as the Consultant to the U.S. Judicial Conference Committee on Federal-State Jurisdiction.[1] My curriculum vitae is attached as **Exhibit 1**.

2. I have been retained by Plaintiff's Counsel to provide an opinion as to: (1) the fairness, reasonableness, and adequacy of the Settlement Agreement; (2) the adequacy of the

[1] I list these appointments to establish my credentials only, and submit this declaration solely in my personal capacity.

Notice of Proposed Settlement; and (3) the reasonableness of Plaintiff's Counsel's attorney's fee request.

3. In forming these opinions, I have reviewed, among other things: (1) pleadings, filings, and orders in this case; (2) the Settlement Agreement; (3) the Declaration of Daniel T. Reineke valuing the past and future benefits of the Settlement; (4) the Declaration of Brian T. Fitzpatrick in support of the application for attorneys' fees; (5) the Declaration of Steven W. Taylor in Support of the Settlement Agreement and Award of Attorneys' Fees; (6) the Declaration of Mediator Robert G. Gum; (7) the Declaration of Jennifer M. Keough Regarding Notice Administration on behalf of Settlement Administrator JND Legal Administration LLC ("JND Decl."); (8) the Joint Declaration of Plaintiff's Counsel in Support of Class Representative's Motion for Final Approval of Class Action Settlement and Approval of Attorneys' Fees, Litigation Expenses, Case Contribution Award, and the attached declarations of Additional Counsel ("Joint Counsel Decl."), including the Declaration of Daniel S. Smolen on behalf of Smolen Smolen & Roytman; the Declaration of Terry Stowers on Behalf of Burns & Stowers, P.C.; the Declaration of Robert J. Kee on behalf of Trippet, Kee, Trippet & Parsons, PLLC; the Declaration of Terry J. Barker on behalf of Barker Woltz & Lawrence, APPC; the Declaration of Robert N. Barnes, Patranell Britten Lewis and Emily Nash Kitch on behalf of Barnes & Lewis, LLP; the Declaration of Jeffrey J. Angelovich on behalf of Nix Patterson, LLP; the Declaration of Michael E. Burrage on behalf of Whitten Burrage; (9) the Declaration of John Cecil in Support of Plaintiff's Motion for Final Approval of the Class Action Settlement and for Plaintiff's Attorneys' Fees, Litigation Expenses, Case Contribution Award, and Administration, Notice and Distribution Costs; and (10) various declarations on attorneys' fees filed in other cases, including declarations by former judges Layn Phillips and Michael E. Burrage, and Professor Geoffrey Miller.

Summary of Opinions

4. It is my opinion that (a) the Settlement Agreement submitted for approval is fair, reasonable, and adequate; (b) the manner of distribution and form of the Notice of Proposed Settlement is fair and adequate; and (c) the fee award requested in this case—representing an estimated 26.6% of the total value of the settlement—is fair and reasonable compensation for the services provided to the Class Members and the benefits bestowed upon the Class Members by the terms of the settlement.

The Litigation and Settlement

5. Plaintiff John Cecil (herein, "Plaintiff," "Class Representative" or "Cecil") first brought the claims in this Litigation against BP America Production Company ("BP) on September 28, 2016. Cecil alleged that BP secretly underpaid royalties on production of gas and its constituents from the Oklahoma wells at issue. BP did this by taking improper royalty deductions for midstream service costs (both fees and in-kind costs) necessary to put the gas in marketable condition. Cecil asserted claims for breach of lease (express and implied terms), breach of fiduciary duty, fraud, deceit, and constructive fraud. [Doc. 1]. The Complaint sought compensatory and punitive damages, and interest.

6. Three similar class actions against BP had been previously filed, but BP had defeated class certification in all of them:

a. *Gillespie v. Amoco Prod. Co. (now BP)*, No. CIV-96-063-M (E.D. Okla.), before Judge Miles-LaGrange, who denied class certification;

b. *Watts v. Amoco Prod. Co.*, No. C-2001-73 (Okla. Dist. Ct., Pittsburg County), before Judge Steven W. Taylor (later Justice Taylor), who also denied class certification;[2] and

c. *Rees v. BP America Prod. Co*., 211 P.3d 910 (Okla. Civ. App. 2009), in which the Court of Civil Appeals upheld the trial court's ruling that the denial of class certification in *Watts* had preclusive effect and therefore barred certification in that case.

7. BP seemed to be immune from a class action by royalty owners even though a class action provides the only way to obtain a meaningful day in Court for those with small dollar value claims. In *Consul Properties, LLC,* Judge Russell effectively held that *Rees v. BP* could be applied to preclude even an effort at class certification. *Consul Properties, LLC v. Unit Petro. Co*., No. CIV-15-840-R (W.D. Okla. Feb. 2, 2016).

8. But Co-Lead Plaintiff's Counsel realized that *Rees v. BP* rested on law that the United States Supreme Court unanimously overruled in *Smith v. Bayer Corp.,* 54 U.S. 299 (2011), and that plaintiff in *Consul Properties* had not raised this issue to Judge Russell. As a result, Co-Lead Plaintiff's Counsel on behalf of Mr. Cecil filed a state-wide royalty underpayment class action against BP, faced down BP's inevitable motion to dismiss, and won. [Doc. 48]. Later, Co-Lead Plaintiff's Counsel added affiliates of BP as defendants and prevailed on the issue once again. [Docs. 50 & 143].

9. BP's defeat of class certification in the *Gillespie, Watts,* and *Rees* cases spawned two additional cases against BP by royalty owners represented by other class action attorneys:

[2] Notably, former Justice Taylor has submitted a declaration in support of the Settlement Agreement and the requested attorneys' fee award in this case.

a. *Chockley v. BP Am. Prod. Co.,* No. CJ-2002-84 (Okla. Dist. Ct., Beaver County) ("*Chockley v. BP*"), filed in state court before enactment of the Class Action Fairness Act in 2005 and before *Cecil v. BP*, was inactive for about 10 years after Judge Russell decided *Rees v. BP*. Then, in 2017, after Judge White accepted Co-Lead Plaintiff's Counsel's arguments that *Rees v. BP* was wrongly decided and twice denied BP's motions to dismiss based on *Rees* [Docs. 48 & 143], *Chockley* reawakened. Armed with new arguments, Plaintiff Chockley beat BP's argument that *Rees v. BP* was good law both in the district court and later, after this case was settled in principle, the Oklahoma Court of Civil Appeals. The Settlement in this case would also settle the claims brought in *Chockley*, which, by minute entry dated May 8, 2018, has been placed in abeyance pending final approval of the *Cecil* settlement.

b. *Chieftain v. BP Am. Prod. Co.,* No. 16-cv-00444-JH (E.D. Okla.) ("*Chieftain v. BP*"), filed after *Cecil v. BP,* tried to get around *Rees v. BP* by pleading a smaller subset of the *Cecil* case. *Chieftain* sought to recover only for the in-kind fuel deductions taken from royalty owners. But *Chieftain v. BP* was stayed under the first-to-file rule. This Settlement, if finally approved, would also settle the claims in *Chieftain.*

c. The attorneys and plaintiffs in both *Chieftain* and *Chockley* have entered their appearances in this case in support of the Settlement negotiated by Co-Lead Plaintiff's Counsel.

10. Returning to activity in *Cecil v. BP* after denial of the motions to dismiss, Co-Lead Plaintiff's Counsel embarked on substantial discovery over this long Class Period. BP objected, providing only some of the leases involved in the case. Co-Lead Plaintiff's Counsel moved to compel on two sets of requests for production, essentially winning every issue raised. [Docs. 68-

69]. As a result, BP was ordered to produce a massive number of documents, including many documents produced in royalty owner litigation against BP in other states, including *Patterson v. BP Am. Prod. Co.,* 263 P.3d 103, 106 (Colo. 2011) (discussing BP's appointment of a committee in 1990 to review BP's royalty practices and its unanimous recommendation "that BP disclose the fact that it was deducting gathering, compression, transportation, and other marketing costs from [p]laintiff's monthly royalty payments...BP's management ultimately rejected the proposal and refused to disclose BP's use of the netback methodology.")

11. With orders compelling production of documents from litigation in other states as well as a massive number of documents for this litigation, the largest law firm in Oklahoma, McAfee & Taft, sought reinforcements. BP hired Squire, Patton, Boggs, LLP to manage the document production, which extended over months, and to assist in the litigation.

12. Co-Lead Plaintiff's Counsel investigated, analyzed, and litigated the claims against BP for years. They have reviewed over 5 million pages of documents, have deposed BP's corporate designees, and have reviewed every one of the 31,319 leases produced by BP, and hired landmen to get any leases that BP did have because it had sold the wells and transferred the leases related to those wells or plugged the wells during the Class Period. Joint Counsel Decl. at ¶ 24. In pursuing and evaluating the Class' claims, Co-Lead Plaintiff's Counsel also worked extensively with experts on subjects including accounting, marketing, and lease and title analysis. *Id.* at ¶25.

13. As a result of these efforts, Plaintiff moved, and was granted leave, to amend his Complaint to add a claim for violation of the Racketeer Influenced and Corrupt Organization Act (RICO). [Docs. 153, 169 & 180].

14. The Parties entered into ongoing settlement negotiations that spanned several months and included substantial additional informal discovery. The discussions eventually led to

mediation under the supervision of Bob Gum, a very well-known and highly-respected mediator of high-stakes oil and gas complex litigation, including oil-and-gas royalty class action litigation. The first formal mediation session with Bob Gum took place in Oklahoma City on Saturday, January 20, 2018. The Parties also participated in pre-mediation telephone conferences with Mr. Gum and submitted extensive mediation briefs outlining their respective positions on class certification, liability, and damages. The first session lasted a full day but did not result in settlement. At Mediator Gum's urging, the Parties continued discussing the possibility of settlement and agreed to try mediation with Bob Gum again. The second session, which took place on February 12, 2018. It lasted another full day; it too did not result in settlement. But Mediator Gum offered to provide a mediator's proposal to break the logjam. Even that did not work. With the groundwork laid, the Parties continued their settlement negotiations and reached an agreement in principle on or about March 21, 2018, when they notified the Court of their agreement and their plan to document the Settlement. Joint Counsel Decl. at ¶¶37-40; Gum Decl. at ¶ 9.

15. The Settlement Agreement provides the Class Members with several substantial benefits—Past, Present, and Future. First, BP will make a cash payment to Class Members in the amount of $147 million. Second, as a result of this litigation (and the previously filed *Chockley* case), BP changed its royalty payment practices for Class Wells in 2009. Those changes equated to an additional $38 million in royalties from the date of those changes through the end of the Class Period, December 31, 2017 being paid to Class Members. Reineke Decl. on Valuation at ¶6. In addition, BP has committed to adhere to those changes for Class Wells for the next seven (7) years. A conservative estimate of the value of the continued changes in BP's royalty payment practices is an additional $36 million in royalty payments to Class Members. Reineke Decl. on Valuation at ¶7.a.

16. In sum, the total present value conferred on the Class Members by this litigation and the Settlement Agreement it brought about is estimated to be at least $221 million and is believed to be the largest Oklahoma class settlement in royalty owner history.

The Settlement is Fair, Reasonable, and Adequate

17. Under Federal Rule of Civil Procedure 23(e), the court must approve any settlement of a class action. Approval requires the court find that the settlement is "fair, reasonable, and adequate."

18. The Tenth Circuit has identified four factors that must be considered in approving 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) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002).

19. The four-factor test set forth in *Rutter* represents the Tenth Circuit's way of focusing attention on the cues a judge has available to determine whether a proposed compromise is "fair." As the Advisory Committee on Civil Rules explains in the Committee Notes to the proposed amendments to Rule 23 set to take effect later this year, there are two ways for a judge to approach the question of fairness.[3] One way is to examine the terms of the deal. The other way

[3] After a five-year study period, the Advisory Committee on Civil Rules proposed a package of amendments to Rule 23. The package has been approved by the U.S. Judicial Conference, adopted

is to examine the process that led to the deal. *See* **Exhibit 2** (Committee Note to Proposed Amendments to Rule 23, at 23-25).

20. The most important consideration in whether a settlement is fair, reasonable, and adequate is whether the benefits provided by the settlement are commensurate with the present, uncertain value of the claims, considering the cost, delay, and risk of litigating to judgment. *See* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 607 (Thomson Reuters 2018 edition) ("In most cases, the key question is whether the value of the relief provided by the settlement is commensurate with the value of the claims to be released."). Making this type of forecast is not something that can be done "with arithmetic accuracy." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 25). That is why the Advisory Committee couches it in terms of "the likely *range* of possible classwide recoveries and the likelihood of success in obtaining such results." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 24-25).

21. In other words, deciding whether the terms of the deal are fair involves, in part, deciding on a range of what the claims might be worth, based on the apparent strength of the claims and defenses. The settlement posture, of course, adds to the uncertainty and underscores the need to guard against second-guessing whether the class could have held out for more. Defendants do not volunteer information about how high they would go to settle. Of course, neither does the class

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by the U.S. Supreme Court, and forwarded to Congress. The amendments will take effect on December 1, 2018 unless Congress takes contrary action.

The amendment package includes amendments to Rule 23(e), with accompanying Committee Notes. Both the changes and the Committee Notes are consistent with current Tenth Circuit practice. Some of the Committee Notes provide valuable insight into what really matters—and what judges meaningfully and usefully can do—when judges are asked to approve a proposed settlement.

volunteer information about what would be the lowest offer it would accept. To the contrary, both sides have every incentive to conceal that information from the other. In this environment of strategic misinformation, lawyers and clients do the best they can with the information available.

22. On top of forecasting a likely range of claim values, the fairness question also considers the cost and delay of litigating to judgment and the value of certainty. When parties settle, they trade the chance of total victory later for a known and certain result today. Plaintiffs take less than they would hope for; defendants pay more than they would like to. But in the process, they avoid the risk of a worse outcome later. As the Tenth Circuit itself put it in the class-action approval setting, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015).

23. The other lens through which judges can try to assess the fairness of a settlement is to examine the process that led to it. Does it appear to be the product of vigorous advocacy? Did Plaintiff's Counsel take the steps one would expect of a vigorous advocate to gather the information needed to assess the strengths and weaknesses of the claims and defenses, and to gain the leverage needed to press for the best result possible in settlement negotiations? "Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement." *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 23).

24. Because the district court judge overseeing the case has the best vantage point to consider all of the myriad considerations, the determination of whether a proposed settlement is fair, reasonable, and adequate is committed to the discretion of the district court judge. *See Fager v. CenturyLink Communs., LLC*, 854 F.3d 1167, 1174-75 (10th Cir. 2016); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186-87 (10th Cir. 2002).

25. Applying the four factors identified by the Tenth Circuit, it is my opinion that the settlement in this case falls well within the range of compromises that would be fair, reasonable, and adequate.

26. *The first factor: "whether the proposed settlement was fairly and honestly negotiated*." By any account, the Settlement was the result of a vigorous, intensive, arm's-length, adversarial process. The contested proceedings in this case spanned years and were preceded by numerous similar cases in which BP prevailed. Co-Lead Plaintiff's Counsel took extensive discovery and ultimately reviewed every one of the over 31,000 leases BP produced, and thousands more that BP did not produce. Co-Lead Plaintiff's Counsel developed the expert resources customarily needed in this type of high-stakes class-action litigation. These efforts, together with Co-Lead Plaintiff's Counsel's considerable experience litigating oil-and-gas royalty class actions, allowed Counsel to evaluate the strengths and weaknesses of the claims and defenses and thoroughly and skillfully advocate for the Class during settlement negotiations. The Parties conducted mediation many times before an experienced and highly-regarded mediator. After years of contested litigation, nearly six months of settlement discussions, and with the perspective provided by two rounds of mediation before an expert mediator, the Parties eventually reached a settlement.

27. *The second factor: "whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt."* During this case, BP steadfastly denied that it underpaid royalties, just as it has been denying royalty underpayment practices since the 1990s. *See* ¶10, *supra* (citing *Patterson*). In the Settlement Agreement, BP continues that denial. BP asserted numerous affirmative defenses, including that the class claims are barred in whole, or in part, by the applicable statute of limitations. Whether BP underpaid royalties, what damages would

result, and how far back damages could run were all vigorously contested questions placing the ultimate outcome of the litigation in doubt.

28. Moreover, BP aggressively opposed certification for litigation purposes, and almost certainly would have sought an interlocutory appeal to get any such order reversed. In a class action, uncertainty about whether a case will be certified for litigation (as opposed to settlement) is another factor placing the ultimate outcome of the litigation in doubt. *See, e.g.*, *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015) (listing obstacles to proceeding as a class action among those that placed the outcome of future litigation in doubt); *see also* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 25) ("If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.").

29. *The third factor: "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation."* Despite BP's continuing assertion that it did not underpay royalties, BP (1) has agreed to pay $147 million in back damages; (2) changed its royalty payment practices in 2009 to stop taking almost all midstream service deductions lease; and, (3) has committed to keep those changes in place going forward for seven (7) years. The total estimated net present value of the settlement is over $221 million. *See* Reineke Decl. on Valuation; Joint Counsel Decl. at ¶78. This is a substantial package of benefits, especially given BP's defeat of class certification in *Gillespie, Watts,* and *Rees*.

30. It was reasonable for the Class to value this package of immediate and certain benefits as outweighing the value of the relief they might or might not get through continued litigation. Is it possible that the Class might have succeeded in obtaining certification of the litigation as a class action, prevailed entirely on the merits, and secured a greater recovery through

trial? It is possible but irrelevant, because it is also possible that, had the case not settled, the Class might have lost at class certification, lost on the merits, been awarded only a fraction of the damages sought, or won at trial but lost it all on appeal. Is it possible that the Class could have held out for more? Again, it is possible but irrelevant because it is also possible that, had the Class not accepted the offer then available, events in the case might have turned leading BP to greatly reduce the amount of any future offers.

31. It is precisely because of these unknowables that the question is not whether the settlement is perfect but whether it is a fair, reasonable, and adequate one, considering the uncertainties and adversarial dynamics of settlement negotiations. As the Tenth Circuit emphasized when affirming a settlement approval over an objector's speculation that some better terms might have been attained, it was not unreasonable for the class to accept the terms of the settlement "instead of deciding to undertake expensive litigation, with an uncertain outcome, in order to try to obtain these additional recoveries." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015).

32. *The fourth factor: "the judgment of the parties that the settlement is fair and reasonable."* Finally, it is evident that the parties believe that the settlement they reached, after contested litigation and arm's-length negotiation, is fair and reasonable. Mr. Cecil sat through both all-day mediation sessions, listened to the explanations of experts, counsel, and mediator Gum about what a fair settlement was, and witnessed the back-and-forth negotiations. His declaration demonstrates his full support for the settlement. *See* Cecil Decl. Co-Lead Plaintiff's Counsel also describe their full support for the settlement in their declaration. *See* Joint Counsel Decl. Further, as of the time I executed this declaration, several absent Class Members had signed affidavits

supporting the Settlement. *See* Declaration of Dan Little on behalf of Sagacity, Inc.; Declaration of Joseph Hancock on behalf of the Baptist Foundation of Oklahoma.

The Form and Manner of Notice

33. In a class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).[4]

34. For known class members with a known address, it is both customary and sufficient to give individual notice by first-class mail. *See Fager v. CenturyLink Communications, LLC*, 854 F.3d 1167, 1173-74 (10th Cir. 2016). Courts may supplement first-class mail notice with other means, including publication in newspapers and the creation of websites providing information about the action and the proposed settlement. The use of a multi-modal notice program is discussed very favorably in the Committee Notes to the amendments to Rule 23(c)(2)(B) scheduled to take effect on December 1. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 18-19).

35. The Parties retained JND Legal Administration to administer the settlement. JND is an established class-action claims administrator with extensive experience and expertise in handling class-action settlement administration. *See* JND Decl. at ¶¶2. In accordance with the Preliminary Approval Order, and at the direction of the parties, on September 26, 2018, JND mailed the Notice of Proposed Settlement of Class Action via first-class mail to the last known mailing address (verified and updated for changes of address through the U.S. Postal Service's

[4] Effective December 1, 2018, Rule 23(c)(2)(B) will be amended to explicitly apply its notice provisions to cases proposed to be certified for settlement under Rule 23(b)(3). *See* Exhibit 2 (amended rule text, at 11). This change enshrines into rule text the practice courts have been following for many years. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 17).

database) of each class member who could be identified from the payment history data provided by BP pursuant to the Settlement Agreement. *Id.* at ¶¶3-7. For notices returned as undeliverable, JND tracked them to try to get an updated address for re-mailing. *Id.* at ¶7. On September 26, 2018, JND arranged for the Summary Notice to be published in *The Oklahoman* and *The Tulsa World*, the two largest general circulation papers in Oklahoma, and in two papers of local circulation: *The McAlester News-Capital*, and *The Muskogee Phoenix*. *Id.* at ¶8. Finally, on September 25, 2018, the settlement notices were posted on the website dedicated to this litigation. *Id.* at ¶9.

36. Rule 23(c)(2)(B) also lists seven topics that the notice "must clearly and concisely state in plain, easily understood language." The Notices identified above address the required topics and do so in language that, in my opinion, is clear, concise, plain, and easily understood.

37. It is my opinion that the form and content of the notice given, and manner in which notice was given, satisfied the requirement of giving the best notice that is practicable under the circumstances. It is also my opinion that the procedures for requesting exclusions and filing objections are fair and reasonable, as approved by the Court in the Preliminary Approval Order.

38. The practices employed in this case and carried out by JND are industry standard and are routinely approved as part of administering oil-and-gas royalty class action settlements. The combination of first-class mail with other methods of giving notice, including publication and using technology, illustrates the type of multi-modal notice program that represents best practice in the federal courts and has been implicitly endorsed by the Civil Rules Advisory Committee. *See* Exhibit 2 (Committee Note to Proposed Amendments to Rule 23, at 18) ("Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court.").

The Fee Request

39. In this common-fund class action, the Court is authorized to make a fee award to Plaintiff's Counsel to recognize the work done on behalf of, and the benefit conferred upon, all Class Members. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 613 (Thomson Reuters 2018 edition).

40. Both case law and Fed. R. Civ. P. 23(h) establish that the standard for setting the fee award is reasonableness. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988); Fed. R. Civ. P. 23(h) advisory committee's note (2003) (stating that "reasonableness" is the customary measurement for common fund fees). That is to say, the amount the Court awards as a fee must be reasonable. The fee decision "is a matter uniquely within the discretion of the trial judge." *Brown*, 838 F.2d at 453.

41. These federal common law standards apply in this case because federal RICO claims were asserted and carry with them federal question jurisdiction. Thus, the Tenth Circuit panel's opinion in the *Chieftain v. Enervest* case, holding that federal courts must look to state fee law in *diversity* class actions, does not apply.[5] In addition, the Parties have removed any uncertainty about which standards apply by agreeing to use federal-law standards to measure reasonableness. Settlement Agreement, ¶7.1.

[5] As this court knows, a panel of the Tenth Circuit held that, in diversity class actions, a federal court should look to state law when determining the reasonableness of class counsel's fee award. *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455 (10th Cir. 2017). As I have written in other materials submitted to this court, the panel opinion departs from longstanding federal-court class action practice not just in the Tenth Circuit but in all of the federal circuits. A petition for certiorari is currently pending with the U.S. Supreme Court.

42. Under the federal-law standards followed in the Tenth Circuit, the preferred method for determining the reasonableness of a fee award in a common fund case is the percentage of recovery method. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231); *Reirdon v. XTO Energy, Inc.,* No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124); *Chieftain Royalty Co. v. Laredo Petroleum, Inc.*, No. CIV-12-1319-D (W.D. Okla. May 13, 2015) (Dkt. No. 52) ("*Laredo* Fee Order"); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010) (endorsing the percentage of recovery method for common fund cases).

43. Since 1988, the Tenth Circuit has instructed district courts to analyze the reasonableness of fee awards under the factors developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Brown*, 838 F.2d at 454-55. The *Johnson* factors are (1) the time and labor required, (2) the novelty and difficulty of the questions presented by the case, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Id.*

44. Because the *Johnson* factors were developed in the context of statutory fee-shifting, the Tenth Circuit held that the scheme should be modified when applied in a common fund case to better fit the setting. *See Brown*, 838 F.2d at 453. Not all of the factors will apply in every case. *Id.* at 456; *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998) (trial

courts need not specifically address each factor in every case). And the weight to be given each factor varies when the court is awarding fees from a common fund. *Brown*, 838 F.2d at 456.

45. The most important difference in the application of the *Johnson* factors in common fund cases is the emphasis placed on the eighth factor—the result obtained by class counsel. In a common fund case, the result obtained is the most important factor and deserves the greatest weight. *Brown*, 838 F.2d at 456. As the Advisory Committee later put it when adopting the 2003 amendments to Rule 23, "[f]or a percentage fee approach to fee measurement, results achieved is the basic starting point." FED. R. CIV. P. 23(h) advisory committee's note (2003).

46. The other important difference is the diminished role of the first *Johnson* factor—the time and labor involved. In *Brown* itself, the Tenth Circuit recognized that the differences between common fund cases and statutory fee cases cautioned against importing a formal lodestar requirement—the usual starting point in statutory fee-shifting cases—into common fund cases. Accordingly, the Tenth Circuit recast the nature of the "time and labor" inquiry in common fund cases. While "time and labor" is a factor to be considered, the court need not conduct a lodestar analysis to assess it. *Brown*, 838 F.2d at 456 & n.3; *Chieftain Royalty Co. v. XTO Energy, Inc.,* No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231 at 6, ¶6(f) (neither lodestar analysis nor lodestar cross-check is required); *Reirdon v. XTO Energy, Inc.,* No. 6:16-CV-00087-KEW (E.D. Okla. Jan. 29, 2018) (Dkt. No. 124 at 5, ¶6(f) (same)); *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013) (lodestar analysis is not required); *CompSource Okla. v. BNY Mellon, N.A.*, 2012 WL 6864701, *8 (E.D. Okla. 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions."); *Childs v. Unified Life Ins. Co.*, 2011 WL 6016486, *15

n.10 (N.D. Okla. 2011) ("Because the other *Johnson* factors, combined, warrant approval of the common fund fee sought by Plaintiff's Counsel, the Court need not engage in a detailed, lodestar-type analysis of the 'time and labor required' factor."). Rather, the court may make a general finding regarding the expenditure of time and labor based on the record as a whole. *See, e.g., Laredo* Fee Order; *Northumberland County Ret. Sys. v. GMX Res. Inc.*, No. CIV-11-520, Dkt. No. 150 (W.D. Okla. July 31, 2014).

47. In this common fund context, the result achieved should be given the greatest weight in determining the reasonableness of the fee request. *Brown*, 838 F.2d at 456; *see also Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained.") (quotations omitted).

48. In my opinion, the result achieved supports Class Counsel's request for a fee award of $58.8 million, an amount that represents 40% of the up-front cash payment of $147 million, but which is less than 27% when calculated as a percentage of the estimated total benefit of over $220 million conferred on the Class Members.

49. First, the $147 million in cash that BP has agreed to pay represents over 100% of the Settlement Class' claimed royalty underpayment principal (i.e., not including interest) over the entire Class Period. Reineke Decl. on Valuation at ¶4. That is an excellent result in light of the cost, delay, and risk associated with future litigation.

50. Even when a party has strong claims, it is reasonable to accept the immediate and certain benefit of partial payment rather than face the risks already known—or expose itself to future unexpected setbacks—that come with future litigation. As the Tenth Circuit appreciates, "[t]hat is the nature of a settlement." *Tennille v. Western Union Co.*, 785 F.3d 422, 435 (10th Cir. 2015). In this case, the Class Members have strong claims. But there are no sure things in high-

stakes class-action litigation. The case would still need to be certified for litigation, something BP has strenuously (and successfully in the past) opposed. The Class Members would need to prevail on their theory of liability, something BP vigorously contested, and uncertainties exist as to the measure of damages and the time period for which they are available. Given the risks posed by continued litigation, the recovery of $147 million in cash is itself a strong result.

51. Importantly, this is a cash recovery that will be distributed to Class Members automatically. There are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits. The only thing Class Members need to do is not opt out and wait for their checks to be distributed after the Court grants final approval of the Settlement.

52. The Class Members also benefitted from, and will continue to benefit from, the changes that BP has made to its royalty payment practices in 2009. BP stopped taking deductions for almost all midstream service charges. To date, these changes have resulted in the payment of an additional $38 million in royalties to Class Members. Reineke Decl. on Valuation at ¶6. Moreover, BP has agreed to continue those royalty payment practices for seven (7) years. Settlement Agreement ¶ 2.4. Valuation expert Daniel Reineke estimates that BP's agreement to keep these changes in place will generate an additional $36 million in royalties (discounted to present value). Reineke Decl. on Valuation at ¶7.a.

53. The value conferred by BP's changed practices is a valuable part of the overall Class recovery, and both the benefit conferred through the class period and the continuing benefit should be included in determining the size of the recovery obtained for the class.

54. It is well established that the value of future benefits should be included when determining the size of the recovery obtained for the class. *See Chieftain Royalty Co. v. XTO*

Energy, Inc., No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018), Order Awarding Attorneys' Fees (Dkt. No. 231) ("*Chieftain* Fee Order"); *Reirdon v. XTO Energy Inc.*, No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Attorneys' Fees (Dkt. No. 124) ("*Reirdon* Fee Order") at ¶6(l); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010); *see also Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013) (awarding $46.5 million in attorneys' fees on a $155 million gross settlement fund, $40 million of which constituted future benefits). Here, the future benefit of additional royalties for Class Wells is estimated to be $36 million. To be clear, Co-Lead Plaintiff's Counsel is not asking the Court to award a fee from the future benefit. Nonetheless, the *existence* of the future benefit is still relevant to the fee request because it is a part of the Class' recovery and therefore speaks to the overall quality of the result.

55. The value of the additional royalties BP has already paid to Class Members as a result of the royalty payment changes should also be included when determining the size of the Class recovery. BP paid those additional royalties as a result of *Chockley* and this litigation. Stowers Decl. at ¶7; Reineke Decl. on Valuation at ¶5. For purposes of determining the benefit conferred on the Class Members, it is immaterial that BP changed its practices and started paying those additional monies before it agreed to settle the case. What matters is whether Plaintiff's Counsel's efforts created an additional benefit for the Class Members. If a payment is the result of the attorney's efforts—which is uncontested in this case—then it is part of the fund created by the attorneys for the Class Members, even if it was paid before a formal settlement was reached. And any such pre-settlement-date payment is therefore part of what the attorneys should, in equity, be compensated for having created. Extra money is extra money, whenever it is paid. Thus, even though Plaintiff's Counsel is not asking the Court to award a fee from the extra royalty payments

BP made between 2009 and December 31, 2017, their existence is still relevant to the fee request because it is a part of the Class' recovery, speaks to the overall quality of the result, and also constitutes part of the overall settlement value against which to assess the reasonableness of the requested fee amount.

56. It is important to recognize that, even though the Settlement contains a future benefit, the Class Members do not release any claims relating to production that occurs after December 31, 2017, the last date of the Class Period. Thus, the future benefit is a one-way benefit. The Class Members gain the continued benefit of BP's changed royalty payment practices, but they remain free to challenge the sufficiency of those practices for production after December 31, 2017.

57. Six of the *Johnson* factors examine, in different ways, whether the fee request is consistent with the market for legal representation of this type.[6] This makes sense in that absent Class Members do not have an express, pre-existing attorney-client relationship with Plaintiff's Counsel. In determining how much Plaintiff's Counsel should be paid for the work done on absent Class Members' behalf, it is appropriate to consider what clients agree to pay their lawyers when a direct attorney-client relationship exists.

58. Here, after arm's-length negotiations with Plaintiff's Counsel, Plaintiff agreed Plaintiff's Counsel would represent Plaintiff on a 40% contingency fee basis. *See* Cecil Decl. at ¶7. At the time this agreement was reached, Plaintiff understood a 40% contingency fee was at or below the market rate. *Id*. The typical fee arrangement in similar royalty underpayment class actions in Oklahoma is a contingency fee of 40%. *See Chieftain* Fee Order at ¶6(u); *Reirdon* Fee

[6] These factors are: (5) the customary fee; (6) whether the fee is fixed or contingent; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Order at ¶6(u); *see also Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *3 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) (finding that, under Oklahoma law, "[i]n the royalty underpayment class action context, the customary fee is a 40% contingency fee.") (collecting cases); *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. CJ-2004-45 (Okla. Dist. Ct. Washita Cty. August 30, 2017) ("In the royalty underpayment class action context, the evidence revealed the customary contingency fee is forty (40) percent."); *Strack, et al. v. Continental Oil, Inc.,* No. CJ-10-75 (Okla. Dist. Ct., Blaine County, Jul 13, 2018), Judgment and Order Approving Attorneys' Fees and Class Representatives' Case Contribution Award at ¶11(e) ("The prevailing customary fee in these types of royalty owner class actions is a contingency fee of 40% of the common fund...).

59. A fee agreement negotiated at arm's-length in advance is particularly relevant in a contingency case because it reflects the value of the service to be provided before the full difficulty and uncertainty of the case is known and while the risk of a loss still exists. *See Laredo* Fee Order at 8 ("Class Representative negotiated at arm's-length and agreed to a forty percent (40%) contingency fee at the outset of this litigation, reflecting the value Class Representative placed on the future success of this Litigation.").

60. Another way of comparing the fee request to the market for comparable legal services is to consider awards in similar cases (*Johnson* factor #12). The 40% fee request in this case is consistent with what many federal and state courts in Oklahoma have awarded in other royalty class actions. *See* Joint Counsel Decl., Exhibit 8.M, Declaration of Geoffrey P. Miller in the *Chieftain v. XTO* case,

61. Further to that point, in work done for the remand proceedings before Judge DeGiusti in the *Chieftain v. Enervest* case, I recently reviewed the fee orders in Oklahoma state-

court oil and gas royalty class actions going back to 1995. The most common fee award, by far, in those cases was an award of 40% of the common fund. Of particular relevance, I identified thirteen (13) fee orders issued after the current class action fee statute, 12 O.S. §2023(G)(4), took effect in 2009, and for which the fee order explains the basis for the award. In every one of those cases, the court awarded fees in the amount of 40% of the common fund. *See* **Exhibit 3** (listing cases). Those fee awards were made by ten different judges in cases filed in ten different counties.

62. Five of the *Johnson* factors examine, in different ways, Plaintiff's Counsel's dedication of time, effort, skill, and commitment to the case.[7] As noted above, these factors are less important in a common fund case (rather than a fee-shifting case) because the most important determinant of the lawyer's contribution—and therefore the most important factor in setting the fee—is the outcome the lawyer was able to achieve. *See Brown*, 838 F.2d at 456. However, a few of these factors deserve specific attention.

63. Having reviewed the history of this case and the docket, and having reviewed selected critical pleadings, filings, and orders, I find that the time and labor factor of the *Johnson* test supports approval of Plaintiff's Counsel's fee request. Plaintiff's Counsel invested significant time and money over the years of litigation with no guarantee of reimbursement or recovery. As experienced oil-and-gas royalty-payment class action litigators, Plaintiff's Counsel knew exactly what needed to be done and what tasks were best calculated to advance the likelihood of certification and to marshal the proof needed to prevail in court or in a favorable settlement. That

[7] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; and (7) any time limitations imposed by the client or the circumstances.

said, the Court knows as well as anyone the challenges and complexity of cases like this and the risk Plaintiff's Counsel undertook in representing the Class.

64. There is no need for the Court to employ a lodestar cross-check to assess whether the "time and labor" factor has been met. The Tenth Circuit made clear in *Brown* that a cross-check is not required, and this Court has followed suit. What *Brown* instructs the judge to do is to satisfy herself that the time and effort of Plaintiff's Counsel instrumentally contributed to the result achieved for the Class Members. *Brown*, 838 F.2d at 456. *See also, e.g.*, *Laredo* Fee Order; *Chieftain Royalty Company v. QEP Energy Company*, No. CIV-11-212-R, Dkt. No. 182 (W.D. Okla. May 31, 2013).

65. Though I suspect the Court does not need me to attest to the skill and reputation of Plaintiff's Counsel, it is nonetheless true that the firms of Rex A. Sharp, P.A., The Lanier Law Firm, PC, Nix Patterson, LLP, Barnes & Lewis, LLP, Whitten Burrage, and Burns & Stowers are leaders in the field of class action royalty litigation. Having worked with several of those firms on multiple occasions, and based on my knowledge of their work in those cases, and having served as a consultant or expert in many other class actions, it is my opinion that they are all excellent lawyers well-deserving of their reputation as being among the very best in the field.

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

Steven S. Gensler

12/16, 2018

CURRICULUM VITA

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EDUCATION

University of Illinois College of Law, J.D. *summa cum laude*, May 1992
- Valedictorian (Class Rank: 1/189)
- Editor-in-Chief, University of Illinois Law Review

University of Illinois (Urbana-Champaign), B.S. (Biology), June 1988

TEACHING POSITIONS

University of Oklahoma College of Law
Gene and Elaine Edwards Family Chair in Law (2018-current)
Welcome D. & W. DeVier Pierson Professor (2009-2017)
President's Associates Presidential Professor (2006-current)
Professor (2005–current)
Associate Professor (2000-2005) (on leave 2003-2004)
- Courses Taught Six or More Times: Civil Procedure I, Civil Procedure II; Conflict of Laws; Federal Courts; Federal Judicial Clerkships
- Courses Taught One to Five Times: Administrative Law; Aternative Dispute Resolution; Comparative Litigation; Complex Litigation; Electronic Discovery
- Teaching Awards: Student Bar Association Oustanding Professor Award (2017, 2003); Best Professor (first-year section; upper-level classes) (multiple awards)

Associate Dean for Research and Scholarship (2012-2015)

University of Illinois College of Law
Visiting Assistant Professor (1998-2000)
- Courses Taught: Civil Procedure II; Property; ADR; Legal Research & Writing

University of Nevada Las Vegas, William S. Boyd College of Law
Visiting Professor (Fall 2017)
- Courses Taught: Civil Procedure; Federal Courts

JUDICIAL FELLOWSHIPS

United States Supreme Court
Supreme Court Fellow, Administrative Office of the U.S. Courts (2003-2004)

JUDICIAL CLERKSHIPS

EXHIBIT 1

The Honorable Deanell Reece Tacha, U.S. Circuit Judge (10th Cir.), Lawrence, KS
Law Clerk (1992-1993)

The Honorable Kathryn H. Vratil, U.S. District Judge (D. Kan.), Kansas City, KS
Law Clerk (1993-1994)

LAW PRACTICE EXPERIENCE

Michael, Best & Friedrich, LLP, Milwaukee, WI
Associate (1996-1998)

Reinhart, Boerner, van Duren, Norris & Rieselbach S.C., Milwaukee, WI
Associate (1994-1996)

PUBLICATIONS

Books:

FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY (West)
- Comprehensive two-volume practice treatise on the Federal Rules of Civil Procedure
- Revised and updated edition published annually
- Annual editions to date: 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018

MOORE'S FEDERAL PRACTICE, Volume 11 (3d. ed. 2012) (with Jeffrey W. Stempel)
- Covering Summary Judgment under Rule 56
- Wrote new chapter for 3d Edition after Rule 56 was substantially revised in 2010
- Responsible for overseeing quarterly updates

THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Lexis/Nexis 2015) (monograph prepared and distributed as part of MOORE'S FEDERAL PRACTICE)

FEDERAL COURTS AND JURISDICTION: CASES AND MATERIALS (in progress) (target publication date May 2019) (Carolina Academic Press) (with Tom Rowe, Katherine Florey, Lou Mulligan)

GILBERT'S LAW SUMMARY ON CIVIL PROCEDURE (West Academic Publishing) (added as new co-author for 19th edition) (with Rick Marcus and Tom Rowe)

Journal Articles:

The Fishing Fallacy in Civil Discovery, in progress

A Proportionality-Options Approach to Regulating Civil Discovery, in progress

Breaking the Boilerplate Habit in Civil Discovery, 51 AKRON L. REV. 683 (2017) (with the Honorable Lee H. Rosenthal) (Symposium on the impact of the 2015 Civil Rules Amendments)

Discovery: What the Form Are We Fighting For?, 80 TEX. B.J. 774 (Dec. 2017) (with the Honorable Xavier Rodriguez)

A Report from the Proportionality Roadshow, 100 JUDICATURE 14 (Winter 2016) (with the Honorable Lee H. Rosenthal)

From Rule Text to Reality: Achieving Proportionality in Practice, 99 JUDICATURE 43 (Winter 2015) (with the Honorable Lee H. Rosenthal)

Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?, 18 LEWIS & CLARK LAW REVIEW 643 (2014) (with the Honorable Lee H. Rosenthal) (Symposium honoring Judge Mark Kravitz)

Measuring the Quality of Judging: It All Adds Up to One, 48 NEW ENGLAND LAW REVIEW 475 (2014) (with the Honorable Lee H. Rosenthal) (Symposium on "Benchmarks: Measurements for Evaluating Judicial Productivity")

The Reappearing Judge, 61 KANSAS LAW REVIEW 849 (2013) (with the Honorable Lee H. Rosenthal) (Symposium on "Advocacy under the Federal Rules of Civil Procedure")

Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth, 46 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 593 (2013)

Managing Summary Judgment, 43 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 517 (2012) (with the Honorable Lee H. Rosenthal) (Symposium on the 25th Anniversary of the Supreme Court's 1986 Summary Judgment trilogy)

- *Reprinted in* 62 DEF. L.J. 1 (2013)

Special Rules for Social Media Discovery? 65 ARKANSAS LAW REVIEW 7 (2012) (Symposium on "Facebook and the Law")

Judicial Case Management: Caught in the Crossfire, 60 DUKE LAW JOURNAL 669 (2010) (Symposium publishing papers selected from the 2010 Duke Conference on Civil Litigation)

Oklahoma's New E-Discovery Rules, 81 OKLAHOMA BAR JOURNAL 2427 (Nov. 2010)

Must, Should, Shall, 43 AKRON LAW REVIEW 1141 (2010) (Symposium issue publishing papers selected for presentation at the 2010 AALS Section on Litigation program on "The Future of Summary Judgment")

The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts, 58 KANSAS LAW REVIEW 809 (2010) (Symposium on Class Actions)

A Bull's-Eye View of Cooperation in Discovery, 10 SEDONA CONFERENCE JOURNAL 363 (Fall 2009 Supp.) (invited contribution to Special Edition on The Sedona Conference Cooperation Proclamation)

Some Thoughts on the Lawyer's E-volving Duties in Discovery, 36 NORTHERN KENTUCKY UNIVERSITY LAW REVIEW 521 (2009) (invited contribution to Symposium on E-Discovery)

- *Reprinted in* 60 DEF. L.J. 1 (2011)

Justness! Speed! Inexpense! An Introduction to The Revolution of 1938 Revisited: The Role and Future of the Federal Rules, 61 OKLAHOMA LAW REVIEW 257 (2008) (Introduction to AALS Civil Procedure Section 2008 Annual Meeting Symposium)

Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction, 57 ALABAMA LAW REVIEW 779 (2006) (with Laura J. Hines)

Diversity Class Actions, Common Relief, and the Rule of Individual Valuation, 82 OREGON LAW REVIEW 295 (2003)

Class Certification and the Predominance Requirement under Oklahoma Section 2023(B)(3), 56 OKLAHOMA LAW REVIEW 289 (2003)

Bifurcation Unbound, 75 WASHINGTON LAW REVIEW 705 (2000)

Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons from Tennessee, 67 TENNESSEE LAW REVIEW 653 (2000) (invited contribution to Symposium: Communicating with Juries)

Wrongful Discharge for In-House Attorneys: Holding the Line Against Lawyers' Self-Interest, 1991 UNIVERSITY OF ILLINOIS LAW REVIEW 515 (Student Note)

Other Publications:

Second Circuit Distinguishes Abandonment from Default in Summary Judgment, 99 JUDICATURE 45 (2015) (brief case note)

A Tribute to Robert Spector: "It Started With Jurisdiction", 63 OKLAHOMA LAW REVIEW i (2011)

FEDERAL RULES OF CIVIL PROCEDURE: 2007 STYLE PROJECT COMPARISON CHARTS (West)
- Companion publication to the 2008 edition of treatise listed above

SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT, Federal Judicial Center (2004) (with Robert Timothy Reagan, Shannon R. Wheatman, Marie Leary, Natacha Blain, George Cort, and Dean Miletich)

Developments in the Federal Rules of Civil Procedure, Association of American Law Schools Civil Procedure Newsletter (2003, 2005, 2006, 2007, 2008)

PROFESSIONAL AND PUBLIC SERVICE

American Law Institute
- Council (2015 – present)
- Member (2006 – present)
- Adviser for Restatement (Third) of Conflict of Laws
- Members Consultative Group for the Principles of Aggregate Litigation Project

- Members Consultative Group for Restatement (Third) U.S. Law of International Arbitration

United States Judicial Conference Advisory Committee on Civil Rules
- Member (2005 – 2011)
- Appointed June 2005 by Chief Justice William H. Rehnquist
- Reappointed August 2008 by Chief Justice John G. Roberts, Jr.

United States Judicial Conference Federal-State Jurisdiction Committee
- Consultant (2017 – present)

National Conference of Bar Examiners, *MBE Civil Procedure Drafting Committee*
- Invited participant (Summer 2017, Winter 2017)
- Member (Spring 2018 – present)

Local Rules Committee, United States District Court for the Western District of Oklahoma
- Member (2008 – present)

Oklahoma State Bar Association Committee on Civil Procedure
- Member (2005 - present)
- Vice-Chair (2009 - 2017)
- Chair, E-Discovery Subcommittee (2009)

Oklahoma Uniform Jury Instruction Committee (Civil)
- Appointed March 21, 2016 by Oklahoma Supreme Court Chief Justice John F. Reif

The Sedona Conference
- Member (2008 – present)
- Advisory Board (April 2012 – present)
- Working Group 1: Electronic Discovery
- Working Group 6: International Electronic Information Management, Discovery and Disclosure
- *Founding Member*: ROI Project for Information Asset Management (exploratory group to identify principles and best practices for maximizing "information assets")

Reporter, *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*
- November 2014 – present
- Project Sponsored by the Duke Center for Judicial Studies

Academic Advisor, *Civil Jury Project (NYU Law School)* (2016-present)

Fellow, *American Bar Foundation* (2016-present)

Planning Committee, 2010 Conference on Civil Litigation ("Duke Conference") (2009-2010)

Member, *Executive Committee, Association of American Law Schools Section on Civil Procedure* (2005 - 2009)
- Chair (2007)

PRESENTATIONS

Breaking the Boilerplate Habit in Civil Discovery
- Presenter
- Akron Law Review Symposium on Civil Discovery
- April 6, 2018, Akron, OH

Sedona Conference eDiscovery Negotiation: Practical Cooperative Strategies
- Faculty Member
- February 22-23, 2018, New York, NY

Technology Assisted Review (TAR) Best Practices
- Program Moderator
- Duke Law Center for Judicial Studies, Bench-Bar-Academy Distinguished Lawyers' Series
- September 8-9, 2017, Arlington, VA

Federal Rules Update
- 2017 Judicial Conference of the Fifth Circuit
- May 9, 2017, Grapevine, TX

The Virtual Reality: Litigating in the 21st Century
- Kansas Legal Revitalization Conference
- February 2, 2017, Kansas City, MO

Big Deal or Big Distraction? Which Recent FRCP Developments Really Matter and Why
- Kansas Legal Revitalization Conference
- February 2, 2017, Kansas City, MO

The New Rules for E-Discovery: What Do They Impact?
- Kansas Legal Revitalization Conference
- February 1, 2017, Kansas City, MO

How E-*Discovery Brought* All *Discovery Back to Its Senses*
- University of Florida College of Law, E-Discovery Distinguished Speaker Series
- October 10, 2016, Gainesville, FL

The 2015 Amendments to the Federal Rules of Civil Procedure
- Westfield Insurance Annual Counsel Meeting
- August 9, 2016, Westfield Center, OH

The 2015 Amendments to the Federal Rules of Civil Procedure
- Eighth Circuit Judicial Conference
- May 4, 2016, Rogers, AR

Federal Rules Amendment Process: How Does It Work? Trends and Predictions.
- Wichita Bar Association Civil Practice CLE
- April 21, 2016, Wichita, KS

Sedona Conference eDiscovery Negotiation: Practical Cooperative Strategies
- ▪ Faculty Member
- ▪ March 1-2, 2016, Washington, D.C.

IAALS Fourth Civil Justice Reform Summit
- • Panelist and Planning Committee Member
- • February 24-25, 2016, Denver, CO

ABA "Roadshow" on Proportionality and the New 2015 Rules
- ▪ Fall 2015 through Spring 2016
- ▪ Presentations at U.S. Courthouses in 17 cities (New York, Philadelphia, Newark, St. Louis, Atlanta, Chicago, Washington D.C., Los Angeles, San Francisco, Denver, Phoenix, Dallas, Miami, San Diego, Seattle, Boston, Detroit)

"What Do the 2015 Amendments to the Federal Rules of Civil Procedure Really Mean for Judges and Lawyers"
- ▪ 2016 Southern District of Georgia Attorney Advisory Committee Meeting
- ▪ January 29, 2016, Amelia Island, FL

"The 2015 Amendments to the Federal Rules of Civil Procedure"
- ▪ Federal Bar Association, Federal Practice Series
- ▪ November 24, 2015, Oklahoma City, OK

"Proportionality and the New 2015 Rules"
- ▪ Judicial Training Symposium co-sponsored by Federal Judicial Center and the Electronic Discovery Institute
- ▪ October 14, 2015, New Orleans, LA

"Proportionality and the New 2015 Rules"
- ▪ ABA Section on Litigation Fall Leadership Meeting
- ▪ October 9, 2015, Memphis, TN

"The 2015 Amendments to the Federal Rules of Civil Procedure"
- ▪ Kansas City Metropolitan Bar Association Bench, Bar, & Boardroom Conference
- ▪ May 15, 2015, Branson, MO

"Proportionality and the New 2015 Rules"
- ▪ National Conference for U.S. Magistrate Judges
- ▪ April 21, 2015, Seattle, WA
- ▪ July 9, 2015, Boston, MA

"Proportionality is Officially Part of Discovery: Now What?"
- ▪ Washington & Lee University School of Law Faculty Speaker Series
- ▪April 6, 2015, Lexington, VA

Sedona Conference eDiscovery Negotiation: Practical Cooperative Strategies

- Faculty Member
- March 4-5, 2015, Atlanta, GA

Duke Center for Judicial Studies Conference on Implementing Discovery Proportionality Standard
- Faculty Member and Panelist
- November 13-14, 2014, Arlington, VA

"Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?"
- Civil Rules Advisory Committee Meeting; Program Honoring Judge Mark Kravitz
- April 10, 2014, Portland, OR

"Hot Topics in Discovery Sanctions: Spoliation and Rule 26(g)"
- Judges Retreat, U.S. District Court for the Western District of Missouri
- March 7, 2014, Kansas City, MO

Sedona Conference Cooperation Training Program
- Faculty Member and Panelist
- February 12-13, 2014, Chicago, IL

"Amendments to Rule 45"
- Presentation to District Judges of the Western District of Oklahoma
- December 2, 2013, Oklahoma City, OK

"Cooperation in Practice"
- Georgetown Law Advanced eDiscovery Institute
- November 21, 2013, Washington, D.C.

"Pretrial Bench Presence"
- New England Law School Symposium: "Benchmarks: Evaluating Measurements of Judicial Productivity"
- November 8, 2013, Boston, MA

Unlocking E-Discovery: Educational Summit for State Court Judges
- Faculty member for e-discovery program for state-court judges from around the country.
- Co-hosted by the National Judicial College and the Institute for the Advancement of the American Legal System ("IAALS")
- September 19-20, 2013, Denver, CO

"Cooperation and Professional Responsibility"
- The Sedona Conference Cooperation Training Program
- February 21, 2013, Phoenix, AZ

"Search Wars: Predictive Coding and the Battle for Control of the Search Process"
- University of Kansas School of Law Symposium: "Advocacy Under the Federal Rules of Civil Procedure After 75 Years"
- November 9, 2012, Lawrence, KS

"New Approaches to Civil Case Management from Around the Country"
- Workshop for Judges of the Fifth Circuit
- May 10, 2012, Santa Fe, NM

"Ed Cooper, Sherpa Guides, and Procedural Discretion"
- Civil Rules Advisory Committee Meeting, Program Recognizing Reporter Ed Cooper
- March 22, 2012, Ann Arbor, MI

"Effective Case Management"
- Judges Retreat, U.S. District Court for the District of Kansas
- February 17, 2012, Topeka, KS

"Closing the Guidance Gaps Under the Federal Rules"
- Presented at the William S. Boyd School of Law, University of Nevada Las Vegas
- January 26, 2012, Las Vegas, NV

"Electronic Discovery and the Sensible Harvest"
- Boston E-Discovery Summit 2011
- December 8, 2011, Boston, MA

"Social Media and the Continuing Evolution of the Discovery Rules"
- University of Arkansas School of Law Symposium: "Facebook and the Law"
- November 4, 2011, Fayetteville, AR

"Discovery After Iqbal: Where Do We Go From Here?"
- Multidistrict Litigation Panel Transferee Judge's Conference
- November 1-2, 2011, West Palm Beach, FL

"Summary Judgment and Case Management: Each in Service of the Other"
- Seattle University School of Law Colloquium: "25th Anniversary of the Summary Judgment
  Trilogy: Reflections on Summary Judgment"
- September 16, 2011, Seattle, WA

"Civil Rules and Appellate Rules: What's New and What's on the Horizon"
- Judicial Conference of the Fifth Circuit
- May 3-4, 2011, San Antonio, TX

"The Rulemaking Response to Twombly *and* Iqbal*"*
- University of Baltimore School of Law Colloquium Presentation
- April 15, 2011, Baltimore, MD

"Knowledge in the Public Interest: Consideration of Incidents Where Scientific and Technical Knowledge Is Kept From the Public Because of Sealed Settlements and Other Restrictive Arrangements"
- Panelist, National Academy of Science, Committee on Science, Technology, and Law
- April 11, 2011, Washington, DC

"Complex Litigation XIII: The Future of Civil Litigation 2"
- Panelist, 13th Annual Sedona Conference on Complex Litigation
- April 7-8, 2011, Del Mar, CA

"The 2010 Amendments to Rule 26 and Rule 56"
- Kansas Association of Defense Counsel Annual Meeting
- December 3, 2010, Kansas City, MO

"The 2010 Amendments to Rule 56"
- LEXIS/NEXIS Webinar
- November 23, 2010

"Incorporating E-Discovery Rules Into State Practice"
- Panelist, Tulsa County Bar Association CLE Program on Electronic Discovery
- November 12, 2010, Tulsa, OK

"Federal Judicial Roundtable on Electronic Discovery"
- Moderator, Oklahoma Bar Association Symposium on Electronic Discovery
- November 5, 2010, Oklahoma City, OK

"Incorporating E-Discovery Rules Into State Practice"
- Panelist, Oklahoma Bar Association Symposium on Electronic Discovery
- November 5, 2010, Oklahoma City, OK

"Report from the 2010 Conference on Civil Litigation: Where We Are and Where We Are Going"
- Panelist, Sedona Conference Webinar Series Presentation
- June 22, 2010

"Cooperation in Discovery: A 90-Year View"
- Northern Illinois University Law Review Symposium: "What It Means to Be a Lawyer in the Digital Age"
- April 16, 2010, DeKalb, IL

"The Future of Civil Litigation: Legislative and Behavioral Changes"
- Panelist, 12th Annual Sedona Conference on Complex Litigation
- April 8-9, 2010, Phoenix, AZ

"Federal Rules of Civil Procedure: What's Coming in December 2010"
- Co-presenter (with The Honorable Lee H. Rosenthal)
- DRI Product Liability Conference
- April 7, 2010, Las Vegas, NV

"Codifying Mediation 2.0"
- Panelist, The Ohio State Journal of Dispute Resolution Symposium 2010
- February 5, 2010, Columbus, OH

"Must, Should, Shall"

- AALS Section on Litigation Program
- January 10, 2010, New Orleans, LA

"Procedure a la Carte"
- AALS Section on Civil Procedure
- January 9, 2010, New Orleans, LA

"E-Discovery: Searching the Virtual File Cabinets"
- Presenter, NBI Seminar
- Forthcoming November 13, 2009, Oklahoma City, OK

"Federal Rules of Civil Procedure: Changes Effective December 1, 2009"
- OBA/CLE Webcast Seminar
- November 10, 2009

"The First Year of the Cooperation Proclamation"
- Panelist, The Sedona Conference Webinar
- November 4, 2009

"The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts"
- Kansas Law Review 2009 Symposium: "Aggregate Justice: Perspectives 10 Years After *Amchem* and *Ortiz*"
- October 30, 2009, Lawrence, KS

"Judicial Management Strategies to Encourage Cooperative, Non-Adversarial Discovery"
- Workshop for U.S. Magistrate Judges II
- July 15 and 16, 2009, Milwaukee, WI

"Some Thoughts on the Lawyer's E-volving Duties in Discovery"
- Northern Kentucky Law Review Symposium on E-Discovery
- February 28, 2009, Cincinnati, OH

"Privilege Waiver Under New Federal Rule of Evidence 502"
- Presenter, NBI Seminar: *Keeping Up with E-Discovery*
- November 13, 2008, Oklahoma City, OK

"E-discovery in Oklahoma"
- Presented to the Kingfisher County Bar Association
- August 28, 2008, Kingfisher, OK

"The Revolution of 1938 Revisited: The Role and Future of the Federal Rules"
- Moderator, AALS Civil Procedure Section Program
- January 4, 2008, New York, NY

"E-discovery: New Adventures in Client Babysitting?"
- Presented at the Kansas University School of Law

- October 19, 2007, Lawrence, KS

"Bell Atlantic v. Twombly: Pleading Standards and Court Access"
- "Brown bag" presentation at the University of Oklahoma College of Law
- June 20, 2007, Norman, OK

"What's Coming Next? A Look Into the Rules Amendment Pipeline"
- Presented at *Winning the Federal Case Before Trial*
- December 15, 2006, Oklahoma City, OK

"Recent Developments in Federal Subject Matter Jurisdiction"
- Presented at *Winning the Federal Case Before Trial*
- December 9, 2005, Oklahoma City, OK

"Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction"
- "Brown bag" presentation at the University of Oklahoma College of Law
- May 25, 2005, Norman, OK

"The Relatively Underguided Erie Analysis"
- University of Oklahoma College of Law
- February 9, 2005, Norman, OK

"Federal Civil Rules Amendments: A Look Into the Pipeline"
- Presented at *Winning the Federal Case Before Trial*
- January 14, 2005, Dallas, TX

"Discretionary Dismissal Based on Post-Jurisdictional Events"
- Presented to United States Judicial Conference Committee on Federal-State Jurisdiction
- June 10, 2004, New York City, NY

"Oil and Gas Class Actions: Issues and Outcomes in Oklahoma"
- Presented at the *Eugene Kunz Conference on Natural Resources Law and Policy*
- November 2002, Oklahoma City, OK

UNIVERSITY OF OKLAHOMA SERVICE

Member, Faculty Appeals Board (2012-present)
Research Liaison, Office of the Vice President for Research (2012-2015)
Member, Small Executive Committee, Faculty Senate (2002-2003)
Member, Faculty Senate (2001-2002)
Chair, Campus Disciplinary Council I (2007-2009)
Chair, Campus Disciplinary Council II (2001-2002)

UNIVERSITY OF OKLAHOMA COLLEGE OF LAW SERVICE

Member, Committee on Endowed Positions (2017)
Chair, Scholarship and Creative Activity Strategic Planning Committee (2012-2015)

Member, New Programs Committee (2012-present)
Chair, Foreign Studies Program Committee (2011-2015)
Director, Oxford Summer Program (2011-2015)
Chair, Curriculum Committee (2016-2017)
Member, Curriculum Committee (2011-2012; 2014)
Member, Committee on Research and Scholarship (2011-2016)
Chair, Committee A (2009-2010)
Member, Dean Search Committee (2009-2010)
Member, Committee A (2008-2010)
Faculty Advisor, Oklahoma Law Review (2002-2003, 2004-2007, 2011-present)
Chair, Mentoring Study Committee (2005-2006)
Chair, Code of Academic Responsibility Appeals Board (2004-2005; 2015-2017)
Chair, Academic Appeals Board (2015-2017)
Member, Externship Subcommittee (2004-2005)
Chair, Personnel Committee (2006-2007)
Member, Personnel Committee (2000-2001, 2002-2003)
Member, Competitions Committee (2001-2003)
Member, Legal Writing Committee (2001-2002)
Member, Judicial Clerkships Program (2000-current)
Faculty Advisor, Phi Alpha Delta (2001-2003)

BAR MEMBERSHIPS

United States Supreme Court (2003)
State of Wisconsin (1992)
Eastern District of Wisconsin (1992)
Western District of Wisconsin (1993)
District of Colorado (1995)

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), ~~—~~or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more

EXHIBIT 2

of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable

it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's~~

~~approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not

been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay

proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice.

Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if

notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the

opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and

litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's

fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central

concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on

the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide

recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a

proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Exhibit 3

Taylor v. Chevron/Texaco Corp., CJ-2002-104 (Texas Cty., Okla. 2009) (Riffe, J.)

Brown v. Citation Oil & Gas Corp., CJ-04-217 (Caddo Cty., Okla. 2009) (Van Dyck, J.)

Mitchusson v. Exco Resources, Inc., CJ-2010-32 (Caddo Cty., Okla. 2012) (Hill, J.)

Holcomb v. Chesapeake Energy Corp., CJ-2011-6 (Roger Mills Cty., Okla. 2013) (Haught, J.)

Drummond v. Range Resources Corp., CJ-2010-510 (Grady Cty., Okla. 2013) (Van Dyck, J.)

DSR Investments LLC v. Devon Energy Prod. Co., LP, CJ-11-12 (Dewey Cty., Okla. 2013) (Linder, J.)

Cornett v. Samson Resources Co, CJ-09-81 (Dewey Cty., Okla. 2013) (Linder, J.)

Cecil v. Ward Petroleum Corp., CJ-2010-462 (Grady Cty., Okla. 2014) (Hill, J.)

Krug v. Helmerich & Payne, Inc., CJ-98-06012 (Tulsa Cty., Okla. 2014) (Sellers, J.)

Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C., CJ-2010-38 (Beaver Cty., Okla. 2015) (Parsley, J.)

Mahaffey v. Marathon Oil Co., CJ-04-581E (Stephens Cty., Okla. 2016) (Graham, J.)

Bank of America, N.A. v. El Paso Natural Gas Co., CJ-2004-45 (Washita Cty., Okla. 2017) (Kelly, J.)

Strack v. Continental Resources, Inc., CJ-10-75 (Blaine Cty., Okla. 2018) (Hladik, J.)