IN THE DISTRICT COURT OF BLAINE COUNTY
STATE OF OKLAHOMA

Mark Stephen Strack, Sole Successor Trustee of the Patricia Ann Strack Revocable Trust DTD 2/15/99 and the Billy Joe Strack Revocable Trust DTD 2/15/99, and Daniela A. Renner, Sole Successor Trustee of the Paul Ariola Living Trust and the Hazel Ariola Living Trust,	)	
For Themselves and all Others Similarly Situated	)	
Plaintiffs,	)	
vs.	)	**Case No. CJ-10-75**
	)	**(Judge Hladik)**
Continental Resources, Inc.,	)	
Defendant.	)	

ROBERT G. GUM DECLARATION ON
SETTLEMENT FAIRNESS AND RELATED ISSUES

I. Overview

I have been asked to opine on the fairness, adequacy and reasonableness of the proposed settlement in this class action lawsuit.

In my opinion: given the risks and uncertainty that today applies to Oklahoma royalty deduction class action litigation, and considering the specific history and character of this case, the proposed settlement is reasonable, adequate, and fair to the royalty class. The Plan of Allocation is also Fair and Reasonable.

II. Background/Qualifications.

Relevant portions of my education and employment background are as follows.

I have practiced law as an Oklahoma oil and gas lawyer for over 40 years. During the past twenty years, I have been involved either as counsel or as a mediator in numerous royalty

underpayment class or mass actions. A copy of my resume' is attached as Exhibit A. It also contains a listing of these cases I have mediated. In preparing to provide my opinions, I have reviewed the docket sheet in this case, selected pleadings, the briefs and orders filed in the case, the proposed Settlement Agreement and Notice of Settlement, and the Declaration of Class Counsel. I have had face-to-face meetings and telephone conversations with Class Counsel.

I have performed all of my work in this case at my hourly rate of $320.00 an hour.

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

To address the core issue, I will discuss four subjects: (1) whether the settlement outcome and process are as one would expect for arm's-length negotiation; (2) whether this case involves serious questions of fact or law, which make the settlement amount reasonable; (3) the value of an immediate recovery with its certainty over the risks and uncertainty if the case proceeds to trial; and (4) the judgment of the parties, including whether the plaintiffs had enough information to determine the fairness of the settlement. I believe this proposed settlement satisfies each of these requirements.

A. The Proposed Settlement Is An Arm's Length Settlement.

The first factor is whether the settlement is an arm's-length settlement. Most of the evidence on that issue is before the Court in the Court's file and in the declaration by Class Counsel, and I will not repeat this evidence.

The record here, as supplemented by what Class Counsel tells me regarding the extended negotiations between the parties, clearly points to an appropriate arm's length process. I wholeheartedly concur with the judgment of Class Counsel that the settlement reached in this case makes more sense than proceeding with trial. I am principally moved to agree because of

the high level of appellate uncertainty surrounding these types of cases and because of the cash and very desirable non-cash benefits offered to the royalty class by this settlement.

Defendant is represented by counsel highly skilled in complex commercial litigation and oil and gas matters, including class action litigation. By reputation and through personal experiences I know them to be fierce and determined adversaries. By personal experience, I also know Continental's principal owner, Harold Hamm, to be as equally contentious. My review of the court file confirms that both sides aggressively litigated the case. The aggressive litigation stance assumed by both sides here kept them well apart for most of the history of the case. All of these things point to an arm's-length process.

B. <u>There Are Open, Serious Questions of Fact and Law Between these Parties that Create Risk and Renders a Trial Outcome Uncertain.</u>

A second fairness factor, and in my experiences the most significant, is whether there are serious questions of fact or law between the parties that add uncertainty to the outcome of the litigation. In this case, there are certainly uncertain questions of both fact and of law that render the litigation outcome of this case uncertain. This legal and factual uncertainty explains why Defendant would strike an aggressive defensive posture. The Defendant's posture and the procedural and substantive legal uncertainties surrounding this case posed very real risks for the class, and clearly justifies a conclusion that the ultimate percentage of recovery versus the claimed amounts reflects a fair outcome for the class in a world in which risk exists and time is money. Moreover, the non-cash future protections secured to the royalty class by this settlement are at least as valuable to the royalty class as is the cash. In my judgment, Class Representatives and Class Counsel were wise and prudent to negotiate this certain very favorable outcome rather than undertake great risk and uncertainty by continuing the litigation in pursuit of some greater recovery.

The class Petition alleges that Defendants underpaid royalties by illegally deducting midstream service costs, and based payments on affiliate sales. The class takes the position that the lessee must bear the cost to get gas in a marketable condition and that a marketable condition means a physical condition and location acceptable for entry into an interstate pipeline. Defendant refutes this contending "marketable" simply means capable of being sold. In my opinion, Oklahoma law, as most recently defined in the Oklahoma Supreme Court's 1998 decision in *Mittelstaedt v. Santa Fe Minerals, Inc.,* 954 P.2d 1203 (Okla. 1998), is capable of being read as supporting either position absent truly explicit lease provisions. Some lower courts have agreed and have even asked our Supreme Court to clarify the matter; unfortunately, the Supreme Court has been steadfast in its refusal to do so. This has resulted in confusion and apparent inconsistency in our courts. This confusion and inconsistency poses a risk to every Oklahoma royalty owner class action case, and this case is no exception.

As noted, the Oklahoma Supreme Court has not fully explained its substantive standard. Its use of uncertain language and failure to formally overrule *Johnson v. Jernigan* have left confusion in its royalty deduction law. Moreover, the Oklahoma Supreme Court recently declined to resolve the deduction standard that its historical silence has left to fester by reversing and remanding summary judgment decisions for more factual development while withholding any practiced guidance for the bar as to what the Court is thinking. *See Pummill v. Hancock Exploration LLC,* Case No. 111,096 (Okla. S. Ct. Nov. 17, 2014), 341 P.3d 69 ("Pummill I"). In *Pummill I,* after the trial court granted summary judgment for the class on the basic lease interpretation issue, holding that none of the various common lease forms negate the duty to market and marketable-product rule under Oklahoma law, the Oklahoma Supreme Court simply reversed and remanded. It also reversed two other partial summary-judgment orders with only the single explanation for all three reversals that

facts which could affect the resolution of the orders need to be addressed before the district court. The Court does not say what facts or what issues it felt need to be addressed. This left counsel for both parties with no clear duty standard against which they could try the case before the trial court on remand.

On remand from *Pummill I*, the trial court held a bench trial primarily focused on the "determination of when the natural gas at issue here became a 'marketable product.'" *Pummill v Hancock Exploration LLC,* Case No. 114,703 (Okla. Ct. Civ. App. Jan. 5, 2018), ___ P.3d ___ ("*Pummill II*"). "Here, the primary relief sought by Plaintiffs, and ultimately, by Defendants, concerned their competing views of the point at which gas production from the well became a "marketable product" for purposes of calculating royalties due under the Pummill and Parrish leases." *Id.* at ¶20. The trial court found for the Plaintiffs and the Oklahoma Court of Appeals held, "[f]inding that the trial court's decision of this fact-intensive issue is supported by competent evidence and is in accord with law, we affirm." *Id.* at ¶2 Further concluding, "[t]he trial court's decision that gas from the 1-32 well is not a marketable product at or near the wellhead is supported by competent evidence, and the court's determination that Defendants failed to sustain their burden of proof under *Mittelstaedt* is correct as a matter of law. Defendants may not deduct from Plaintiffs' royalties the proportionate expenses associated with preparing the gas for sale to an interstate pipeline downstream from the well. We find no error in the trial court's holding that POP and PIP contract forms may not be used to avoid Defendants' royalty obligations that the court found apply here, nor do we find error in its decision concerning royalties payable on 1-32 gas used in Defendants' or midstream service companies' operations off

the Parrish and Pummill leases. The trial court's judgment is therefore affirmed." *Id.* at ¶48-49.

The defendants sought certiorari to the Oklahoma Supreme Court, requesting further guidance from the Court on the meaning of "marketable product." On May 21, 2018, on a vote of 2-7, the Court denied the petition for certiorari; again, leaving the mineral bar with no clearer duty standard against which they could measure the payment of royalties.

The class interprets Oklahoma law as categorically allowing no deductions for services rendered on the lease and factually denying deductions for any off-lease services needed to make gas marketable, or interpret *Mittelstaedt* as extending this factual rule to all field services. But in either case, at least many of the major costs will require one of the parties to bear the burden of proof as to when the natural gas became a marketable product (plaintiff say that burden is upon the defendant and the defendant says that burden remains with the plaintiff). The class has argued that the standard has evolved into a standard that equates pipeline-ready condition with marketability. This issue is likely to be preserved by Defendants in any appeal. The current State of Oklahoma law on this issue remains a potentially unresolved issue that leaves the trial result here in substantial doubt.

The marketability standard, coupled with lease language differences, also poses a very substantial procedural certification risk, as certain divisions of the Court of Civil Appeals seem to be pre-disposed to reverse trial court class certification under Oklahoma's de novo review standards as impacted by these substantive deduction standards.

The risk of no recovery is very real in these types of cases. Numerous class actions have been brought by royalty owners in Oklahoma **without any recovery**. *Gillespie v. Amoco Prod. Co.* (BP), No. CIV-96-063-M (E.D. Okla. 1999); *Rees v. BP Am. Prod. Co.*,

211 P.3d 910 (Okla. Civ. App. 2008); *Tucker v. BP Am. Prod. Co.*, 278 F.R.D. 646 (W.D. Okla. 2011); *Foster v. Merit Energy Co.*, 282 F.R.D. 541 (W.D. Okla. 2012) (denying class certification); *Foster v. Apache Corp.*, 285 F.R.D. 632 (W.D. Okla. 2012) (denying class certification); *Panola Indep. Sch. Dist. No. 4 v. Unit Petroleum Co.*, 287 P.3d 1033 (Okla. Civ. App. 2012), *cert. denied,* Oct. 8, 2012.

The Class Members in this case appear to have reached the same conclusion concerning substantial risks in this case as there are no fairness objections.

C. There Is A Real Value In A Known Current Recovery Instead of A Mere Chance of Future Recovery.

In most cases the value of immediate and certain recovery favors the class, because (1) having an amount certain today has an advantage over an uncertain amount tomorrow and, all other things being equal, (2) a dollar today has more economic value than a dollar received at some point in the future.

In addition, there are risks from delay in this case that have not always existed. One is a more than ordinary risk of unfavorable legislation to the Oklahoma Class Action Statute and an even greater risk posed by future unfavorable judicial decisions in Oklahoma and at the Tenth Circuit Court of Appeals. The law is currently somewhat favorable to the royalty position, but it has many uncertainties. The existence of cases like the COCA decision from the appeal of *Fitzgerald v. Chesapeake,* CJ-10-38 (Beaver County, Oklahoma), the reversal of the class certification in this very case, the Oklahoma Supreme Court's reversal of the above-mentioned summary judgment orders (*Pummill I*), the Oklahoma Supreme Court's denial of certiorari in *Pummill II*, the reversal and remand of certification and decertification in several federal cases, all show that lessees continue to devote a great deal of resources, with growing success, to challenging the existing deduction standard in court and in

defeating certification. I believe the high-water mark for these cases has been seen and the litigation risk posed to this or any other plaintiff class only increases with time. In my judgment it was time for the plaintiffs to settle their case.

D. The Judgment of the Parties.

The fourth fairness factor is the judgment of the parties. Obviously, the parties saw fit to settle this case. I have had conversations with class counsel to determine whether there was enough information to fairly make that judgment. In this case, the class has undertaken a massive amount of pretrial discovery, the class has certainly reviewed enough information to analyze the value of deductions and how much would be saved had Defendants not been taking deductions, and to estimate the amount of off-lease gas used and lost. The class had well-defined damage models. Based on what I typically see in my mediation practice of more challenging cases, such as this case, I believe the proposed settlement represents an appropriate discounting by class counsel, especially in light of the great value to the class I see in the forward-looking provisions.

IV. The Plan of Allocation in this Case is Fair and Reasonable.

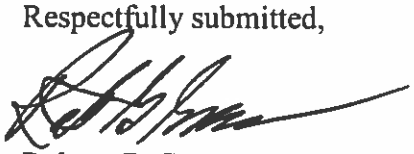
As explained in Class Counsel's Declaration, in structuring the Plan of Allocation, Class Counsel took into account the relative merits of specific claims and causes of action as between groups of royalty owners. The factors used show substantial sophistication by Class Counsel. This Plan of Allocation is very sensible.

V. Conclusion.

The factors typically used by our courts to examine fairness, adequacy and reasonableness of a proposed class settlement are addressed in *Velma-Alma v. Texaco*, 2007 OK CIV App. 4C, 162 P3d 238. They include fairness and honesty by the negotiator, presence of serious questions placing the outcome in doubt, whether settlement benefits have value or values

that outweigh the mere possibility of future relief, and judgment of the parties that the settlement is fair and reasonable. This settlement here proposed easily meets each of these requirements. I encourage the Court to approve it.

Respectfully submitted,



Robert G. Gum

EXHIBIT A

ROBERT G. GUM RESUME

Undergraduate Education:	B.S. Oklahoma State University, 1974
Legal Education:	J.D. University of Oklahoma College of Law, 1977
Employment:	Spradling, Alpern and Gum, 1977 – 2003 Gum, Puckett, Mackechnie, Coffin and Matula, 2004 – Present
Practice Areas:	Oil and gas, insurance defense, condemnation and mediation
Practice before all court settings in Oklahoma, 10th Circuit U.S. Court of Appeals, and the Oklahoma Corporation Commission	
Rating:	AV – Martindale-Hubbell, Best Lawyers in America and Oklahoma Super Lawyers

Representative Listing of Reported Cases

Moran v. OCC (GHK)

Oklahoma Gas & Electric Company v. Gerald A. Beecher, et al.; Kingfisher County District Court, CV-2009-48

Eagle Energy v. OCC

Sandra Ladra v. New Dominion, LLC, et al.; Lincoln County District court, CJ-2014-115

Stephens Production Company Continental Properties, LLC, and Eagle Oil and Gas Co., v. Tripco, Inc.; Logan County District Court, CV-2014-10

CASES MEDIATED BY ROBERT G. GUM

Case
Billy B. Tucker, et al. v. BP America Production Company; U.S. District Court, W.D. of Oklahoma, Case No. CIV-08-619- M
Edward Glaesman, et al. v. Chevron U.S.A., Inc., et al.; Roger Mills County District Court, Case No. CJ-06-27
J.C. Hill and Alice Hill, individually and on behalf of others similarly situated v. Marathon Oil Company; U.S. District Court, W.D. of Oklahoma, Case No. CIV-08-37-R
Naylor Farms, Inc. and Harrel's LLC, on behalf of themselves and all others similarly situated v. Chaparral Energy, LLC; U.S. District Court, W.D. of Oklahoma, Case No. CIV-2011-634-HE
Loren Rapp, on behalf of himself and others similarly situated v. Dorchester Hugton, Ltd.; Texas County District Court, Case No. CJ-2004-60
Garland Holcomb, Trustee of the Frady B. Holcomb Revocable Trust, For himself and all others similarly situated v. Chevron USA, Inc.; Roger Mills County District Court, Case No. CJ-2011-7
Christina Dean Bonner v. Marathon Oil Company; Stephens County District Court, Case No. CJ-2008-433E
Guy and Loretta Tatum, et al. v. Devon Energy Corporation, et al.; Nowata County District Court, Case No. CJ-2010-77
Garland Holcomb, Trustee of the Frady B. Holcomb Revocable Trust, et al. v. Chesapeake Energy Corporation and Chesapeake Operating, Inc.; Roger Mills County District Court, Case No. CJ-2011-6
Wattenbarger, et al. v. Newfield Exploration Mid-Continent, Inc., et al.; U.S. District Court, N.D. of Oklahoma, 11-CV-755-GKF-TLW
John W. Flemings, et al. v. Endeavor Energy Resources, LP, et al.; Nowata County District Court, Case No. CJ-2010-48
John W. Fitzgerald, on behalf of himself and all others similarly situated v. Chesapeake Operating, Inc.; Beaver County District Court, Case No. CJ-2010-38

Case
Bollenbach Enterprises Limited Partnership, on behalf of itself and all others similarly situated v. Oklahoma Energy Acquisitions LP, Alta Mesa Services, LP, et al.; U.S. District Court for the W.D. of Oklahoma, CIV-2017-134-HE
John Cecil, on behalf of himself and all others similarly situated, v. BP America Production Company, et al.; U.S. District Court for the Eastern District of Oklahoma, CV-16-410-RAW
James and Judy Grellner, on behalf of themselves and all others similarly situated, v. Devon Energy Corporation, et al.; Pittsburg County District Court, Case No. CJ-2016-242