IN THE SUPREME COURT OF THE STATE OF KANSAS

JAMES HADLEY, JOHN EDWARD TETERS, MONICA BURCH, TIFFANY TROTTER, KARENA WILSON, ABRAHAM ORR, DAVID BROOKS, SASHADA MAKTHEPHARAK through his next friend KAYLA NGUYEN*; on their own and on behalf of a class of similarly situated persons*; *Petitioners*, v. JEFFREY ZMUDA, in his official capacity as the Secretary of Corrections for the State of Kansas, SHANNON MEYER, in her official capacity as the Warden of Lansing Correctional Facility, DONALD LONGFORD, in his official capacity as the Warden of Ellsworth Correctional Facility, and GLORIA GEITHER, in her official capacity as the Warden of Topeka Correctional Facility, *Respondents.*	Original Action No. _____ **Class Action** **IMMEDIATE RELIEF SOUGHT**

MOTION FOR CLASS CERTIFICATION

COME NOW Petitioners, pursuant to K.S.A. 60-223, and move this Court for certification of the proposed Class and Subclasses set forth in Section V of the Verified Class Action Petition for Writ of Habeas Corpus. In support, they state as follows:

1. In this action, Petitioners challenge the conditions of their confinement by Respondents, Kansas Secretary of Corrections Jeffrey Zmuda (in his official capacity), Lansing Correctional Facility Warden Shannon Meyer (in her official capacity), Ellsworth Correctional Facility Warden Donald Longford (in his official capacity), and Topeka Correctional Facility Warden Gloria Geither (in her official capacity). In particular, Petitioners are challenging the Department of Corrections' unmitigated and unconstitutional exposure of inmates to coronavirus infection without providing adequate social distancing, sanitation, or access to medical treatment. By maintaining overcrowded facilities and denying inmates free access to soap and other sanitation products, Respondents are placing all individuals incarcerated in KDOC custody at serious risk to contract COVID-19, spread the infection to other inmates and staff, and, in some cases, die.

2. For the reasons set forth below, Petitioners meet the numerosity, commonality, typicality, and adequacy requirements to justify a Class of all individuals like them who are now, or will in the future be, in the custody of Respondents and have been, or will be, exposed to coronavirus infection. Moreover, the proposed Class and Subclasses also meet the requirements of K.S.A. 60-223(b).

3. First, the proposed Class and Subclasses meet the numerosity requirement. Joinder is impracticable because: (1) the classes are numerous; (2) the classes include future members, and (3) the class members are incarcerated, rendering their ability to institute individual lawsuits limited, particularly in light of reduced legal visitation throughout KDOC facilities and court closures across the state due to COVID-19 (*see* KS Sup. Ct.

Administrative Order 2020-PR-032). With respect to the Class itself, there are close to 10,000 people currently in KDOC custody. Petition Ex. A ¶ 27 (identifying 9,968 individuals in KDOC custody as of April 8, 2020). The Medically-Vulnerable Subclass also likely has several hundred members based on reports that KDOC plans to open a new facility dedicated to confining elderly and ill inmates. *See*, *e.g.*, Nomin, Ujiyediin, *Kansas May Build Specialty Prisons To Deal With Elderly Inmates And Drug Problems*, KCUR 89.3 (Dec. 6, 2019), https://www.kcur.org/post/kansas-may-build-specialty-prisons-deal-elderly-inmates-and-drug-problems#stream/0 (plan to create a "a 250-bed geriatric care facility"). The proposed Release-Eligible and Low-Level Offender Subclasses are also believed to include hundreds of inmates. Moreover, Kansas courts have acknowledged that prison conditions cases often satisfy the numerosity requirement based on the fluid composition of prison populations. *See*, *e.g.*, *Combs v. Devon Energy Prod. Co., L.P.*, No. 108,624, 2013 Kan. App. Unpub. LEXIS 663, at *19 (Kan. App. 2013) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

4. Second, common questions of law and fact exist as to all members of the proposed Class and Subclasses: all have a constitutional right to receive adequate COVID-19 prevention, testing, and treatment.

5. Third, the named Petitioners have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of the Class and their respective Subclasses. The Petitioners have no interests adverse to the interests of the proposed Class.

6. Finally, Respondents have acted on grounds generally applicable to all proposed class members—i.e. they are exposing them to serious and unconstitutional harm by failing to mitigate the known risk of coronavirus infection, and this action seeks declaratory and injunctive relief to enjoin Respondents from continuing to do so. Petitioners therefore properly seek class certification under K.S.A. 60-223(b)(2).

7. Furthermore, class certification is appropriate by this Court without further fact-finding. *See*, *e.g.*, 2013 Kan. App. Unpub. LEXIS 663, at *8 (noting that courts are "not required to conduct a mini-trial with extensive fact-finding before ruling on the class certification issue").

WHEREFORE, Petitioners respectfully request that this Court:

A. Certify a Petitioner Class of all those individuals in the custody of KDOC, now or in the future;
B. Certify a Subclass of all medically-vulnerable individuals, as defined in Section V of the Verified Class Action Petition for Habeas Relief, who are at risk for serious harm or death from COVID-19 as a result of their age or pre-existing medical conditions;
C. Certify a Subclass of all release-eligible individuals, as defined in Section V of the Verified Class Action Petition for Habeas Relief;
D. Certify a Subclass of all low-level offenders, as defined in Section V of the Verified Class Action Petition for Habeas Relief;

E. Appoint James Hadley, John Edward Teters, Monica Burch, Tiffany Trotter, Karena Wilson, David Brooks, and Sashada Makthepharak through his next friend Kayla Nguyen, as Class representatives; and

F. Appoint Zal Shroff and Lauren Bonds as Class counsel.

Dated: April 9, 2020

Respectfully Submitted,

ACLU FOUNDATION OF KANSAS

/s/ Lauren Bonds_____

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CERTIFICATE OF SERVICE

The undersigned person hereby certifies that a true and correct copy of the above and foregoing document was placed with a courier service on April 9, 2020, for delivery to:

Jeff Cowger
Chief Legal Counsel
Kansas Department of Corrections
714 SW Jackson, Suite 300
Topeka, KS 66603

/s/ Lauren Bonds_____
Lauren Bonds

CITED UNPUBLISHED DECISIONS

Combs v. Devon Energy Prod. Co., L.P.

Court of Appeals of Kansas

July 26, 2013, Opinion Filed

No. 108,624

Reporter
2013 Kan. App. Unpub. LEXIS 663 *; 303 P.3d 1278; 2013 WL 3867981

JAYSON COMBS, Individually, and as Representative Party on Behalf of a Class of Surface Owners, Appellees, v. DEVON ENERGY PRODUCTION COMPANY, L.P., Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by *Combs v. Devon Energy Prod. Co., L.P., 2013 Kan. LEXIS 1317 (Kan., Dec. 27, 2013)*

Prior History: **[*1]** Appeal from Kearny District Court; PHILIP C. VIEUX, judge.

Disposition: Reversed.

Counsel: Stanford J. Smith, Jr., Marcia A. Wood, and W. Rick Griffin, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellant.

Lee Thompson and Deborah Thompson, of Thompson Law Firm, LLC, of Wichita, for appellees.

Judges: Before MCANANY, P.J., ATCHESON and ARNOLD-BURGER, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Devon Energy Production Company, L.P. appeals from the district court's order certifying a class in this suit. Plaintiff Jason Combs, on behalf of himself and others, claims that Devon failed to provide a usable supply of free gas to leasehold residents for home use under the terms of oil and gas leases attached to their properties.

In the 1940's, Lester McCoy and C.W. Chapman entered into leases of their properties in Kearny County for oil and gas exploration and production. These leases are collectively referred to as the McCoy lease. Devon is the current lessee under the McCoy lease. Since 2001, Combs has owned and occupied a residence on the property subject to the McCoy lease.

The McCoy lease includes a provision that "[l]essor shall have the privilege at his own risk and expense of using gas from any gas well **[*2]** on said land for stoves and inside lights in the principal dwelling located on the leased premises by making his own connection thereto." The parties refer to this as a "free gas clause." Combs contends, and Devon does not dispute, that this lease provision runs with the land. Since Combs purchased the property, he has been obtaining free gas for his home under this provision.

In April 2010, Combs filed this action against Devon asserting that Devon improperly operated his lease by failing to provide uninterrupted gas service or by providing gas not usable by him. According to Combs, he has experienced reoccurring problems with his household appliances due to inadequate pressure in Devon's line and excessive moisture in the line that causes the line to freeze in winter.

Combs alleged in his petition that other owners of residences

on Kansas real estate subject to Devon "free gas" leases have experienced similar problems. Thus, Combs sought to represent a class of similarly situated homeowners. Combs asked the district court for a class-based declaration that the free gas clause in his lease and similar clauses in other leases expressly or impliedly require Devon to furnish homeowners **[*3]** with "useable" gas of adequate quality and sufficient pressure to avoid service interruptions. He also requested injunctive relief to enjoin Devon from interfering with the flow of natural gas to these homes.

The district court stayed discovery on the merits of Combs' claims and directed the parties to conduct discovery on the propriety of class certification.

In December 2010, Combs filed his motion to certify the class. In support of his motion, Combs claimed that Devon had hundreds of Kansas leases that contained a free gas clause and that the leaseholds were scattered through at least six Kansas counties. Combs also contended that there was a common issue of law for all leaseholders as to whether Devon's free gas clauses obligated it to provide useable gas sufficient to operate the appliances and lighting in the residences without interruption. Combs asserted that his claims were typical of other prospective class members on the issue of Devon's alleged consistent failure to provide useable gas and that he and his counsel would vigorously represent the interests of the prospective class members.

Finally, Combs argued that class certification was appropriate under *K.S.A. 2012 Supp. 60-223(b)*. **[*4]** Combs claims that certification was appropriate under *subsection (b)(2)* because declaratory or injunctive relief would be an appropriate remedy for the proposed class as a whole. Combs also relied on *K.S.A. 2012 Supp. 60-223(b)(3)*, arguing that the "key" question for the class—whether Devon was obligated to provide useable gas under the leases—predominated over questions affecting only individual prospective class members.

Devon argued against class certification asserting there were a number of defects in Combs' proposed class action. Those defects can be summarized as follows:

- Combs failed to precisely define the proposed class.

- Combs was unable to satisfy the numerosity requirement of *K.S.A. 2012 Supp. 60-223(a)(1)* based on the evidence supporting a potential class of less than 24 members.

- Combs failed to establish commonality, typically, and adequacy requirements under *K.S.A. 2012 Supp. 60-223(a)(2)-(4)* and *(b)(3)* due to factual and legal variations in the terms of the leases and the nature of the legal issues.

- The prayer for relief required the court to issue an advisory opinion such that declaratory and injunctive relief was not appropriate under *K.S.A. 2012 Supp. 60-223(b)(2)*.

The **[*5]** district court granted Combs' motion and certified the class, with Combs as the class representative. The court adopted the law set forth in Combs' supporting brief and his proposed findings of fact and conclusions of law and found:

(1) There were potentially 24 different locations using house gas from Devon and as many as 174 Devon leases with domestic gas users.

(2) Devon leases with free gas clauses were located in multiple Kansas counties and the potential claimants, 175 in number, rendered joinder impractical.

(3) Various Devon leases contained similar free gas clauses creating a common issue as to whether the lessors/homeowners were entitled to declaratory and/or injunctive relief on the claim that the leases require Devon to provide useable gas and to assume any costs incurred in doing so.

(4) The typicality requirement was satisfied because Combs had problems obtaining usable gas for his home and multiple other surface owners also experienced problems relating to the quality or quantity of the free gas.

(5) The requirements of *K.S.A. 60-223(b)(2)* and *(b)(3)* had been met.

The court accepted the following definition by Combs of the proposed class:

"The resident owners of surface estates **[*6]** and associated rights and privileges in lands in Kansas burdened by oil and gas leases held or operated by Devon which such leases contain a covenant which obligates the lessee to extend to the lessor the privilege of using gas from any gas well on the land for person [sic] use in the principal dwelling located on the leased premises."

Devon appealed, and further proceedings in the district court have been stayed pending resolution of this appeal.

Standards for Class Certification

K.S.A. 2012 Supp. 60-223(a) establishes several prerequisites for class certification, which are characterized as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy

of representation. Even though a court may later modify or decertify a class, this does not lessen the movant's burden of establishing the prerequisites for certification in the first instance. *Dragon v. Vanguard Industries, Inc., 277 Kan. 776, 787, 89 P.3d 908 (2004) (Dragon I)* (quoting *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 [1982])* ("This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with [*Federal Rule of Civil Procedure] 23(a)* **[*7]** remains, however, indispensable.").

Thus, Combs had the burden of establishing that all the prerequisites for class certification exist. Those include:

> "(1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *K.S.A. 2012 Supp. 60-223(a)*.

Numerosity and commonality focus on whether the characteristics of the prospective class and claims make representative litigation appropriate; that is, whether there are many parties who share common legal or factual questions. Typicality and adequacy of representation focus on the appropriateness of the class representative to pursue the proposed claims. 1 Newberg on Class Actions § 3:28, pp. 262-63 (5th ed. 2011).

A proposed class representative who satisfies these four prerequisites in *K.S.A. 2012 Supp. 60-223(a)* must also establish that the proposed class action is appropriate under one of the three standards set forth in *K.S.A. 2012 Supp. 60-223(b)(1)-(3)*. *Dragon v. Vanguard Industries, 282 Kan. 349, 355, 144 P.3d 1279 (2006)* **[*8]** (*Dragon II*). Here, the district court found that Combs satisfied *subsections (b)(2)* (declaratory or injunctive relief is appropriate because a party has acted or refused to act in a manner generally applicable to the entire class) and *(b)(3)* (common questions predominate over individual issues, and a class action is the superior method of adjudication).

Kansas courts have traditionally followed the federal courts' interpretation of the comparable *Federal Rule of Civil Procedure 23*. See *Dragon I, 277 Kan. at 778*. In determining the propriety of a class action under the federal rule, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of *Rule 23* have been met. *Anderson v. City of Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982)*.

In Kansas, the district court is not required to conduct a mini-trial with extensive fact-finding before ruling on the class certification issue. However, the district court must *rigorously analyze* the proffered evidence to determine whether class certification is appropriate. *Critchfield Physical Therapy v. The Taranto Group, Inc., 293 Kan. 285, 293, 263 P.3d 767 (2011)*. That **[*9]** rigorous analysis does not encompass consideration of whether the class members will likely prevail on the merits. *293 Kan. at 294-95*. Nevertheless, some consideration of the merits of the underlying claim may be inevitable. See *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. , 131 S. Ct. 2541, 2551-52, 180 L. Ed. 2d 374 (2011)*. The merits of the plaintiffs claim may be considered only to the extent such inquiry is relevant in deciding whether the *Rule 23* requirements have been met. *Amgen v. Connecticut Retirement Plans and Trust, 568 U.S. , 133 S. Ct. 1184, 1194-95, 185 L.Ed. 2d 308 (2013)*.

Standards for Appellate Review

On appeal we review the district court's ruling for any abuse of discretion.

> "'Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.' [Citations omitted.]" **[*10]** *Critchfield, 293 Kan. at 292*.

We may not use hindsight to judge the propriety of a class certification. To the contrary, our task is to ensure that the district court applied the statutory factors and rigorously analyzed the evidence in making its decision. *O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 360, 277 P.3d 1062 (2012)*; *Anderson Office Supply v. Advanced Medical Assocs., 47 Kan. App. 2d 140, 154, 273 P.3d 786 (2012)*.

Generally, when such a discretionary decision is made within the legal standards and takes the proper factors into account in the proper way, we must affirm even if we think it unwise to do so. But to be entitled to the full measure of deference when certifying a class, the district court must apply the provisions of *K.S.A. 2012 Supp. 60-223*. *Coulter v. Anadarko Petroleum Corp., 296 Kan. 336, 352, 292 P.3d 289 (2013)*.

With these principles in mind, we turn to the evidence on the class certification issue and district court's findings and

conclusions.

Numerosity

The numerosity factor in K.S.A. 2012 Supp. 60-223(a)(1) addresses the issue of whether the number of prospective class members is so large as to render *impractical* the joinder of all the proposed **[*11]** class members as additional named parties. Here, the district court concluded that there were potentially 24 different locations using free house gas from Devon and as many as 174 Devon wells with domestic gas *users*. The court also found that the Devon leases with free gas clauses were located in multiple Kansas counties and that the potential number of claimants (175) would render joinder impractical.

Devon disputes these findings. It argues that the documents in the record do not establish the number of resident surface owners with free gas rights. Further, it contends that the number of Devon's Kansas leases is not helpful in determining the size of the class. Devon argues that a number of lessors either do not have a principal residence on the property subject to the leases or otherwise do not utilize free house gas. Based on the record, Devon argues, the number of prospective class members is only approximately 16 persons.

Unlike the current case, the facts in most of our reported Kansas cases clearly have involved sufficiently numerous potential class members that the numerosity requirement is rarely at issue. We recognize that Combs is not required to allege the exact number or **[*12]** specifically identify his proposed class members. Nevertheless, he cannot satisfy the numerosity requirement with mere speculation or bald allegations. See Fleming v. Travenol Laboratories, Inc., 707 F.2d 829, 833 (5th Cir. 1983) (mere allegation that joinder is impracticable is not sufficient to show numerosity); see also Roe v. Town of Highland, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990) (plaintiff seeking certification cannot rely on conclusory allegations or speculation as to the size of the class); Sandlin v. Shapiro & Fishman, 168 F.R.D. 662, 665-66 (M.D. Fla. 1996) (numerosity not met where plaintiffs offered no estimate of the size of the proposed class). To the contrary, when there is a dispute as to whether a plaintiff has satisfied the numerosity requirement, the court should require evidence on the issue. See Dragon I, 277 Kan. at 783.

A plaintiff generally is required to present enough evidence of the potential size of the class to enable the court to make common sense assumptions regarding the number of putative class members. 1 Newberg on Class Actions § 3.13, pp. 214-15; see Rex v. Owens ex rel. State of Okla., 585 F.2d 432, 436 (10th Cir. 1978) (the party must produce **[*13]** some evidence or otherwise establish a reasonable estimate of the number of potential class members who may be involved). In the absence of direct evidence of the number of class members, a plaintiff may present circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition. This circumstantial evidence must be sufficient to allow a district court to make a "common sense" factual finding of the number of prospective class members. Marcus v. BMW of North America, LLC, 687 F.3d 583, 596-97 (3d Cir. 2012).

When numerosity is challenged, moreover, the district court must rigorously analyze the evidence relating to potential class members. For example, in Fredrick v. Southern Star Cent. Gas Pipeline, Inc., No. 10-1063-JAR, 2011 U.S. Dist. LEXIS 99102, 2011 WL 3880902 (D. Kan. 2011) (unpublished opinion), the court noted that simply counting the number of individual oil and gas lessors would not provide an accurate number because some lessors held multiple leases, one had significantly different lease terms, and one member filed an affidavit indicating she had no desire to participate in the case. Moreover, of the remaining 39 individual lessors, 29 **[*14]** of them were either married or otherwise related to another lessor or a beneficiary of a trust holding the lease. Based on these numbers and related issues, the court found joinder was not impracticable for the potential class members. 2011 U.S. Dist. LEXIS 99102, 2011 WL 3880902, at *3. See Peterson v. Albert M. Bender Co., Inc., 75 F.R.D. 661, 667 & n.7 (N.D. Cal. 1977) (numerosity not shown due to inconsistencies of plaintiff's exhibits reflecting flawed statistical information); Calabrese v. CSC Holdings, Inc., No. 02-CV-5171, 2009 U.S. Dist. LEXIS 13119, 2009 WL 425879, at *10 (E.D.N.Y. 2009) (unpublished opinion) (numerosity not established when review of more than 50 affidavits failed to establish the affiants qualified as potential class members).

Here, Combs relies on various documents provided by Devon to establish the numerosity prerequisite. Regrettably, the contents of these documents are not self-explanatory and have not been explained by any deponent or affiant. Combs and the district court apparently relied upon a spreadsheet labeled "Kansas Wells with Domestic Gas Connections" to conclude there may be up to 174 house gas users. This spreadsheet lists 179 entries, plus a few indecipherable handwritten items. Each entry apparently **[*15]** refers to an individual wellhead connection. However, the document includes wellhead connections other than those that provide "house gas" to a residence. A number of them, for example, refer to gas used for irrigation purposes: *i.e.*, connections that fuel gas-operated irrigation pumps. Only 19 of the 174 entries refer to "House," "House Gas," "House Use," or similar references so as to permit an inference that the connections provide the type of

house gas forming the basis of Combs' claims.

Another document relied upon by Combs is a one-page document entitled "House Tap Usage." It contains the names of 24 leases that apparently have residences that use gas for household purposes. These 24 leases are associated with the names and addresses of only 16 different persons. For example, the first entry is for " Berg #1 (PZ-145)." Max Ingler of Deerfield is identified as the person who apparently gets free house gas from this lease. But Ingler is also identified as the person using free gas on the fourth entry for "Havel #1 (PZ-155)." It is not clear whether one of the tracts has a residence occupied by a tenant of Ingler or what accounts for him are being listed twice as a user of free house **[*16]** gas.

Moreover, the potential class members listed on the "House Tap Usage" document are within a limited geographic area. Seven of these persons have addresses in Deerfield (Kearny County); one has an address in Garden City (Finney County); four are in Sublette (Haskell County); one is in Holcomb (Finney County); one is in Pratt (Pratt County); two are unspecified; and two have an address in Taos, New Mexico. This document appears to identify the leaseholders and not necessarily the individuals living in the residences that use the gas. It is clear, however, all of the listed leases involve properties located in five contiguous Kansas counties: Kearny, Haskell, Finney, Seward, and Stevens.

Combs' discovery responses do little to clarify any evidentiary basis that permits a rigorous analysis of the numerosity requirement. In his interrogatory answers, Combs identified nine persons other than himself who held surface estates subject to Devon leases containing a free gas provision. These persons all have addresses in Deerfield, Kansas. Combs asserted there were 50 unidentified neighbors who used house gas but provided no other specifics. Elsewhere, Combs offered the conclusory statement **[*17]** that "[m]y neighbors have all reported experiencing the same issues with low gas pressure" on Devon-operated leases. Combs' information did not clearly distinguish which or how many neighbors had problems with house gas or the frequency or types of problems they were having with Devon's gas. Combs' deposition testimony provided little or no additional information helpful in evaluating the numerosity prerequisite. Such meager evidence after 6 months of class-focused discovery is not sufficient. *Cf.* *Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980)* (numerosity requirement was not met where the putative class consisted of 31 readily identifiable persons who lived in a limited geographical area); *Schwartz v. Upper Deck Co., 183 F.R.D. 672, 681 (S.D. Cal. 1999)* (merely identifying the number of sales made by defendant is speculative in determining the number of potential class members who purchased product for a particular purpose).,

Combs repeatedly relies on *Schell v. OXY USA, Inc., No. 07-1258-JTM, 2009 U.S. Dist. LEXIS 65568, 2009 WL 2355792 (D. Kan. 2009)* (unpublished opinion). In *Schell*, the federal district court certified a class in a case involving claims for useable gas under OXY USA leases with free gas **[*18]** clauses. However, the evidence in *Schell* established that the proposed class included over 300 persons who *actually used* free gas under the free gas clauses. As a result, the decision in *Schell* provides little assistance in resolving the numerosity issue.

In contrast, Combs argues that the number of lessors *actually using* free gas from Devon is irrelevant. Combs asserts that current nonusers *may* in the future connect to the wellhead and demand free gas from Devon; thus, they should be included when considering the size of the prospective class.

The inability to identify potential future class members does not necessarily bar certification of class with future class members. 1 Newberg on Class Actions § 3:15, pp. 221-22. But Combs' reliance on potential future members does not bear up under rigorous scrutiny.

In some cases—such as litigation regarding jail conditions or broad policy-based discriminatory employment practices—the courts have recognized the likelihood of future members with potential claims because of the fluid and continuous nature of the class population and the likelihood that the class-based practice will affect that future population. See, *e.g.*, *Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986)* **[*19]** (claims of disparate impact discrimination properly certified based on 31 present class members as well as future employees); *Dean v. Coughlin, 107 F.R.D. 331, 332-33 (S.D.N.Y. 1985)* (finding numerosity in a class of prisoners challenging the prison dental care due to "[t]he fluid composition of a prison population . . ., the nature of the wrong and the basic parameters of the group affected remain constant"). But here, there is little basis to infer that there are likely to be future members of the class. While there may be up to 174 Devon leases with the free gas clause, there is simply no evidence from which to infer any meaningful potential that current or future surface owners will build new residences or occupy vacant residences on the leaseholds. The parties do not dispute that most of Devon's leases were executed a number of years ago. Yet, there is nothing to indicate that the number of leases actually invoking the free gas clause has increased or will likely to do so. Without evidence of a fluid class population, a plaintiff cannot speculatively bootstrap into the class possible future members in order to satisfy the numerosity requirement.

Based upon the record, the district **[*20]** court's finding that

Combs has established a potential class of 175 members is not supported by substantial competent evidence or reasonable inferences from the evidence. Under the facts of this case, it is mere speculation that the number of surface owners invoking the free gas clause will increase and such new owners might benefit from declaratory or injunctive relief if Combs' claims are successful. At best, the evidence supports finding of 25 or fewer potential class members located in a small geographic region. One cannot conclude from this that joinder of these parties would be impractical. As a result, the district court abused its discretion in finding Combs satisfied the numerosity requirement.

Commonality

Commonality requires a plaintiff to show that the proposed class members have suffered the same injury. Likewise, their claims must turn on a common fact or legal question that is capable of class-wide resolution. In other words, the determination of the common fact or legal question must resolve an issue central to the validity of each class member's claims. *Critchfield, 293 Kan. at 295* (citing *Wal-Mart Stores, Inc., 131 S. Ct. at 2551*). As stated by the United States Supreme **[*21]** Court, the commonality issue really focuses on "'not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.' [Citation omitted.]" *131 S. Ct. at 2551*.

The district court found that the commonality factor had been established. The court noted that the free gas clause in Combs' lease was substantially similar to the language in other Devon leases. Because Combs was seeking declaratory and injunctive relief relating to that key clause, the court found common questions of law were presented.

Devon argues that the resolution of Devon's duty under the free gas clause will vary based upon the terms of the lease. The free gas provisions in leases now held by Devon vary somewhat, such as these three examples from Devon leases:

> "Lessor shall have the privilege at his own risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling located on the leased premises by making his own connections thereto."
>
> "[T]he lessor to have gas free of charge from any gas well on the leased premises for stoves and inside lights in the principal **[*22]** dwelling house on said land by making his own connections with the well, the use of such gas to be at the lessor's sole risk and expense."
>
> "[L]essor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connection with the well at his own risk and expense."

Notwithstanding their minor variations, these lease provisions present a common question of law as to whether Devon has a contractual duty, express or implied, to provide useable gas under these various provisions. As the United States Supreme Court has said, the commonality issue focuses on "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.' [Citation omitted.]" *Wal-Mart Stores, Inc., 131 S. Ct. at 2551*. Here, the language of the provisions is sufficiently similar that it is likely that defining the extent of Devon's duties to Combs will define the duties owned to all class members.

Devon claims, however, that resolution of the claims would require numerous individualized inquiries such as whether the surface owners have experienced problems, the types of problems, **[*23]** and whether the users' problems have been caused by Devon or the users' own equipment. Devon asserts there may be statute of limitations issues or other defenses individual to different users. Finally, Devon contends there will be individual issues of whether the surface owner uses gas for uses not permitted under the applicable free gas clause.

But these are all issues that are beyond the scope of the relief sought in this action. At the present time, Combs seeks only declaratory and injunctive relief. If he prevails, a carefully drawn declaration of Devon's duties under the free gas provision and, potentially, an injunction tied to such a declaration would set the parameters for resolving any future disputes with lessors and their successors. We find no abuse of discretion in the district court's findings and conclusions regarding this factor.

Typicality

Class certification under *K.S.A. 2012 Supp. 60-223(a)(3)* requires a showing that that Combs' claims are "typical of the claims or defenses of the class." Typicality is generally found to exist when the named plaintiff and other proposed class members challenge the same unlawful conduct under the same legal theories. See *Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982)*; **[*24]** *Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10th Cir. 1975)*.

Whether the typicality requirement has been met depends on the answer to two questions: (1) Does the class representative have any kind of a material conflict of interest with the class

with respect to the common questions involved? and (2) Will counsel vigorously prosecute the action on behalf of the class? See *Zapata v. IBP, Inc., 167 F.R.D. 147, 160-61 (D. Kan. 1996)*; *Olenhouse v. Commodity Credit Corp., 136 F.R.D. 672, 680 (D. Kan. 1991)*.

Devon challenges the district court's finding that Combs satisfied the typicality requirement, reiterating its concern that the definition of the proposed class is imprecise. Devon cites to Combs' proposed notice to class members defining the case as a breach of contract case and including all surface owners, even if they also own the mineral rights leased to Devon. In addition, Devon asserts that Combs' claims are time barred and therefore may not be typical of other class members. Devon also emphasizes the different types of problems that Combs specifically identified that other gas users experienced. The federal district court in *Schell* rejected similar arguments. *Schell, 2009 U.S. Dist. LEXIS 65568, 2009 WL 2355792, at *3-4*.

While **[*25]** we find most of these arguments unpersuasive, we cannot ignore the potential conflict between Combs' claims—as a surface owner only—because his proposed class includes persons with both the surface rights and the mineral rights in the same land. In this situation, these owners may find extracting the most gas for sale is much more important than requiring Devon to change operations to support more consistent house gas; such a change in operations may reduce the quantity of gas for sale or increase expenses that reduce the royalties paid for the gas sold.

Combs and the district court assume the declaratory relief requested is beneficial to or desired even by those who do not have a current need for the house gas. However, Combs has provided no information as to how many of his purported class members own only the surface rights and, thus, do not need to weigh a choice between obtaining free usable house gas and maximizing gas sales. With documentation of less the 19 actual users of house gas from approximately 175 leases, it is difficult to conclude that Combs' claims are typical of all the members of the class he has defined and the district court adopted.

Based upon the record presented **[*26]** by the parties, we are forced to conclude that the district court abused its discretion in finding that Combs' claims were typical of the class he seeks to represent.

Adequacy

In a class action a named party represents the absent class members, who will be bound by the eventual court judgment if they do not opt out of the class. More significantly, plaintiffs in class actions under *K.S.A. 2012 Supp. 60-223(b)(2)* are not statutorily required to issue notice, and class members are not required to be given the option to opt out of the litigation. See 1 Newberg on Class Actions § 3:7, p. 172. Accordingly, it is important that the named party adequately represent the class.

In general, there are two concerns that need to be examined. First, the named party's claims must be sufficiently interrelated to—and not in conflict with—those of other class members so that the named party would be expected to pursue the interests of absent class members. Second, the attorney(s) representing the class must be sufficiently qualified and experienced to conduct the litigation. See *North Star Capital Acquisition v. Budd, 266 P.3d 1253, 2012 WL 98489, at *7 (Kan. App. 2012)* (unpublished opinion), *rev. denied* **[*27]** 296 Kan. _(February 7, 2013).

The parties' arguments on this point basically repeat the arguments made with respect to the commonality and typicality issues. Whether class counsel is adequate is determined by *K.S.A. 2012 Supp. 60-223(g)*, amended in 2010 to provide specific standards in evaluating class counsel. See *Coulter, 296 Kan. at 354*. While this court has no reservations regarding the qualifications of class counsel, the questions relating to the typicality of Combs' claims with the broad nature of the class certified undermines the district court's finding that Combs presents an appropriate representative for the class certified.

Definiteness of Class

On appeal, Devon also takes issue with the language used to describe the class Combs seeks to represent. As noted above, the district court appears to have adopted Combs' proposed class definition as:

> "The resident owners of surface estates and associated rights and privileges in lands in Kansas burdened by oil and gas leases held or operated by Devon which such leases contain a covenant which obligates the lessee to extend to the lessor the privilege of using gas from any gas well on the land for person [sic] use in the principal **[*28]** dwelling located on the leased premises."

Many courts have adopted the implicit requirements for a class action under *Federal Rule of Civil Procedure 23* and similar state statutes. One of those implicit requirements is that the class be "definite" and "ascertainable." In other words, the putative class must be clearly defined and ascertainable with reference to objective criteria. 1 Newberg

on Class Actions § 3.1, pp. 151-52 (5th ed. 2011). The same level of definiteness is generally not at issue when a class is certified for declaratory and/or injunctive relief because notice to class members is not obligatory and the relief obtained is of a nature that does not require distribution to the class. See 1 Newberg on Class Actions § 3:7, pp. 172-75; see *Shook v. El Paso County, 386 F.3d 963, 972 (10th Cir. 2004)*. Although Combs proposes giving notice and allowing members to opt out, it is unclear whether his class definition is too indefinite to make this feasible.

The Kansas Supreme Court has recognized that ambiguities in the description of proposed class members present real, albeit not necessarily fatal, problems for class certification. *Critchfield Physical Therapy v. The Taranto Group, Inc., 293 Kan. 285, 308, 263 P.3d 767 (2011)*. **[*29]** As the court has repeatedly recognized, the district court retains the ability to modify a class at any time before final judgment. *Dragon v. Vanguard Industries, 282 Kan. 349, 364, 144 P.3d 1279 (2006)* (*Dragon II*). Thus, even if the certified class is overly vague, when the interests of judicial economy and the rights of the parties may support class certification, the appellate court may simply direct the district court to modify the class definition to clarify which parties constitute the plaintiff class. *Critchfield, 293 Kan. at 309*.

Because of our determination that the district court erred in finding the numerosity and typicality requirements have been met, however, we need not address this issue other than to emphasize that if in further proceedings a class is certified, the definition of the class and proposed notice must clearly address the problems connected to numerosity and typicality discussed above.

Standards of K.S.A. 2012 Supp. 60-223(b)

Even if this court could defer to the district court's determination that Combs satisfied the prerequisites of *K.S.A. 2012 Supp. 60-223(a)*, we must still face the serious questions as to whether Combs has made a satisfactory showing that **[*30]** class certification is appropriate under *K.S.A. 2012 Supp. 60-223(b)(2)* or *(b)(3)*.

To qualify under *K.S.A. 2012 Supp. 60-223(b)(2)*, Combs was required to show that Devon "has acted or refused to act" in the same manner to the entire class, "so that declaratory or injunctive relief or is appropriate for the class as a whole." In the alternative, to qualify under *K.S.A. 2012 Supp. 60-223(b)(3)*, Combs must prove (1) that the class members' common questions of law or fact "predominate over any questions affecting only individual members" and (2) that pursuing the matter as a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

Declaratory and Injunctive Relief

To satisfy the requirements of *K.S.A. 2012 Supp. 60-223(b)(2)*, Combs must establish that Devon "has acted or failed to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The second portion of the subsection—that declaratory or injunctive relief is appropriate for the class as a whole—is more restrictive than the first portion. The latter "'demands a certain cohesiveness **[*31]** among class members with respect to their injuries.'" *Schell, 2009 U.S. Dist. LEXIS 65568, 2009 WL 2355792, at *6* (quoting *Shook v. Bd. of County Comm'rs, 543 F.3d 597, 604 [10th Cir. 2008]*). As recently stated by the Supreme Court: "The key to the *(b)(2)* class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' [Citation omitted.]" *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. , 131 S. Ct. 2541, 2557, 180 L.Ed. 2d 374 (2011)*.

Cohesiveness is deemed especially important for a *Rule 23(b)(2)* class because, unlike *Rule 23(b)(3)*, there is no express provision for unnamed class members to opt out of the litigation. See *Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1035 (8th Cir. 2010)*. 2 Newberg on Class Actions § 4:36, p. 1144 (5th ed. 2012). Compare *K.S.A. 2012 Supp. 60-223(c)(3)(A)* (judgment in a class action under *[b][1]* or *[b][2]* must include those whom the court finds to be class members) with *K.S.A. 2012 Supp. 60-223(c)(3)(B)* **[*32]** (judgment entered in action under *[b][3]* must include those receiving notice who have not requested exclusion from the class).

Combs relies on *Schell* to support his claim that declaratory and injunctive relief is appropriate in this case. *Schell* involved similar claims about free gas clauses for a much larger lessee and a putative class of over 300 members actually using free gas. In *Schell*, the lessee had sent letters to a number of free gas users over a period of many years indicating problems with high concentrations of hydrogen sulfate (H2S) in the free gas, as well as letters advising of low gas pressure in line. All these letters advised the users that their free gas could be in jeopardy. In that case, the defendant argued that there was insufficient cohesiveness because the members of the class included individuals who do not use house gas and who have never requested house gas. But the court never determined whether the requirements of *Rule*

23(b)(2) were met. See 2009 U.S. Dist. LEXIS 65568, 2009 WL 2355792, at *5-6.

Unlike Schell, Combs has failed to establish any meaningful evidence reflecting that Devon has overtly threatened to discontinue house gas service to any users or potential users. The record **[*33]** contains only one letter dated in 2002 in which two house gas users were notified of problems with H2S in the well to which they were connected. After several months of correspondence, Devon notified these lessors that Devon would, at its own expense, either connect the lessors' homes to a different well or provide a propane tank and free propane gas to replace the house gas. That apparently resolved the matter in 2003. There is no explicit information in the record that these lessors objected to Devon's actions or have any on-going problems with their residential service.

Moreover, there is no evidence that Devon, prior to suit, has advised other house gas users that their home gas connections are in jeopardy. Instead, Combs solely relied on his claim of recurring low volume and freezing gas lines as the indicator that Devon has acted or failed to act to honor the terms of the free gas clauses to all potential users. Even the evidence of the number of free gas users suffering similar problems is ambiguous at best. Otherwise, Combs simply relies on Devon's answer to the petition and counterclaim asserting that the free gas clauses do not require it to provide useable gas as defined **[*34]** by Combs.

There are serious issues as to whether certification under K.S.A. 2012 Supp. 60-223(b)(2) is appropriate in this case. The record establishes an uncertainty of the cohesiveness of interests—the relatively small percentage of actual gas users as compared to the number of Devon's leases. Similarly, there are only vague allegations that Devon is systematically failing to provide useable gas to surface owners. These problems raise serious questions of whether the district court abused its discretion in allowing the matter to proceed as a class action under K.S.A. 2012 Supp. 60-223(b)(2).

Predominance and Superiority

Even if the district court erred in certifying the class under subsection (b)(2), it alternatively allowed certification of the class under subsection (b)(3). Certification under K.S.A. 2012 Supp. 60-223(b)(3) requires both predominance and superiority. Predominance requires more than mere commonality: the proposed class must be sufficiently cohesive to warrant adjudication though the representative procedures of a class action. Farrar v. Mobil Oil Corp., 43 Kan. App. 2d 871, 875-76, 234 P.3d 19, *rev. denied* 291 Kan. 910 (2010). Although there is some overlap with subsection (a)(2)'s **[*35]** requirement of commonality, subsection (b)(3)'s requirement for predominance imposes a "far more demanding" showing. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); see Monreal v. Potter, 367 F.3d 1224, 1237 (10th Cir. 2004).

The requirement of predominance permits the court to ensure that the case is one in which aggregate treatment would be efficient to resolve multiple claims. If required evidence will vary with each class member in order to make out a prima facie case, then the individual issues may predominate. If, however, the same evidence will suffice for each member to make out a prima facie case, then the common question predominates. Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005); see Harlow v. Sprint Nextel Corp., 254 F.R.D. 418, 421 (D. Kan. 2008).

As Combs notes, certifying class action cases involving oil and gas leases is not uncommon, especially when the claims are based on claims of breach of express or implied covenants in such leases. See Farrar, 43 Kan. App. 2d at 884-90 (claims of implied covenant did not require proof of the parties' intent; thus, issue of existence of implied duty did not turn on individual **[*36]** issues); Hershey v. ExxonMobil Oil Corp., No. 07-1300-JTM, 2011 U.S. Dist. LEXIS 36317, 2011 WL 1234883, at *6-7 (D. Kan. 2011) (unpublished opinion) (predominant common issue was the propriety of the method of calculating royalty payments). Again, however, there are times when the review of the individual facts of the claims may preclude class actions, even in oil and gas cases. See Foster v. Apache Corp., 285 F.R.D. 632, 646 (W.D. Okla. 2012) (common issues do not predominate because thousands of varying leases would have to be reviewed to determine if the marketable-product rule applied to the individual leases); Witt v. Chesapeake Exploration, L.L.C., 276 F.R.D. 458, 467-69 (E.D. Tex. 2011) (individual issues predominated lessors' claims that lessee presented fraudulent oil and gas leases in deed records).

The evidence relevant to determining the merits of Combs' claims will turn on whether Devon owes a duty to provide useable gas at the wellhead to home gas users. Combs' present claims do not seek a determination that, if such a duty exists, Devon has breached that duty toward any member of the class. Individual issues will only arise if the class members seek additional relief—*i.e.*, a finding that Devon has **[*37]** breached this duty to individual gas users. If such additional relief were sought, there would need to be individual determinations of various issues, *i.e.*, the quality and pressure of the gas at the wellheads; whether the surface owners' equipment is all or part of the cause of the homeowners' problems; and whether the gas is being used for purposes allowed by the leases.

Combs' request for injunctive relief is more problematic. Unlike the *Schell* case, there is no claim that Devon directly or indirectly notified users of house gas that gas may be unavailable or that they should anticipate finding other sources of home fuel. Moreover, Combs seeks a permanent injunction to prohibit Devon from acting in a manner to disconnect gas taps or "interfere with the flow of natural gas" on lands subject to free gas clauses. Establishing irreparable harm and other elements for injunctive relief will require individual evaluations of the class members' status and problems. We note that the court in *Schell v. OXY USA, Inc., 822 F. Supp. 2d 1125, 1142-43 (D. Kan. 2011)*, ultimately denied injunctive relief finding insufficient evidence of irreparable harm and that the relief afforded by the injunction **[*38]** was not commensurate with the potential harm.

Finally, Devon alleges the district court erred in finding that a class action was the superior mechanism for resolving the issues in this case. The superiority requirement of *K.S.A. 2012 Supp. 60-223(b)(3)* requires the court to determine whether representative litigation—a class action suit—is the superior procedural mechanism to resolve the claims as compared to other processes. Thus, comparison to the possibility of multiple individual actions, joinder of claims, or other alternatives should be considered. 2 Newberg on Class Actions § :64, p. 249. The statute incorporates four factors to evaluate this requirement:

> "(A) The class member's interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *K.S.A. 2012 Supp. 60-223(b)(3)*.

Neither the district court's memorandum decision nor Combs' proposed findings of fact or conclusions of law **[*39]** addressed these factors. *Subsections (b)(3)(B)* and *(b)(3)(C)* do not appear to weigh in favor of Devon in this case. However, the meager evidence presented by Combs relating to numerosity and his attempts to gloss over typicality issues undermine any argument that a class action is superior to allowing the individual lessors to have control over their own claims. This may be especially true if the surface owners also own the royalty rights. There is nothing in the record that reflects any interest by other potential class members—even Combs' unidentified neighbors—in participating in the litigation. Even if they were, Combs' evidence reflects, at best, less than 20 leases where Devon is currently providing house gas. Due to the close proximity of the leases and the small number of actual recipients, joinder of these other potential plaintiffs in the present case, without class certification, would appear to be the superior methodology for pursuing these claims.

Conclusion

This court is fully cognizant that to overturn the district court's decision, we must find that court abused its discretion. Although a federal judge granted class certification in an action with similar claims, the **[*40]** number of leases and actual free gas users was substantially higher than what exists in the present case. Moreover, the court's memorandum and order, even taking into account plaintiffs proposed findings of fact and conclusions of law, does little more than recite legal standards without applying the law to the facts. The order fails to reflect a rigorous analysis of the evidence presented and application of the law to that evidence.

Based upon the record before us, the district court's findings that Combs established the prerequisites of numerosity and typicality is simply not supported by substantial evidence; thus, the district court abused its discretion in certifying a class action under *K.S.A. 2012 Supp. 60-223*.

Reversed.

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