No. _____

In The
Supreme Court of the United States

DAVID SCHELL, ET AL.,
on behalf of himself and all others similarly situated,

Cross-Petitioners,

v.

OXY USA INC.,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two sections comprise the Declaratory Judgment Act: §§ 2201 and 2202 of Title 28 of the United States Code. Section 2201 authorizes "any court of the United States . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Section 2202 authorizes that federal court to award "[f]urther necessary or proper relief based on a declaratory judgment . . . , after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." After the Plaintiff Class won, preventing class-wide injury that Defendant estimated at $30 million, the Tenth Circuit denied recovery of attorney's fees and expenses. It ruled that such recovery was not "necessary or proper" under § 2202, but in doing so relied on authority from the First, Fifth, and Eighth Circuits which looked to state law, rather than federal law, to determine the issue.

The questions presented are:

(1) If federal law controls the issue of whether attorney's fees and expenses can be awarded for obtaining a declaratory judgment, is an award of fees and expenses "necessary or proper relief . . . against [the losing party]," or is a declaratory judgment only available to corporations and the upper class, who can afford to pay the hourly fees and expenses required for access to the courthouse?

QUESTIONS PRESENTED – Continued

(2) If state law controls the issue of whether attorney's fees and expenses can be awarded for obtaining a declaratory judgment, should the case be remanded to the district court to consider Kansas state law on the subject because the district judge affirmatively stated that fees and expenses should be awarded if they legally could be?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were:

1) David Schell, Donna Schell, and Ron Oliver were the plaintiffs, on behalf of themselves and the certified class of "[a]ll surface owners of Kansas land burdened by oil and gas leases owned or operated by OXY USA, Inc. which contain a free gas clause," App. 4a, as well as appellees-cross-appellants below.[1] This conditional cross-petition for writ of certiorari refers to plaintiffs as "Cross-Petitioners" or "the Class."

2) OXY USA, Inc. was the defendant-appellant-cross-appellee below. This conditional cross-petition for writ of certiorari refers to defendant as "OXY."

RULE 29.6 STATEMENT

David Schell, Donna Schell, and Ron Oliver are not nongovernmental corporations to which Rule 29.6 applies.

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[1] Cross-Petitioners signal citation to the Appendix to the Petition for a Writ of Certiorari with "App." followed by the pertinent page number. Cross-Petitioners signal citation to the Appendix to this Conditional Cross-Petition for a Writ of Certiorari with "Cross-Pet. App." followed by the pertinent page number.

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Per Rule 12.5, Cross-Petitioners do not reproduce material already reproduced in the appendix to the opening petition.

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OPINIONS BELOW

The initial opinion of the court of appeals, App. 39a-74a, is reported at 808 F.3d 443. The revised opinion of the court of appeals upon granting in part the first petition for rehearing, App. 1a-38a, is reported at 814 F.3d 1107. The opinion of the district court granting cross-petitioners' motion to certify the plaintiff class is unreported, but available at 2009 WL 2355792. The opinion of the district court granting partial summary judgment to cross-petitioners, App. 75a-111a, is reported at 822 F. Supp. 2d 1125. The opinion of the district court reinstating that partial summary judgment, App. 112a-114a, is unreported but available at 2013 WL 1308385. The opinion of the district court denying cross-petitioners' motion for attorney's fees and expenses, Cross-Pet. App. 1-10, *infra*, is unreported, but available at 2013 WL 5876593. The opinion of the district court denying cross-respondent's motion to decertify the plaintiff class is unreported, but available at 2013 WL 4857686.

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JURISDICTION

The decision of the court of appeals was entered on December 14, 2015. A timely petition for rehearing was granted in part on February 9, 2016. The court denied a second timely petition for panel rehearing or rehearing en banc on March 21, 2016. On June 9, 2016, Justice Sotomayor extended the time for filing a petition for writ of certiorari to July 20, 2016. A timely

petition for writ of certiorari was filed on July 20, 2016 and docketed on July 22, 2016. Cross-Petitioners expressly rely on Rule 12.5 in filing this conditional cross-petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2201(a) of Title 28 of the United States Code provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 of Title 28 of the United States Code provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

INTRODUCTION

OXY threatened to cut off free house gas that would have cost users approximately $30 million to replace. App. 3a-4a, 31a; Cross-Pet. App. 2, App. 8, *infra*. Instead of waiting for $30 million in harm to befall the Class of house gas users (which could have produced a substantial common fund fee), counsel for the Class brought a declaratory judgment action to prevent the harm altogether. Cross-Pet. App. 8-9, *infra*.

After nine years of litigation resulting in a successful declaratory judgment for the Class, the district court wanted to award reasonable fees and expenses, but found the law did not permit such further relief, even though Section 2202 of the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, permits "further necessary or proper relief based on a declaratory judgment . . . against any adverse party whose rights have been determined by such judgment." The Tenth Circuit affirmed. App. 26a-37a.[2]

[2] The Class accepts the Tenth Circuit's finding that the common-benefit exception to the American Rule does not apply

The Class cross-petitions this Court to determine a question of exceptional importance: Must attorneys, in order to be reasonably compensated for their time and expenses, wait for hundreds of people to suffer damage from a defendant's conduct rather than pursue a declaratory judgment action to avert that damage? If so, declaratory judgments will be pursued only by the wealthy.

STATEMENT

All of the approximately 2,200 oil and gas leases at issue promise gas "free of charge" or "free of cost" to the principal dwelling house on the land for as long as gas is produced under the lease. App. 76a-77a. The leases contain no term permitting the lessee OXY to cease providing free house gas while continuing production. *Id.* But OXY sent letters to the plaintiff surface owners indicating that their present and future ability to get free gas was in jeopardy due to high H_2S or low pressure. App. 78a-82a. In August 2007, four surface owners sued OXY in this class action seeking a declaratory judgment that gas "free of charge" or gas "free of cost" meant just that – the gas for household use was free – and that OXY had the duty to make the gas useable for household purposes if it was unuseable

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because an award of attorney's fees, litigation expenses and incentives to the class representatives cannot be spread across the Class, and, therefore, pursues this cross-petition solely under the statutory text of § 2202 or Kansas state law.

in its raw condition.[3] App. 82a. In 2009, the district court certified a Class of: "All surface owners of Kansas land burdened by oil and gas leases owned or operated by OXY USA, Inc. which contain a free gas clause." App. 82a. Upon cross-motions for summary judgment, the district court entered final judgment in favor of the Class on March 26, 2013. App. 83a; Cross-Pet. App. 11, *infra*. OXY provided notice of the judgment to the Class in December 2013. Cross-Pet. App. 12, *infra*.

Upon obtaining a "great result" for the Class in an "exceptional case," counsel for the Class applied to the district court for an award of attorney's fees, litigation expenses, and incentives to the class representatives after more than seven years of litigating this action purely on a contingent fee basis. Cross-Pet. App. 1-2, 7, *infra*. The district court "reluctantly" denied each request, Cross-Pet. App. 9, *infra*, while acknowledging that "an award of attorneys' fees would seem to be appropriate for reasons of justice. . . ." Cross-Pet. App. 7, *infra*. The district court's reluctance stemmed from its recognition that "the result of the litigation confers a substantial benefit on the members of the class," Cross-Pet. App. 6, *infra*, following seven years of litigation, Cross-Pet. App. 7, *infra*, with a "result (that) is worth a great deal: rather than losing a source of free energy and being forced to convert their homes to some alternative source, these plaintiffs will continue to have free, useable house gas provided by OXY, at OXY's expense. At one point OXY placed a value of $30

[3] Howard Pickens died on September 28, 2008, and was removed as a named plaintiff in this case. App. 3a, n.11.

million on this benefit to the plaintiffs." Cross-Pet. App. 8, *infra*. The district court went on to praise "plaintiffs' counsel(s') . . . proactive legal action," finding that "plaintiffs and their counsel surely made the most prudent and efficient choice by filing at the first sign that a breach of contract was on the horizon," rather than waiting "until the gas became unusable in quality – forcing the class members to convert to alternative energy sources for their homes." Cross-Pet. App. 8, *infra*. Given the totality of these circumstances, the district court concluded that "plaintiffs' attorneys having worked for free," Cross-Pet. App. 8, *infra*, is an "absurd conclusion," Cross-Pet. App. 7, *infra*, but the district court felt compelled by its reading of "the current state of the law to [reach] that bizarre result." Cross-Pet. App. 8-9, *infra*.

The district court based its decision upon an analysis of the American Rule, as applied to "Section 2 of the Declaratory Judgment Act, codified at 28 U.S.C. § 2201," Cross-Pet. App. 2, *infra*, focusing on the "bad faith exception" and the "common benefit exception." Cross-Pet. App. 3-5, *infra*. The Tenth Circuit affirmed the district court's denial of Class Counsel's application. App. 26a-37a.

The Class urges this Court to overturn the denial of attorney's fees, expenses, and incentive awards, and to recognize that there exists in this case "'dominating reasons of justice'" that warrant exercise of the Court's "equitable powers," even as such exercise "'is drawn very narrowly.'" Cross-Pet. App. 2, *infra* (quoting *Jones v. Cole*, No. 08-1011-JTM, 2011 WL 1375685, at *4 (D.

Kan. April 12, 2011), and *Kornfeld v. Kornfeld*, 393 Fed.App'x 575, 577 (10th Cir. Aug. 31, 2010)). The "further necessary or proper relief" language of the Declaratory Judgment Act, codified at 28 U.S.C. § 2202, permits the district court's exercise of discretion and equitable powers to award attorney's fees, litigation expenses, and incentive awards in this declaratory judgment class action, as does Kansas state law if it applies.

REASONS TO GRANT THE CONDITIONAL PETITION

A. The Tenth Circuit Disregarded The Ordinary Meaning Of The Statutory Text On An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Contrary to the ordinary meaning of the statutory language, the Tenth Circuit concluded 28 U.S.C. § 2202 "does not authorize an independent grant of attorneys' fees that is not otherwise authorized by statute, contract or state law." App. 35a. But the plain text of § 2202 authorizes a district court to award attorney's fees (and expenses and incentive award) to a prevailing party in a declaratory judgment action if the district court finds the award to be "necessary or proper relief." Section 2202 provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been

determined by such judgment." App. 35a. Nothing in the statutory language limits the district court's discretion to award relief determined to be necessary or proper to a declaratory judgment entered against a party after reasonable notice and hearing. *See Halo Electronics, Inc. v. Pulse Electronics, Inc.*, ___ U.S. ___, 136 S.Ct. 1923, 1934 (2016) (ruling that § 284 of the Patent Act "contains no explicit limit or condition," and emphasizing that the "word 'may' clearly connotes discretion. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994)).").

This Court unanimously has held that in determining the scope of a district court's authority under a federal statute the "analysis begins and ends with the text." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. ___, 134 S.Ct. 1749, 1755 (2014). In *Octane Fitness*, this Court held that § 285 of the Patent Act "imposes one and only one constraint on district courts' discretion to award attorney's fees," *i.e.*, the case must be "exceptional," and rejected any "more rigid and mechanical formulation" that "impermissibly encumbers the statutory grant of discretion to district courts" to award attorney's fees. *Id.* at 1756-57. This Court reiterated its analysis in *Highmark, Inc. v. Allcare Health Mgmt. Syst., Inc.*, 572 U.S. ___, 134 S.Ct. 1744, 1748 (2014) (noting that *Octane Fitness* held that the statute was to be "interpreted in accordance with its ordinary meaning" and recognizing that "the district court 'is better positioned' to decide whether a

case is exceptional . . . because it lives with the case over a prolonged period of time."). Even more recently, this Court "eschewed any rigid formula" developed by a circuit court of appeals to restrict a statutory grant of discretion to the district court. *Halo Electronics*, 136 S.Ct. at 1934. The lesson of *Octane Fitness, Highmark*, and *Halo Electronics* is that a Congressional grant of authority is to be construed according to its ordinary meaning and without imposing tests more restrictive than provided in the statutory language. Yet, that is precisely what the Tenth Circuit and other circuits have done in interpreting § 2202.

In a statute, Congress may specifically authorize fee shifting as in *Octane Fitness* and *Highmark*, specifically deny it, or stay silent on the issue, thereby leaving discretion to a court under its equitable powers. Under the exercise of equitable powers, a federal court may award attorney's fees "when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 4-5 (1973) (awarding fees under the common benefit doctrine). Section 2202 is not entirely silent. Rather, it authorizes, in the district court's discretion, reasonable fees, expenses, or other relief that the district court deems either "necessary" or "proper." Here, awarding fees, expenses, and incentive awards are "necessary" to enlist attorneys willing to represent, on a contingent basis, people with legal rights that have been jeopardized as in this case or with damages too small to warrant the expense of individual litigation as is true in all class actions. Without the prospect of compensation, the courthouse door will be shut to those unable to pay

attorneys an hourly rate for litigation likely to last many years. An award would also be "proper" given the approximate $30 million benefit preserved for the Class.

In a prior case, the Tenth Circuit declined to "determine the outer scope of a court's authority" to award attorney's fees and related relief under § 2202, sidestepping the issue by finding that the bad faith exception would apply to support the award of attorney's fees. *Kornfeld*, 341 Fed.App'x at 400. In reaching its "absurd conclusion" and "bizarre result," the district court erroneously read *Kornfeld* to conclude that § 2202 barred the necessary or proper relief in the form of attorney's fees, litigation expenses, and an incentive award. Cross-Pet., *infra*, App. 2 (quoting *Jones v. Cole*, No. 08-1011-JTM, 2011 WL 1375685, at *4 (D. Kan. April 12, 2011) and *Kornfeld*, 393 Fed.App'x at 577).[4] As the Tenth Circuit properly found, *Kornfeld* relied on bad faith in awarding fees and left open the issue of whether the award could be made under § 2202. App. 35a, n.13. So the district court's reliance on *Jones* and

[4] Chief Judge Marten previously came to this erroneous legal conclusion in *Jones v. Cole*, No. 08-1001-JTM, 2011 WL 1375685 (D. Kan. April 12, 2011), *aff'd sub nom*. *Jones v. Estate of Cole*, 483 Fed.App'x 468 (10th Cir. 2012). In *Jones*, Judge Marten cited *Kornfeld*, *supra*, and *Gant v. Grand Lodge of Texas*, 12 F.3d 998, 1003 (10th Cir. 1993), in stating § 2202 "may include an award of attorney fees" in an appropriate case but concluded a finding of bad faith or improper motive was required even though no such limiting language appears in the statute. *Id.* at *4. The conclusion is at odds with *Halo Enterprises, Octane Fitness*, and *Highmark*, discussed *supra*, and *Key Construction*, discussed *infra*.

Kornfeld to deny Plaintiff Class's motion for compensation was erroneous and should be corrected. Contrary to the Tenth Circuit's opinion, some courts have interpreted the "necessary or proper relief" clause to include an award for attorney's fees. *See Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 550 (D.C. Cir. 1988); *National Indem. Co. v. Harper*, 295 F. Supp. 749 (W.D. Mo. 1969); *GNB, Inc. v. Gould, Inc.*, No. 90C2413, 1996 WL 18898, at *2 (N.D. Ill. Jan. 18, 1996).[5]

As in *Octane Fitness*, the determination of whether fees are awarded must be made by district courts in a "case-by-case exercise of their discretion, considering the totality of the circumstances." 134 S.Ct. at 1756. Here, because the district court and the Tenth Circuit erroneously concluded that the district court had no such discretion under § 2202, the district

[5] In another context, the Federal Circuit found exceptional cases for awarding attorney's fees as follows:

> Thus, the payment of attorney's fees for the victor is not to be regarded as a penalty for failure to win a patent infringement suit. *The exercise of discretion* in favor of such an allowance *should be bottomed upon* a finding of *unfairness or bad faith in the conduct of the losing party*, or some other equitable consideration of similar force, *which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees* which prevailing litigants normally bear.

Rohm & Haas Co. v. Crystal Chemical Co., 736 F.2d 688, 691 (Fed. Cir. 1984) (emphasis in original). Certainly, the "unfairness" or "grossly unjust" standard would be met here. Without the payment of attorney's fees, large companies could roll over small rural farmers and free gas users with impunity.

court failed to exercise its equitable power. This requires reversal so that the district court can apply the proper standard and make a determination based on its sound discretion and the totality of the circumstances. *See*, *e.g.*, *Highmark*, 134 S.Ct. at 1749 (noting that review of matters commended to the district court's discretion are "not susceptible to 'useful generalization' of the sort that *de novo* review provides," and "likely to profit from the experience that an abuse-of-discretion rule will permit to develop").

OXY cannot dispute that the district court's judgment determined its rights and obligations under the oil and gas leases. App. 1a-38a, 75a-114a. OXY also cannot dispute that the district court afforded it reasonable notice and hearing on the Class's request for further relief, *i.e.*, its request for attorney's fees, litigation expenses, and incentive awards. Nor can OXY dispute that the district court would have granted the requested relief in its discretion if it had not erroneously concluded that the current state of the law did not permit it to do so. Cross-Pet. App. 7-9, *infra* (recognizing denial of attorney's fees to be a "seemingly absurd conclusion," "a bizarre result," "an award of attorneys' fees would seem to be appropriate for reasons of justice," but "reluctantly" denying the requested relief).

This case exhibits good reason to allow a district court to make discretionary awards under § 2202 as the statutory text permits, especially in complex declaratory judgment class actions like this one. Encouraging the resolution of disputes before substantial

harm is done promotes justice. Without the prospect of such awards, this class case (and countless others like it) would not have been brought until *after* OXY cut off gas to the homes of hundreds or thousands of people. *See Lee v. Conocophillips Co.*, No. CIV-14-1391-D, 2016 WL 67803 (W.D. Okla. Jan. 5, 2016), at *8, n.8 (noting that its order "issued at the beginning of the winter season and on the heels of a winter storm that . . . significantly impacted the area of the state where the Landowners reside" and noting the parties "have invoked the Court's equity jurisdiction" and "broad equitable powers to fashion appropriate remedial orders and grant effective equitable relief"). Where the only risk to OXY or Conoco (as in *Lee*) is providing free, useable house gas, it can litigate and re-litigate the case for years while the landowners live with the fear of having their gas supply curtailed and while their counsel invest thousands of hours in time and thousands of dollars in case expenses with no prospect for remuneration as most free gas users lack sufficient money to convert to an alternative energy source, much less to finance prolonged litigation.

This Court made such an observation in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980): "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device." *Id.* at 339. Without the possibility of recovering attorney's fees, most class actions would never be filed. This Court likened attorneys who

undertake risk to vindicate legal rights to "private attorneys general." *Id.* at 338. Those legal rights include seeking a declaratory judgment under § 2201, and the ordinary meaning of "further necessary or proper" relief in § 2202 must include relief, including attorney's fees and expenses, otherwise § 2202 becomes superfluous.

One court aptly described the contingent fee and class action as the "poor man's keys to the courthouse":

> Both vehicles allow the average citizen and taxpayer to have their injuries redressed and their rights protected. Both permit persons of limited resources to obtain competent legal counsel, an essential ingredient in our adversary system of justice. . . . The annals of class action case law are replete with examples of lawyers who were willing to commit their personal resources over a substantial period of time to present a class of injured plaintiffs, motivated only by the incentive that if they succeed in vindicating the rights of their class clients, they would be paid an attorney's fee at least commensurate with what they would have received for winning an equivalent sum representing a single client. Often, these suits are brought against companies with resources that allow them to retain squadrons of top-flight lawyers, and all of the technological paraphernalia and human resources that have become characteristic of modern litigation. . . . If the plaintiff's bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective

> representation for plaintiffs in these cases will disappear. *Muehler v. Land O'Lakes, Inc.*, 617 F.Supp. 1370, 1375-76 (D.Minn.1985).

Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1217, n.23 (S.D. Fla. 2006) (internal quotations omitted). Without the prospect of reimbursement of expenses and payment for their investment of time, attorneys will be reluctant, if not unable, to accept representation of a large number of people wanting to avert harm via a declaratory judgment action. *See id.* at 1217 ("Unless that risk [the risk undertaken to vindicate legal right] is compensated with a commensurate reward, few firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct."). As this case shows, litigation consumes years of time and resources – researching and filing the case, discovery, class certification, appeal after class certification, merits discovery, summary judgment, motions to alter and amend judgment, appeals from judgment, petitions for rehearing, and now responding to a petition for writ of certiorari and filing a conditional cross-petition for writ of certiorari. Justice is best served by bringing a declaratory judgment class action before harm is done rather than leaving hundreds of people to suffer and many different judges contending with the same issues. Construing § 2202 to permit any court of the United States to award, after reasonable notice and hearing, attorney's fees, expenses, and the like, where necessary or proper

to the declaratory judgment granted against a party promotes justice and aligns § 2202 with *Octane Fitness, Highmark*, and *Halo Enterprises.*

Construing § 2202 to permit the district court's exercise of discretion in awarding attorney's fees under the "necessary or proper relief" language in § 2202 would be consistent with prior rulings and of the Tenth Circuit and the Kansas federal district courts also. *See Key Construction v. State Auto. Ins.*, No. 06-2395-KHV, 2008 WL 940797, at *1 (D. Kan. April 7, 2008) (finding attorney's fees could be *legally* awarded under § 2202 citing *Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956), and *Gant*, *supra*, but exercising discretion not to award fees); *Gant*, 12 F.3d at 1003 ("[T]his court has specifically held that a court has the power in a diversity case to award fees as damages under § 2202 even though they are not recoverable under state law. *See Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956). '[[T]he grant of power contained in § 2202] is broad enough to vest the court with jurisdiction to award damages where necessary or proper to effectuate relief based upon the declaratory judgment rendered in the proceeding. *Id.*'").

The Tenth Circuit panel in this case attempted to distinguish *Gant*'s holding that § 2202 allowed attorney's fees because the underlying will require an "adequate living," not an adequate living reduced by the cost of fees. App. 36a. So it is here. The leases in this case require free, useable gas, not free gas reduced by the cost of attorney's fees and expenses. Section 2202, and the Tenth Circuit's recognition in *Gant* of the

"broad authority conveyed by Section 2202," 12 F.3d at 1003, authorizes the district court to award attorney's fees in this case given the lease language and the unique circumstances of this declaratory judgment class action. The Tenth Circuit has an internal split among panels about whether fees and expenses are authorized by the "necessary or proper" clause of § 2202. The ordinary meaning of the "necessary or proper relief" language and the commitment of that determination to the district court's discretion under § 2202 within the context of the federal court's broader equitable declaratory judgment remedy under § 2201 must be construed to allow the courts discretion to award fees and expenses in exceptional cases like this one. Otherwise the statutes risk becoming ineffective because no attorneys will act as private attorneys general to pursue declaratory judgments via the class action procedure.

B. If § 2202 Never Allows Necessary Attorney's Fees And Expenses, The Tenth Circuit Opinion Creates A Circuit Split Since Most Other Courts Have Found State Law Controls The Issue

The Tenth Circuit held that federal law under § 2202 governed the request for attorney's fees, expenses, and incentive award, but in support of that holding cited other cases from the First, Fifth and Eighth Circuits – all of which found the issue controlled by state law. App. 35a-36a. Either the Tenth Circuit erred in applying federal law and in holding, no

matter the circumstances, that the "necessary or proper" clause could not include attorney's fees and expenses, or it erred by creating a circuit split in not considering Kansas law on the subject.[6]

Although the Tenth Circuit stated that its sister circuits have concluded that § 2202 does not give an independent power to award attorney's fees, App. 35a-36a, all of the cases cited held that § 2202 required the courts to look to state law. *Id.* at 39-40 (citing *Utica Lloyd's of Tex. v. Mitchell*, 138 F.3d 208 (5th Cir. 1998) (Texas Declaratory Judgment Act precluded an award of attorney's fees); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990) (New Hampshire law permitted award of attorney's fees so the case was remanded to the district court for a determination of a reasonable attorney's fees); *Am. Family Ins. Co. v.*

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[6] Kansas law would not bar attorney's fees for a declaratory judgment. K.S.A. 60-1703 provides:

> Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment, to show cause why further relief should not be granted.

A prevailing declaratory judgment plaintiff can apply to the court for further relief, including attorney's fees and expenses. *Id.* The burden then shifts to the defendant to "show cause why further relief should not be granted." *Id.* As the district court found, OXY cannot show any reason why fees should not be awarded under § 2202. Cross-Pet. App. 7-9, *infra*. But neither the Tenth Circuit nor district court considered this statute because they determined § 2202 precluded the request for attorney's fees and related relief.

Dewald, 597 F.2d 1148, 1151 (8th Cir. 1979) (applying North Dakota law and finding insurer did not breach its contractual duty to defend insureds so district court did not err in denying insureds' request for attorney's fees).

This Court should reverse the Tenth Circuit's denial of attorney's fees and related relief as erroneous in its conclusion that § 2202 does not *legally* authorize discretion in making the requested awards (or hold that state law controls the issue) and, either way, remand the case to the district court for further proceedings that permit the district court to exercise its discretion to award attorney's fees, litigation expenses, and an incentive award.

CONCLUSION

If OXY's petition for writ of certiorari is granted, the Class's conditional cross-petition for writ of certiorari should likewise be granted so the federal courts will know whether they have the discretion to award attorney's fees, litigation expenses, and incentive awards, after reasonable notice and hearing under 28 U.S.C. § 2202 and so attorneys know they might be paid if they bring a declaratory judgment class

action on behalf of many to avert injury, rather than wait for many people to suffer damages.

Respectfully submitted,

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AUGUST 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID AND DONNA SCHELL, AND RON OLIVER, INDIVIDUALLY, AND AS REPRESENTATIVE PARTIES ON BEHALF OF SURFACE OWNERS,

Plaintiffs,

Case No. 07-1258-JTM

v.

OXY USA INC.,

Defendants.

MEMORANDUM AND ORDER

(Filed Oct. 31, 2013)

On March 26, 2013, the court granted summary judgment to the plaintiffs in this contest over who owed the duty to make free gas useable under the contracts at issue. Dkt. 155. On September 11, 2013, the court held that its judgment applied to the entire plaintiff class, not just the individual plaintiffs. Dkt. 191. Having decided these issues, the court now has before it the plaintiffs' Motion for Attorneys' Fees and Nontaxable Expenses (Dkt. 160) and Motion for Approval of Second Class Notice (Dkt. 163). The court is prepared to rule.

Motion for Attorneys' Fees and Nontaxable Expenses

A. Attorneys' Fees

The plaintiffs seek attorneys' fees of $2 million, nontaxable expenses of $4,790.50, and incentive awards of $120,000 in total. They estimate the value of the outcome of the litigation at over $30 million and argue that their requested fees, expenses and incentive awards are reasonable in light of this valuation.

Under Section 2 of the Declaratory Judgment Act, codified at 28 U.S.C. § 2202, the district court has broad authority to grant "further necessary or proper relief based on a declaratory judgment . . . after reasonable notice and hearing, against any adverse party whose rights have been determined by the judgment." *Gant v. Grand Lodge of Texas*, 12 F.3d 998, 1002 (10th Cir. 1993). "Necessary or proper relief" may include attorneys' fees. *Id.* at 1002-03.

"[T]he standard for an award [pursuant to § 2202] is no lower than for general civil litigation under the American rule." *Jones v. Cole*, No. 08-1011-JTM, 2011 WL 1375685, at *4 (D. Kan. April 12, 2011) (internal citation omitted). "That is, the scope for any attorney fee award, even under § 2202 'is drawn very narrowly, and may be resorted to only in exceptional cases and for dominating reasons of justice.'" *Id.* (quoting *Kornfeld v. Kornfeld*, 393 Fed. App'x 575, 577 (10th Cir. Aug. 31, 2010)). Accordingly, the court looks to the American rule.

"Under the American Rule, absent a statute or enforceable contract, a prevailing litigant is ordinarily not entitled to collect reasonable attorney fees from the loser." *Aguinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1480, 1481 (10th Cir. 1993) (internal citation omitted). "However, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. *Id.* (internal quotation marks and citation omitted). Accordingly, courts have recognized a small number of equitable exceptions to the American Rule – i.e., the bad faith exception, the common fund exception, the willful disobedience of a court order exception, and the common benefit exception. *Id.* (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975)).

"The first and perhaps most firmly established exception to the traditional American rule is illustrated by those exceptional cases where the behavior of a litigant has reflected a willful and persistent defiance of the law, or where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." *Gilpin v. Kansas State High Sch. Activities Ass'n, Inc.*, 377 F. Supp. 1233, 1245 (D. Kan. 1973) (internal quotation marks and citations omitted). "The award of attorneys' fees under this exception is punitive in nature and therefore is limited to those cases where a defense is maintained in 'bad faith' without any basis in law or fact and represents 'obdurate obstinacy.'" *Id.*

Under the common fund exception, the successful plaintiff is awarded attorney fees because his suit creates "a common fund, the economic benefit of which is shared by all members of the class." *Hall v. Cole*, 412 U.S. 1, at 5 n. 7 (1973). The common fund exception allows the court to make the beneficiaries of the plaintiff's litigation "contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover." *Id.*

The common benefit exception to the American rule originates from the common fund exception. This exception permits "reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite*, 396 U.S. 375, 393-94 (1970). "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale." *Id.* at 392. As the case law makes clear, applying this exception inherently requires a relationship between the class of beneficiaries and the defendant such that an award of attorneys' fees against the defendant shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had [the class members] brought the suit."

See id. at 397. For example, this relationship exists between a corporation and its shareholders (see *Mills*) and between a union and its members (see *Hall*).

As was stated above, this court has the authority to award fees and expenses under § 2202. However, this case does not meet any of the exceptions to the American rule that justify granting fees to the prevailing plaintiffs. As the plaintiffs recognize, there are only a small number of exceptions to the American Rule, including the bad faith exception and the common fund/common benefit exceptions. *Aguinaga*, 993 F.2d at 1492. The plaintiffs argue for attorneys' fees under the bad faith and common benefit exceptions.

In their reply brief, plaintiffs argue that OXY litigated this issue in bad faith. The plaintiffs' assertion of bad faith relies solely on the fact that OXY sent out letters to all house gas users, leading the plaintiffs to believe their free gas supply might be in jeopardy. Although this act by OXY may have been the catalyst for plaintiffs filing their suit, it is not evidence of bad faith. The court finds no evidence supporting a finding that OXY litigated this issue in bad faith.

Plaintiffs also argue that they are entitled to fees under the common benefit exception. But, as the court explained above, cases where courts have applied this exception require a relationship between the defendant and the class members such that an award that will operate to spread the costs proportionately among them. "Fee shifting is justified in these cases, not because of any bad faith of the defendant but, rather,

because to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Hall v. Cole*, 412 U.S. 1, 5-6 (1973). The Tenth Circuit described the exception in *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995):

> When the common benefit is a fund, fees are extracted from the predetermined damage recovery rather than obtained from the losing party. Thus, when a class action yields a fund for class members, fees may be paid from the recovery. Similarly, in a typical shareholder derivative suit, the successful shareholder plaintiff confers a substantial benefit on all of the shareholders of the defendant corporation. Any fees assessed against the corporation can be spread proportionately among all of the shareholders, who are the real beneficiaries of the litigation, because the corporation is the alter ego of the shareholders.

Id. at 1444.

The requisite relationship mentioned and explained above does not exist in this case. Although the result of the litigation confers a substantial benefit on the members of the class, an attorneys' fee award against OXY would not operate to spread the costs proportionately among the class members. The class members receive free gas from OXY; they do not own shares or pay dues to OXY. OXY is not an alter ego of the class members. Granting the plaintiffs requested attorneys'

fees would not spread the costs of litigation to the other class members. Rather, it would operate solely as a penalty against OXY, an extra burden in addition to the declaratory judgment ordered against it. The common benefit exception is inappropriate under these circumstances.

Neither of the exceptions to the American rule argued for by the plaintiffs applies here. Additionally, there is no independent statutory or contractual basis for attorneys' fees under § 2202. Accordingly, the court denies the plaintiffs' motion for attorneys' fees.

The court is aware that this is a seemingly absurd conclusion. This is an exceptional case for myriad reasons, and an award of attorneys' fees would seem to be appropriate for reasons of justice, if only the case fit one of the exceptions to the American rule. The plaintiffs filed their complaint on August 31, 2007, after receiving a letter from OXY that clearly implied that their source of free house gas was in jeopardy. The court granted summary judgment to the plaintiffs on March 26, 2013, and the class certification issue continued to be litigated into this case's seventh year with the court. The case resulted in a great result for the plaintiffs, as they have received a declaratory judgment that OXY is responsible for providing them free, useable house gas for the remainder of their leases. Three hundred members of the plaintiff class currently exercise their right to free useable gas from OXY, and there are approximately 2,000 class members if those who could exercise this right – but currently do not – were included in the calculation. Whether the value of

the result of the litigation is measured using actual or potential class members, the result is worth a great deal: rather than losing a source of free energy and being forced to convert their homes to some alternative source, these plaintiffs will continue to have free, useable house gas provided by OXY, at OXY's expense. At one point OXY placed a value of $30 million on this benefit to the plaintiffs.

OXY points out that the plaintiffs succeeded on only their declaratory judgment claim, losing on their breach of contract, lease forfeiture and injunctive relief claims. But this result stems from the fact that plaintiffs' counsel took proactive legal action. In hindsight, had plaintiffs' counsel waited until the gas became unusable in quality – forcing the class members to convert to alternative energy sources for their homes – damages would be available against OXY for a clear breach of the leases. The plaintiffs' attorneys would have been entitled to a portion of those damages as compensation for their work. The plaintiffs and their counsel surely made the most prudent and efficient choice by filing at the first sign that a breach of contract was on the horizon. Strangely, this route results in the plaintiffs' attorneys having worked for free.

The obvious corollary this court's denial of attorneys' fees here is that any attorney who makes the wise decision to file early in a case such as this – that is, seeking a declaratory judgment before the contract is actually breached – must litigate the case pro bono, with no chance of recovering a portion of damages and no attorneys' fees. This court follows the current state

of the law to that bizarre result, but it does so reluctantly.

B. Nontaxable Expenses

The parties agree that an award of nontaxable expenses depends on whether the court awards attorneys' fees. As the court awards no attorneys' fees, nontaxable expenses are inappropriate here.

C. Incentive Fees

The court also declines to award incentive fees to the named plaintiffs in this case, finding that none of the cases cited by the plaintiffs in support of such an award provides authority for an award in the absence of a common fund.

Motion for Approval of Second Class Notice

Finally, the court has before it a pending motion by the plaintiffs seeking approval of class notice. *See* Dkt. 164. OXY responded by arguing that this notice should be delayed until its motion to alter or amend the Judgment and the plaintiffs' motion for attorneys' fees and nontaxable expenses are both decided; this objection is moot as a result of the current order. OXY also objected to the form of notice proposed by the plaintiffs, noting that the parties were able to agree on the first form of notice without the court's involvement. Accordingly, the court gives the parties two weeks to agree on the form of notice currently at issue.

IT IS THEREFORE ORDERED this 31st day of October, 2013, that the court denies plaintiffs' Motion for Attorneys' Fees and Nontaxable Expenses (Dkt. 160).

IT IS ALSO ORDERED that the parties have until November 22 to agree on the form of notice to be issued pursuant to the plaintiffs' Motion for Approval of Second Class Notice (Dkt. 163). The court will take up the Motion after that time if the parties do not reach an agreement.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

DAVID AND DONNA SCHELL, AND RON OLIVER, INDIVIDUALLY, AND AS REPRESENTATIVE PARTIES ON BEHALF OF SURFACE OWNERS,

Plaintiffs,

v.

OXY USA INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 07-1258-JTM

IT IS ORDERED AND ADJUDGED in accordance with the Memorandum and Order filed March 26, 2013, that plaintiffs' Motion for Summary Judgment (Dkt. 143) is granted.

IT IS FURTHER ORDERED AND ADJUDGED in accordance with the Memorandum and Order filed September 11, 2013, that OXY's Motion to Decertify Class Action (Dkt. 145) is denied.

November 5, 2013
Date

TIMOTHY M. O'BRIEN,
Clerk of Court

By s/ S. Smith
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID and DONNA SCHELL, and RON OLIVER, individually, and as representative parties on behalf of a class of surface owners,	)	
Plaintiffs,	)	Case No. 07-1258-JTM
v.	)	
OXY USA, INC.,	)	
Defendant.	)	

DECLARATION REGARDING NOTICE

The Defendant's Counsel states to the Court and the parties as follows:

This Court entered its Memorandum and Order approving a Second Class Notice on November 25, 2013 ("Order"). Dkt. No. 197. Per the Order, Defendant was to distribute the Second Class Notice by mail and publication in the same manner as the initial Notice of Pendency of Class Action.

1. *Direct Notice by Mail.* Defendant's Counsel mailed the Second Class Notice on or about December 5, 2013.

2. *Publication.* The Second Class Notice has been published as detailed in Exhibit A. Affidavits of Publication are attached as Exhibit B.

I, Lisa T. Silvestri, declare under penalty of perjury that the foregoing is true and correct.

/s Lisa T. Silvestri

Executed January 6, 2014.

Respectfully submitted,

/s Stanford J. Smith, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2014, a true copy of the foregoing instrument is being served on the following counsel of record via the Court's CM/ECF system:

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s/ Stanford J. Smith, Jr.
Stanford J. Smith, Jr.

[Exhibits Omitted]