No. _____

In The

Supreme Court of the United States

CHARLES D. GONZALEZ; SUSANNAH GONZALEZ;
TED. L. VAUGHAN; and HILDA VAUGHAN,

Petitioners,

vs.

ELNA SEFCOVIC, LLC; WHITE RIVER ROYALTIES, LLC;
JUHAN, LP; and ROY ROYALTY, INC., individually and on behalf
of all others similarly situated; and TEP ROCKY MOUNTAIN, LLC,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A Magistrate of the United States District Court for the District of Colorado approved a class action settlement over the objection of the Petitioners. The Tenth Circuit affirmed. The following questions are presented:

1. Did the district court and the court of appeals improperly apply obsolete standards for approval of settlement class actions under prior caselaw rather than the current standard set out in the 2018 amendments to Federal Rule of Civil Procedure 23(e)(2)?

2. When the settlement class was certified in the same order approving the settlement, and objections and evidence of inadequate representation and intra-class conflict of interest were before the district court and court of appeals, did the court of appeals improperly fail to require rigorous analysis and adequate findings by the district court as required by Federal Rules of Civil Procedure 23(a) and 23(e)(2)?

3. When the objectors repeatedly asserted that the interests of a subclass were wrongfully "sacrificed" by the Class Representatives, did the court of appeals improperly decline to reach the issue of adequate representation on the grounds that it had been waived?

4. When the district court failed to analyze or make fact findings evidencing the exercise of its discretion, did the court of appeals improperly affirm approval of the class settlement based on its own fact findings and conclusions regarding the release given by the Class Representatives on behalf of the class?

PARTIES TO THE PROCEEDING

Petitioners here, appellants below, are Charles Dean and Susannah Gonzales, and Ted. L. Vaughan and Hilda Vaughan.

Respondents here, appellees below, are Elna Sefcovic, LLC, White River Royalties, LLC, Juhan, LP, and Roy Royalty, Inc., individually and on behalf of all other similarly situated, and TEP Rocky Mountain, LLC.

RELATED PROCEEDINGS

- *Lindauer, et al. v. Williams Prod. RMT Co.*, No. 2006 cv 317, Garfield County, Colorado, District Court. Judgment entered March 20, 2009; proceedings ongoing.
- *Elna Sefcovic, LLC, et al. v. TEP Rocky Mountain, LLC*, No. 17-cv-01990, U.S. District Court for the District of Colorado. Judgment entered November 9, 2018, judgment vacated January 23, 2019, judgement entered March 15, 2019.
- *Elna Sefcovic, LLC, et al. v. TEP Rocky Mountain, LLC*, No. 19-1120, U.S. Court of Appeals for the Tenth Circuit. Judgment entered March 18, 2020, rehearing denied May 15, 2020.

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PETITION FOR WRIT OF CERTIORARI

When considering settlements in class actions, federal district courts often simultaneously address the separate issues of (1) class certification, and (2) the fairness and reasonableness of the proposed settlement, in a single hearing and a single order. Unfortunately, in their (perhaps understandable) eagerness to grant approval to a class settlement that would remove a potentially difficult, protracted, and time-consuming case from their crowded dockets, and at the eager and united urging of the named parties and their counsel as proponents of the settlements, the district courts, and the courts of appeals that purport to review their decisions, frequently succumb to the temptation to conflate or ignore the essential requirements for class certification and for approval of a class settlement. The result is that corners are cut, the requirements of Federal Rule of Civil Procedure 23 are overlooked or ignored, "rigorous analysis" is replaced with boilerplate recitals, "heightened scrutiny" becomes increased deference to the class representatives and class counsel, intra-class conflicts are overlooked, and settlements that are unfair to a portion of the class are nevertheless approved as "fair and reasonable."

Such is the case here, where the United States Court of Appeals for the Tenth Circuit affirmed the district court's use of pro forma boilerplate language rather than conducting any rigorous analysis of the requirements for certification of the settlement class, including adequacy of representation, and then compounded that error by failing to address the core concerns of adequacy of representation and equitable treatment of subgroups in connection with the settlement itself, notwithstanding the express requirements of Rule 23(e)(2)(A) and (D).

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit to address the significant erosion of the due process rights of absent class members that frequently occurs when settlement class certification and settlement approval are addressed simultaneously in a truncated fashion that does not include any rigorous analysis of adequacy of representation, which should be mandatory for both class certification and settlement approval.

OPINIONS BELOW

The opinion of the District Court for the District of Colorado involved herein is not reported but is reproduced in the Appendix hereto ("App") at 34-44.

The opinion of the Tenth Circuit, which was designated as "unpublished," is reported at *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 807 Fed. Appx. 752 (10th Cir. 2020), and reproduced at App. 1-27. The order denying rehearing or rehearing en banc is not reported but is reproduced at App. 47-48.

JURISDICTION

The Tenth Circuit issued its opinion on March 18, 2020, and denied rehearing or rehearing en banc on May 15, 2020. The deadline to file any petition for writ of certiorari was extended to 150 days by this Court's Order dated March 19, 2020. This Petition is therefore timely filed and this Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 23, as most recently amended effective December 1, 2018, is set forth in full at App. 644-650.

STATEMENT OF THE CASE

Introduction

In 2009, Williams Production Company ("Williams") (now known as "TEP") entered into a court-approved partial settlement of claims involving certain improper deductions that Williams was taking from royalty payments, with the plaintiff class in a state court class action, *Lindauer v. Williams Prod. RMT Co.*, Case No. 2006 CV 317 (Garfield Cty., Colo., Dist. Ct.) (the "*Lindauer* Settlement"). *See* App. App. 49-140. The *Lindauer* Settlement and the related state court Judgment (App. 141-149). divided the oil and gas leases held by the *Lindauer* Class into thirteen distinct categories, based on the language of their royalty clauses.

Eight years later, the Plaintiffs in this action filed suit in a different court to enforce a portion of the *Lindauer* Settlement and the state court Judgment on behalf of royalty owners under four of the thirteen lease categories that constitute the *Lindauer* Class. The Plaintiffs and TEP reached a settlement, which was approved by a Magistrate[1] over the objection of the Petitioners, who are members of the *Lindauer* Class.

[1] The Magistrate presided over settlement approval by consent of TEP and the *Sefcovic* Class Representatives. All references to the federal district court herein refer to proceedings conducted by the Magistrate in the District of Colorado.

The *Lindauer* Settlement

The *Lindauer* Settlement provided for refunds to *Lindauer* Class members of royalty deductions taken for gathering and fuel costs incurred upstream of access points into interstate transmission pipelines. In addition, Section 4 of the *Lindauer* Settlement sets out eight paragraphs of agreements regarding "Future Royalty Payments" made to the thirteen separate categories of royalty instruments. App. 63-66.

The Petitioners own royalty interests under *Lindauer* Category 2 oil and gas leases, and are members of *Sefcovic* Subclass I, which also includes royalty owners under *Lindauer* Category 3 Instruments with substantially different terms:

- *Lindauer* Category 2 royalty clauses allow TEP to deduct only costs of transporting gas "from the mouth of the well to the point of sale," or "customary transportation charges" or "all transportation charges." App. 81.
- *Lindauer* Category 3 royalty clauses allow TEP to deduct only third-party transportation costs "from the mouth of the well to the point of sale." App. 81.

Lindauer Settlement Section 4.1 provides that, in the future, Williams will not take "Deductions,"[2] which include gathering and fuel costs, from future royalty payments to *Lindauer* Class members, except those in Categories 1, 2, 3, 12 and 13. App. 63.

[2] In the *Lindauer* Settlement, "Deduction" is a defined term which includes costs incurred upstream of the point of access into the Mainline Transmission Pipeline (including gathering and fuel costs). App. 51-52.

The *Lindauer* Class claimed that both Category 2 and Category 3 leases prohibit gathering and fuel deductions, and Williams/TEP agreed to refund past, but not future, gathering and fuel deductions for both categories. This is reflected in Section 4.2, which provides:

> [N]othing herein prohibits Williams from taking any Deductions it claims it is entitled to take under the terms of [Category 2 and Category 3] Royalty Instruments, and nothing herein prohibits any Settlement Class Member from challenging such deductions.

App. 63. Section 4.4 sets out limits on TEP's processing cost deductions, and applies to Category 2, 3, and 5 leases included in the *Sefcovic* Subclasses I and II (but not to Category 11, Subclass III). App. 64.

The *Lindauer* Settlement also states that the Grand Valley Gathering System ("GVGS") is owned by Williams/TEP. App. 53. The gas involved in this case is gathered on the GVGS, and TEP's deduction of the resulting charges is at the heart of this dispute. GVGS was later transferred to Williams Field Services, so the gas is gathered under an affiliate gathering contract. Thus, GVGS gathering and fuel costs are not "third-party" costs and are not deductible from Category 3 owners.

The *Sefcovic* Class Action

The *Sefcovic* Class Action was filed in the Colorado District Court for the City and County of Denver July 18, 2017, and was removed by TEP to the United States District Court for the District of Colorado on August 17, 2017. After some informal discovery, a settlement was reached on behalf of four subclasses described as I, II, III and IV. Subclass I consists of royalty owners receiving payments under *Lindauer*

Category 2 and Category 3 leases. The Magistrate granted preliminary approval of the Settlement on August 17, 2018.

On January 29, 2019, only 21 days prior to the Fairness Hearing, the *Sefcovic* Class Representatives filed their Second Amended Complaint, which asserted for the first time that Subclass I's Category 2 lease claim expressly includes gathering and fuel deduction by TEP (App. 349. 352-353) for the sole purpose of promptly conceding the opposite—that Category 2 (and Category 3) leases expressly authorize TEP to deduct gathering and fuel costs.

Significantly, the Subclass I Class Representatives do not own any interest in any Category 3 Royalty Instrument. Plaintiff Elna Sefcovic, LLC owns a single *Lindauer* Category 2 Lease. Plaintiff White River Royalties, LLC owns a single *Lindauer* Category 2 Lease (App. 346-348), together with substantially larger interests in Subclasses II and III.

The newly added Subclass I claim alleges only that TEP breached the leases by deducting gathering and fuel costs that exceeded the "reasonable transportation cost deduction" permitted by the royalty clause. This authorization of "reasonable transportation cost deduction[s]" is contained solely in Category 2 leases. In contrast, Category 3 leases authorize only deduction of "third-party transportation costs." Significantly, the Subclass I claims in the Second Amended Complaint failed to assert the much stronger Category 3 claim seeking to recover all deductions other than "third-party transportation costs"—the specific lease language that differentiates Category 3 leases from Category 2 leases. If this Category 3 claim had been made, unlike the

belated Category 2 claim it would demand recovery of all deductions of TEP's non-third-party gathering and fuel costs, which are expressly prohibited by Category 3 leases. But this much stronger Category 3 claim was not made in the Second Amended Complaint.

The *Sefcovic* Settlement

The *Sefcovic* Settlement provides that TEP will refund 100% of prior gathering, fuel and processing costs deducted from Subclasses II, III and IV (totaling $9,570,464 before any opt-outs). App. 262-264. The Class Representatives as a whole own 99.92% of their interests in Subclasses II, III and IV leases, and refunds to Subclasses II, III and IV were largely uncontested by TEP.

In stark contrast, the *Sefcovic* Class Representatives own virtually no interest in Subclass I leases—only 8/100ths of one percent of their interests are in Subclass I. The *Sefcovic* Class Representatives agreed to forfeit the Subclass I breach of lease claims by immediately capitulating to TEP's factual defense that "gathering" is synonymous with "transportation costs." Once the *Sefcovic* Class Representatives conceded this disputed fact, they construed Category 2 leases to allow the deduction of gathering costs. The Class Representatives simply ignored that the Category 3 lease terms, which provide that only third-party transportation costs can be deducted, cannot be impacted by a definition equating gathering and transportation costs, because TEP's gathering costs are not "third-party" costs but charges by affiliated companies. As a result, TEP is expressly precluded from deducting them from royalty payments under Category 3 leases.

Subclass I class members collectively received a one-time payment of $454,845 (App. 261), but forfeited their claim to approximately $2.6 million in prior gathering and fuel deductions. App. 523-524. In addition, ¶ 9.a. of the *Sefcovic* Settlement authorizes TEP to deduct $1.2 million per year (for the thirty to fifty year life of the leases) from Subclass I class members, and ¶ 9.b authorizes TEP to recoup another $4 million in past gathering deductions from Subclass I owners. App. 524-526. Thus, the *Sefcovic* Class Representatives agreed, over the long life span of their leases, to allow TEP to retain, recoup, and continue to deduct from Subclass I class members 90 to 140 times the amount they receive under the *Sefcovic* Settlement.

To summarize the effect of the *Sefcovic* Settlement: (1) *Sefcovic* Class Representatives received 100% of TEP's undisputed improper deductions under their Subclasses II, III and IV leases; (2) the Category 2 and Category 3 lease owners in Subclass I each owed more money to TEP on the date of distribution than they received and will forfeit between $36 million and $60 million in additional deductions over the life of their leases; and (3) TEP will profit, because it will retain three to six times more in future deductions from Subclass I class members than the entire amount it paid to all *Sefcovic* Class Members under the settlement. Subclass I members with Category 3 leases, which expressly preclude TEP's affiliated gathering and fuel deductions, have and will needlessly suffer the same fate as Category 2 owners, who have much different claims because of their different lease langauge.

REASONS FOR GRANTING CERTIORARI

Due process requires adequate representation of absent class members "at all times." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985); *see also Hansberry v. Lee*, 311 U.S. 32, 41-44 (1942) (class members are only bound by a judgment "where they are fairly and adequately represented.") This Court applied the bedrock concepts of due process and adequacy of representation to class action settlements in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997), holding that no member of a subgroup in a settlement class can be bound, except when their class representative understands his or her role is to represent solely the members of that respective subgroup. Where an intra-class conflict exists, it is cured only by forming homogenous subclasses with separate class representatives and class counsel for each. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). These decisions led to "a new era of judicial scrutiny of class certification and settlement." *Epstein v. MCA, Inc.*, 179 F.3d 641, 651 (9th Cir. 1998) (Thomas, J., dissenting), *cert. denied*, 528 U.S. 1004 (1999).

In 2018, two decades after *Amchem* and *Ortiz*, Rule 23(e)(2) was amended to expressly and uniformly require federal courts to enter findings regarding whether the class representatives and class counsel sponsoring a class settlement have adequately represented the class, and whether the settlement treats members equitably relative to each other, consistent with this Court's holdings in *Amchem* and *Ortiz*. *See* FED. R. CIV. P. 23(e)(2)(A) & (D).

In this case—which involves a settlement-only class—despite express objections and undisputed evidence that (1) Category 3 class members were not represented at all; (2) Category 2 class members were not adequately represented; and (3) material intra-class conflicts of interest existed, the district court did not conduct the rigorous analysis required by *Amchem*. The district court also did not make the findings regarding adequacy of representation and intra-class conflicts as indicated by this Court's holdings in *Amchem* and *Ortiz* and expressly required by Rule 23(e)(2)(A) and (D), as amended. Instead, both the district court and the Tenth Circuit applied different standards previously developed by the Tenth Circuit, which the 2018 amendment of Rule 23(e)(2) was purposefully enacted to supersede.

Petitioners expressly reiterated the applicability of the 2018 amendments in their Petition for Rehearing (App. 626-627), but the Tenth Circuit continued to disregard and fail to apply the 2018 amendments.

The Tenth Circuit also failed to require fact findings, rigorous analysis, and the heightened scrutiny required by the holdings of this Court and by Rules 23(a) and 23(e)(2) to protect absent class members and ensure the adequacy of representation. The Tenth Circuit did not grasp that the district court certified the settlement class in its order approving the settlement, so that a rigorous analysis of all factors including adequacy of representation was required by Rule 23. This fundamental failure is particularly apparent in this case where a "rigorous analysis," or anything beyond the district court's boilerplate pro forma recitals, would have established a lack of adequate representation, conflicts between subgroups of class members, and inequitable

treatment of Subclass I members with Category 2 and Category 3 leases by their purported Class Representatives, who own virtually no interest in the affected subgroups.

Compounding its fundamental misapplication of the law, the Tenth Circuit held that the Petitioners somehow waived the issue of lack of adequate representation, despite that: (1) the Magistrate purported to rule on the issue in the context of class certification as required by Rule 23(a); (2) the Petitioners raised the issue in their briefs; and (3) the uncontested evidence at the fairness hearing and in the record clearly demonstrated the lack of adequate representation and the existence of substantive conflicts between subgroups of class members.

Finally, even though the district court failed to address the disputed issue of whether the scope of the release was fair and reasonable, the Tenth Circuit refused to remand for additional fact findings. Instead, the Tenth Circuit improperly engaged in its own, limited fact findings and analysis regarding the scope and propriety of the release included in the class settlement.

The Tenth Circuit's opinion conflicts with this Court's holdings in *Amchem* and *Ortiz* regarding the fundamental matters of due process of law, adequacy of representation, and intra-class conflicts in class actions. The Tenth Circuit has reverted to the pre-*Amchem* standard when minimal boilerplate statements regarding class certification and settlement approval, drafted by the named parties prior to any hearing, were often considered adequate with no real analysis of the facts in evidence nor protection of absent class members by the district court. In addition, the Tenth

Circuit has departed from the accepted and usual course of judicial proceedings by disregarding the new requirements of Rule 23(e)(2)(A) and (D), and refusing to correct obvious legal errors on rehearing. Finally, the Tenth Circuit's holdings regarding fact findings, "rigorous analysis," and waiver are contrary to law and depart from the accepted and reasonable course of appellate review of class action settlements.

I. THE DISTRICT COURT AND TENTH CIRCUIT IMPROPERLY APPLIED OBSOLETE STANDARDS FOR APPROVAL OF A SETTLEMENT RATHER THAN THE STANDARDS REQUIRED IN THE 2018 AMENDMENT TO RULE 23(e)(2).

Rule 23(e)(2) was amended in 2018 to permit approval of a class settlement:

> only on finding that it is fair, reasonable and adequate after considering whether:
>
> > (A) the class representatives and class counsel have adequately represented the class; . . . and
> >
> > (D) the [settlement] proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2).

This amendment was enacted to address the long lists of differing factors developed by the separate circuit courts of appeal, and "directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendment.

Rather than following the current mandates of Rule 23(e)(2) as amended, the Tenth Circuit reviewed whether the settlement was "fair, reasonable and adequate" using wholly different and contradictory criteria set out in *Tennille v. Western Union*

Co., 785 F.3d 422, 434 (10th Cir. 2015), *cert. denied*, —U.S.—, 136 S. Ct. 835, 193 L. Ed. 2d 719 (2016). App. 8. Notably, the *Tennille* factors do not include Rule 23(e)(2)'s new requirements that the court must consider whether the class (and all subclasses) have been adequately represented and that the settlement treats all class members equitably. The *Tennille* factors are "whether '(1) the settlement was fairly and honestly negotiated, (2) serious legal and factual questions placed the litigation's outcome in doubt, (3) the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation, and (4) [the parties] believed the settlement was fair and reasonable.'" *Tennille*, 785 F.3d at 434 (quoting *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.*,) 354 F.3d 1246, 1266 (10th Cir. 2004)). In fact, the amended Rule 23(e)(2) is intended to replace the *Tennille* factors and directs the parties and the federal courts to apply a shorter list of different factors. Here, the Tenth Circuit did not even mention the current requirements of Rule 23(e)(2)(A) or (D) and acted contrary to those requirements.

The Petitioners properly focused on the Rule 23(a) and (e)(2)(A) and (D) considerations of adequate representation of absent Subclass I class members, and whether Subclass I was treated equitably relative to other Subclasses (i.e., whether Subclass I interests were "sacrificed" and an intra-class conflict exists). But neither the Tenth Circuit nor the district court evaluated these factors. Instead, they erroneously focused solely on the now-obsolete *Tennille* factors.

This Court has previously observed the need to grant certiorari "to examine whether there ha[s] been sufficient compliance" with the Federal Rules of Civil

Procedure. *Conway v. O'Brien*, 312 U.S. 492, 493 (1941). *See also Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 203 (1958) (granting certiorari to consider "important questions as to the proper application of the Federal Rules of Civil Procedure"). That is especially true in the present class action context, where the Court has recognized a duty to "ensure that the [lower] court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981). The present case presents a situation that warrants the Court's intervention as guardian of the Federal Rules.

II. THE TENTH CIRCUIT AND DISTRICT COURT OPINIONS CONFLICT WITH THE HOLDINGS OF THIS COURT REQUIRING RIGOROUS ANALYSIS OF THE REQUIREMENTS OF RULE 23(a) AND (e)(2) WHEN CERTIFYING A CLASS AND APPROVING A CLASS SETTLEMENT.

It is well-established that Rule 23(a) and (b) require the district court to conduct a "rigorous analysis" and make actual findings of fact when certifying a class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363, 375 (2011); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Rule 23(e)(2), as amended in 2018, also requires express fact findings, and necessarily involves a "rigorous analysis" under *Wal-Mart* and "heightened scrutiny" under *Amchem* (particularly of disputed issues), regarding its four enumerated prerequisites. This is especially the case where, as here, certification of a settlement class and the fairness and reasonableness of the settlement are being considered simultaneously.

When approving class action settlements, all Rule 23(a) requirements for class certification must be satisfied (except for manageability). Settlement class certification

is not entitled to deference or relaxed standards, but demands heightened scrutiny to protect absent class members. *Amchem*, 521 U.S. at 620; *Cf. Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217 (5th Cir. 1981) (without adequate evaluation of the facts and law an appellate court lacks any basis upon which to review the discretion of the district court), *cert. denied*, 456 U.S. 998 (1982).

Here, the district court's final order contains only one perfunctory, boilerplate paragraph which starkly concludes, without any analysis, that all Rule 23(a) requirements are met:

> There are questions of law and fact common to the Settlement Class and Subclasses. The claims of the Plaintiff class representatives are typical of the claims of the Settlement Class and Subclasses. The Plaintiff class representatives **will** fairly and adequately protect the interests of the Settlement Class and Subclasses. The prerequisites to maintain this action as a class action set forth in Fed. R. Civ. P. 23(a) are met.

App. 39-40. Thus, the district court merely uttered its forecast that representation "will" be adequate in the future. But there was no rigorous analysis, as demanded by *Amchem*, and no rule-based analysis regarding the settlement. There is not even a mention of adequacy of representation under Rule 23(e)(2)(A) nor of equitable treatment of class members relative to each other under Rule 23(e)(2)(D). There was no evaluation of the facts in evidence, nor of applicable law, upon which to base any appellate review of the discretion of the district court.

The heightened scrutiny of certification of a settlement class and rigorous analysis demanded by *Amchem* cannot be satisfied by pro forma recitals, and serve the purpose of satisfying critically important due process requirements. Rule 23(a)(4) and

(e)(2)(A) both expressly require the district court to determine whether the absent class members are adequately represented in the settlement. "The adequacy inquiry. . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625.

> Brevity may be the soul of wit, but it isn't the soul of rigorous analysis. Such a short discussion of class certification is incompatible with the district court's obligation for thorough examination. . . . We can't determine whether the district court abused its discretion when the district court didn't explain how or why it exercised its discretion.

Harper v. C.R. England, Inc., 746 Fed. Appx. 712, 721 (10th Cir. 2018); *see also Weinman*, 354 F.3d 1246, 1268 (10th Cir. 2004) ("mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" is not adequate.)

Here, faced with substantive objections to the sacrifice of the interests of Category 2 and Category 3 lease owners in Subclass I, together with actual evidence of both inadequate representation and actual intra-class conflicts, the district court failed to provide written findings or otherwise evidence rigorous analysis of the prerequisites for certification and settlement approval.

The Tenth Circuit attempted to justify its failure to require rigorous analysis and accompanying fact findings regarding adequacy of representation because, it said, rigorous analysis is only required when the district court certifies a class under Rule 23(a), and is therefore "inapposite" here. App. 7, n.4. But in reaching this conclusion the Tenth Circuit applied the wrong legal standard. This fundamental error occurred

because the Tenth Circuit overlooked the fact that the district court's order simultaneously certified the *Sefcovic* Class pursuant to Rule 23(a) and (b) and approved the settlement under 23(e). App. 7. Further, class certification is mandated by Rule 23 when any class settlement proposal is approved:

> In addition to evaluating the proposal itself, [the court] must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendment.

It seems apparent that the Tenth Circuit found the required analysis to be missing because it undertook to do the lower court's job for it by writing eight pages of its own fact-finding and evidence-weighing. App. 12-18, 26-27. But, where a district court fails to conduct the analysis required by Rule 23, the remedy is not for the appellate court to assume the role of factfinder to fill in the district court's gaps. Rather, the proper course, consistent with the accepted and usual course of judicial proceedings, is to remand to the district court with instructions to make adequate findings. *See, e.g.*, *Harper*, 746 Fed. Appx. at 722; *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1290-91 (10th Cir. 2008).

The shortcomings of the district court's analysis are further demonstrated by the fact that it dismissively reduced the objections to the settlement to a single inaccurate sentence:

> The principal argument advanced by the settlement objectors is the uncertainty of future obligations by the Settlement Class to incur deductions from their royalty payments based on post-production costs.

App. 38. To the contrary, Petitioners raised no concerns about "future uncertainties," but rather objected to the ***existing certainty*** that the settlement sacrificed the interests of Subclass I by allowing TEP to deduct substantial previously-disputed costs from Subclass I—the only subclass in which the Class Representatives own virtually no interest. These objections and the actual evidence elicited at the fairness hearing required rigorous analysis, factfinding, and heightened scrutiny by the district court, which were entirely absent. *See In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 330-31 (3d Cir. 2019) (mischaracterizing objections and dismissing the issue with a single sentence is not "the scrupulous examination required of a court acting as a fiduciary for absent class members").

When rigorous analysis is not performed and required findings are not made, certification of a settlement-only class becomes simply a "rubber-stamp" procedure for the proponents of the settlement to manipulate, and deprives absent class members of the due process required by *Amchem*. The district court abrogated its duty to act as the guardian and fiduciary of the absent class members of each subgroup. *See Gruin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). The Tenth Circuit opinion endorsing that approach conflicts with this Court's holdings in *Falcon*, *Wal-Mart*, and *Amchem*, and with the holdings of other circuits.

III. IF A RIGOROUS ANALYSIS HAD BEEN PERFORMED, THERE IS ABUNDANT EVIDENCE OF INADEQUATE REPRESENTATION, CONFLICTS BETWEEN SUBGROUPS, AND INEQUITABLE TREATMENT OF ABSENT CATEGORY 2 AND CATEGORY 3 LEASE OWNERS IN SUBCLASS I.

At the Fairness Hearing, previously unavailable testimony was elicited largely through cross examination from the Class Representatives. This was new, live testimony that could not have been presented in pre-hearing briefs (at least not by the Petitioners). When this fairness hearing testimony is combined with the documentary record in the case, it is apparent that absent class members were not adequately represented, conflicts between subgroups existed, and subgroups of absent class members were treated inequitably by Class Representatives.

A. There Is Undisputed Evidence That Category 3 Lease Owners Were Not Represented.

Subclass I consists of Category 2 and Category 3 owners with two quite different types of oil and gas leases. The claims of Category 2 owners (with leases that permit deduction of "all transportation costs") are not common with, nor typical of, the claims of Category 3 owners, whose leases permit deduction only of "third-party transportation costs." This difference is fundamental because costs incurred by TEP on the non-third-party gathering system cannot be deducted under Category 3 leases. App. 81. Indeed, it is because their lease terms are different that Category 2 and Category 3 lease owners were assigned separate categories in *Lindauer*.[3]

"To satisfy Rule 23(a)(4), the named plaintiffs must 'possess the same interests[s] and suffer the same injur[ies] as the class members'" in the represented

[3] *Lindauer* Category 5 and11 leases, which make up Sefcovic Subclasses II, III, and IV, have different terms, as is apparent from the Complaint and *Lindauer*.

subgroup. *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (quoting *Amchem*, 521 U.S. at 625-26) (alterations by the court). It is fundamental that class representatives "cannot represent a class of whom they are not a part . . . ." *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17 (2d Cir. 1981); *Irvin v. Harris*, 944 F.3d 63, 71 (2d Cir. 2019). The Class Representatives clearly fail this test because none of them is a part of the Category 3 subgroup.

No *Sefcovic* Class Representative owns any interest in a Category 3 lease. Therefore, no Class Representative falls within the Category 3 subgroup, nor do they have claims in common with or typical of Category 3 claims. The purported Subclass I Class Representative, Ms. Jerman, owns a Category 2 Lease but not a Category 3 Lease. She testified that the interests of Category 3 class members were not considered by the Class Representatives. App. 485. Further, Ms. Jerman testified that she had not even thought of Category 3 class members and was not familiar with, and had not even read, a Category 3 lease.[4] App. 485.

Subclass II and IV's representative, Mr. Juhan, testified he had not considered the interests of Category 3 lease owners and had no understanding of how the Category 3 owners were negatively affected by the *Sefcovic* Settlement. App. 499. Thus, no Class Representative owns any interest in a Category 3 Lease, and they are admittedly

[4] No testimony was offered from the other Subclass I representative, Elna Sefcovic, LLC, and there is no evidence it adequately represented Subclass I. *See Weinman*, 262 F.3d at 112 ("'A party seeking to certify a class is required to show under a strict burden of proof, that all the requirements of Fed. R. Civ. P. 23(a) are clearly met,' including that the class is adequately represented by the named party." [citation omitted]).

totally uninformed regarding the rights and interests of Category 3 class members. The *Sefcovic* Subclass I Representatives never attempted to protect the interests of Category 3 lease owners, who have different and much better claims than Sefcovic and White River, who hold only Category 2 leases.

Significantly, the Second Amended Complaint asserts that TEP's deductions were improper solely because they exceeded "the reasonable transportation" costs permitted by the Sefcovic and White River Leases, which are both Category 2 leases. There is no allegation that deductions were improper because they involved an affiliated company's charges and not the third-party transportation costs permitted by the Category 3 leases. App. 346-349. By failing to contest TEP's deduction of non-third-party transportation costs, the Class Representatives abandoned a claim that was unique to the Category 3 class members. Because that quintessential Category 3 claim was never asserted nor certified, the Subclass I Class Representative and Class Counsel had no power to settle the Category 3 claims.

In an apparent attempt to disguise the lack of adequate representation of Category 3 members, TEP and the *Sefcovic* Class Representatives jointly misled the Tenth Circuit by stating that "the leases in Categories 2 and 3 of the *Lindauer* Settlement expressly provide that TEP is entitled to deduct the cost for transporting gas 'from the mouth of the well to the point of sale,' or 'customary transportation costs' or 'all transportation charges." App. 569. This statement was patently false, because it recited only Category 2 lease terms, and Category 3 leases have wholly different terms which permit deduction of only "third-party transportation" costs.

At the Fairness Hearing, Class Counsel also misled the district court by stating that all Category 2 and Category 3 leases include Category 2 terms (which "permit the lessee to deduct the full cost of transporting gas from the well head to the point of sale.") App. 376. Class Counsel further misled the district court by eliciting testimony from Ms. Jerman that her Category 2 lease is a typical royalty provision for both Category 2 and Category 3 leases. App. 467. This testimony was also false, because Category 3 leases contain different royalty terms than her Category 2 lease.

B. There Is Undisputed Evidence That Category 2 Lease Owners Were Not Adequately Represented.

Although Ms. Jerman owns a Category 2 Lease, she cannot adequately represent Category 2 lease owners in Subclass I because she also owns significantly greater interests under leases in Subclasses II and III, which have divergent interests. In *Amchem*, this Court held that even if the class representative

> thought the Settlement serves the aggregate interests of the entire class[,] . . . the adversity among subgroups requires that members of each subgroup cannot be bound to a settlement except by the consents given by [representatives] ***who understand their role is to represent solely the members of their respective subgroups.***

521 U.S. at 626 (citation omitted, emphasis added); *see also In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233-36 (2d Cir. 2016), *cert. denied*, —U.S.—, 137 S. Ct. 1374, 197 L. Ed. 2d 568 (2017).

Ms. Jerman conceded that the settlement forfeits the gathering and fuel cost deduction claims of Subclass I members (both Category 2 and Category 3 owners), App. 482-483, that she did not know how much TEP could deduct from Subclass I class

members for gathering costs after the settlement and that she thought this outcome was fair because "I am thinking of the settlement as a whole. I can't think only of myself [or my subgroup]. I have to think of the settlement based on the whole class." App. 484-485. Although her willingness to "take one for the team" might be commendable in other contexts, it has no place in the thoughts of a subclass representative, as *Amchem* makes clear.

On this record, it is clear that Ms. Jerman mistakenly believed that her role was to represent the *Sefcovic* Class as a whole, rather than solely her own subgroup as *Amchem* requires. In fact, she did not actually represent solely the interests of Subclass I members and conceded that she sacrificed the interests of that subgroup for the benefit of the *Sefcovic* Class "as a whole." App. 485. Ms. Jerman's belief that the settlement was "fair" was no doubt influenced by the fact that the vast majority of her leasehold interests fall within Subclasses II and III, which were treated much better than Subclass I, which she nevertheless purported to represent. As in *Amchem*, there is "no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities." 521 U.S. at 627.

C. There Is Undisputed Evidence of Intra-Class Conflicts.

Regardless of who introduced the idea to the settlement negotiations, at the time the proposal was made to benefit TEP by forfeiting the Subclass I claims in which the *Sefcovic* Class Representatives own virtually no interest, and to simultaneously benefit the Class Representatives and Class Counsel by refunding 100% of the improper

deductions to the Class Representatives in Subclasses II, III and IV, the divergent interests of the *Sefcovic* subgroups became competing and antagonistic interests, and the fundamental intra-class conflict of interest became obvious.

Once this conflict emerged, Class Counsel could no longer properly represent three groups with opposing interests in the same negotiation. From that point, separate class representatives and separate counsel were required to continue the negotiation with TEP on behalf of at least three subgroups: (1) Category 2 lessors; (2) Category 3 lessors; and (3) Subclass II, III and IV lessors. *See Amchem*, 521 U.S. at 627. Class Counsel then had the duty to disclose this conflict between the Class Representatives and other class members to the district court so that the court could take appropriate steps to protect the absent class members. *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986).

The *Literary Works* court applied *Amchem* and *Ortiz* and explained that the class representative must have "no interests antagonistic to the interests of other class members" in the subgroup she represents. 654 F.3d at 249. It also held that a class representative cannot own interests in multiple subgroups with competing interests and adequately represent the interests of the members of any one of those subgroups, because the ownership of any interest in another subgroup with antagonistic interests creates a structural conflict of interest between the class representative and the subgroup members she purports to represent. *Id.* at 251-255.

Importantly, the *Literary Works* court concluded that when, as here, a structural conflict exists, a court cannot determine whether the discount or disadvantage to any

subgroup in the settlement results from the weakness of that subgroup's claims, or from the sacrifice of that subgroup's interests by a conflicted subclass representative. *Id.* at 253. It held that the interests of the disadvantaged subgroup can only be adequately represented by the formation of homogenous subclasses, with separate class representatives who own only an interest in the disadvantaged subgroup, and with separate and independent counsel for each, as required by *Amchem* and *Ortiz*. *Id.* at 254-255; *see also Payment Card*, 827 F.3d at 232-36.

As noted above, the *Sefcovic* Class Representatives, all of whom own virtually no interest in Subclass I, agreed to a settlement that disproportionately benefits Subclasses II, III and IV while sacrificing the claims of the *Lindauer* Category 2 and 3 owners in Subclass I. They testified that they did so because of an erroneous belief that it was necessary to obtain a greater benefit to the class as a whole—meaning Subclasses II, III, and IV, in which their true interests lay. As a result, no Class Representative owned any interest in a Category 3 lease or protected the interests of the owners of those leases.[5] These facts demonstrate the existence of fundamental intra-class conflicts of interest.[6]

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[5] Elna Sefcovic, LLC's interest also is not typical of and is in conflict with the interests of Subclass I members it represents, because it received an incentive award of $5,000 for entering into the *Sefcovic* Settlement, which award dwarfed its $153 distribution as a Subclass I member. *See Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013).

[6] White River Royalties, Inc. (Ms. Jerman's entity) was added as a Subclass I representative after the settlement was agreed to. For her time and trouble in ratifying the Settlement after the fact and testifying at the Fairness Hearing, Ms. Jerman also received an "incentive award" of $5,000.00. *Cf. Johnson v. NPAS Sols., LLC*, —F.3d—, 2020 WL 5553312, at *10-12 (11th Cir. 2020) (describing incentive awards to be "part salary and part bounty" and, relying upon *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central R.R. Banking Co. v. Pettus*, 113 U.S. 116 (1885), finding that such awards are not allowed, even though they are "commonplace in modern class-action litigation").

Where such competing interests exist, only advocacy of a class representative who owns only interests in the one subgroup and an attorney who represents only each subgroup can ensure that the interests of that particular subgroup are in fact adequately represented. *Amchem*, 521 U.S. 591; *Ortiz*, 527 U.S. 815; *Literary Works*, 654 F.3d at 233-234.

The need for separate representation of each subgroup is explained in *Payment Card*, 827 F.3d at 233-34, and is demonstrated by the conduct of the *Sefcovic* Class Counsel in this case. First, as described in more detail in Section III.A., Class Counsel attempted to mislead both the Tenth Circuit and the district court by falsely stating that Category 2 and Category 3 leases have the same (Category 2) terms. Second, Class Counsel filed a Second Amended Complaint that lumped Category 2 and Category 3 leases together and completely omitted any claim that, under Category 3 leases, TEP's deductions were improper in toto. Third, just days after filing that pleading claiming that TEP's gathering and fuel deductions under Category 2 leases were improper, Class Counsel completely capitulated to TEP's factual defense and declared that the provisions of Category 2 and 3 leases expressly allowed those deductions. Class Counsel stated:

> [Subclass1, Category 2 and 3 leases] unlike Category 5 and 11 leases, generally have provisions that expressly permit . . . TEP to deduct the full cost of transporting the gas from the wellhead to the point of sale. . . . [G]athering cost deductions are essentially the cost of transporting the gas from the wellhead to the point of sale, and so that for the gathering cost deductions about which the [objectors]

> complain, there are express provisions in the lease which foreclose that.[7]

App. 376-377.

In the same breath, Class Counsel advocated that the *Sefcovic* Class Representatives be refunded 100% of their prior gathering, fuel and processing deductions under their Category 4 and 11 leases in Subclasses II, III, and IV, and advocated forfeiting the claims of two separate, homogeneous subgroups Counsel also purports to represent in order to obtain the refund for the Class Representatives—and not coincidentally, to secure Counsel's own significant fee. Despite the contrary allegations in the Second Amended Complaint, Class Counsel told the district court that it is undisputed that the terms of Category 2 and Category 3 leases have always "foreclose[d]" their claims that TEP deductions for gathering and fuel costs are improper. The intended result of Counsel's statement is recovery of 100% of all (non-Subclass I) TEP deductions for the Class Representatives, a large fee for Class Counsel, a profit for TEP, and a massive loss for Category 2 and 3 lease owners. "An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of [any subgroup], whether few or many." *Super Spuds*, 660 F.2d at 19.

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[7] This is not a capitulation that counsel representing only the interest of either Category 2 or Category 3 owners could ever make, because it seeks to benefit the opposing interests of the Class Representatives and TEP to the detriment of both Category 2 and 3 lease owners. Adequate counsel representing only Category 3 owners, for example, would not mischaracterize their claims as being based on the much different Category 2 lease terms, and thereby forfeit their claim that only third-party costs can be deducted. Such counsel could not disparage Category 3 lease terms just so their claims could be sacrificed and TEP could deduct an additional $1,200,000/year from Category 2 and 3 lease owners for thirty to fifty years in exchange for a one-time payment of $454,854. Counsel's capitulation repudiated the vigorous and tenacious protection of the interests of Category 2 and Category 3 owners that is required of an adequate representative. *See Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973).

Class Counsel's statement also demonstrates the fundamental intra-class conflict in this case—that the Class Representatives obtained a settlement which recovered 100% of TEP's improper deductions from Subclasses II, III, and IV by agreeing to forfeit to TEP the Subclass I claims, namely: claims under Category 2 leases, in which the Class Representatives own virtually no interest, and claims under Category 3 leases, in which they own no interest at all. The Tenth Circuit's opinion endorsing and encouraging such intra-class conflicts is irreconcilable with the holdings in *Amchem*, *Ortiz*, *Agent Orange*, *Literary Works*, and *Super Spuds*.

IV. BECAUSE OBJECTORS REPEATEDLY ASSERTED THAT THE INTERESTS OF SUBCLASS I WERE WRONGLY "SACRIFICED" BY CLASS REPRESENTATIVES, AND THE RECORD CONTAINED EVIDENCE OF INADEQUATE REPRESENTATION AND INTRA-CLASS CONFLICTS, THE TENTH CIRCUIT IMPROPERLY DECLINED TO ADDRESS THE ISSUE OF ADEQUATE REPRESENTATION ON THE GROUNDS THAT IT HAD BEEN WAIVED.

The Tenth Circuit compounded the district court's lack of rigorous analysis by refusing to even consider the issue of adequacy of representation in the mistaken belief that the issue had been waived. App. 19, 21.

The Tenth Circuit ignored the Rule 23(a)(4) and (e)(2) requirements that the district court must rule on the adequacy of representation in two separate contexts,[8] and further overlooked the fact that the district court actually purported to rule on the issue, albeit only perfunctorily and prospectively, and only in the context of class certification. App. 39-40. When the district court rules on an issue, that issue is

[8] Rule 23(a)(4) plainly requires a determination that absent class members have actually been adequately represented in order to certify the settlement class. Rule 23(e)(2) further mandates that a class settlement cannot be approved unless the court determines each of four issues—the first being adequacy of representation and the fourth conflicts among subgroups. FED. R. CIV. P. 23(e)(2)(A) & (D).

preserved on appeal. *Volvo Const. Equip. N. Am, Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 604 (4th Cir. 2004); *see also Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1250, n.14 (11th Cir. 2019); *Burnette v. Dresser Indus., Inc.*, 849 F.2d 1277, 1282 (10th Cir. 1988). There can be no doubt that the issue of adequacy of representation was properly before the Tenth Circuit.

The Tenth Circuit's holding that adequacy of representation had been waived is also clearly contrary to the record. Petitioners repeatedly asserted the interests of Subclass I were "sacrificed" by the Class Representatives, i.e., not adequately represented by the proponents of the settlement because of intra-class conflicts. *See Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000) (preservation of an issue "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue"). These objections plainly addressed the requirements of Rule 23(e)(2)(A) and (D), together with the requirements of Rule 23(a)—commonality, typicality and adequate representation of each subgroup.

For example, Objectors stated:

> [T]here is no reason why some class members should be forced to give up something of value to enable other class members to benefit from a settlement made richer at their expense. (Citations omitted)." *Karvaly v. Ebay, Inc.*, 245 F.R.D. 71, 90 (E.D.N.Y. 2007). *See also*, 4 NEWBERG ON CLASS ACTIONS §13.60; *Nat'l Super Spuds v. N.Y. Merch. Exch.*, 660 F.2d 9, 18 (2d Cir. 1981) (Sacrifice of uncompensated claims of putative class members indicates inadequate representation.)

App. 331-332.

Again, the Tenth Circuit's holding conflicts with the applicable rule and the holdings of other circuits, and it does not explain how Petitioners could do more to challenge the defects in the district court's abbreviated Rule 23(a) ruling, or the lack of any Rule 23(e)(2)(A) and (D) rulings, ***before*** the district court issued its final order. *See* FED. R. APP. P. 46 ("Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made."); *City of Waco, Texas v. Bridges*, 710 F.2d 220, 228 (5th Cir. 1983) (issue can be raised for first time on appeal where "there was no opportunity to object to an order upon its issuance"), *cert. denied*, 465 U.S. 1066 (1984).

Moreover, evidence received without objection establishes the existence of an issue that is properly "before the court for determination" on appeal. *Hopkins v. Metcalf*, 435 F.2d 123, 124 (10th Cir. 1970); *see also, e.g.*, *Palacios Seafood, Inc. v. Piling, Inc.*, 888 F.2d 1509, 1512 (5th Cir. 1989). Issues tried by consent (whether express or implied) at the Fairness Hearing are treated as if they were raised by the Petitioners in their pleading. *See* FED. R. CIV. P. 15(b); *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600, n.13 (5th Cir. 1980) (issues raised by admitted evidence are preserved for appeal). Evidence of lack of adequate representation was admitted at the Fairness Hearing, without objection, and was thereby preserved for appeal.

Because it ruled, contrary to law, that the issue of adequate representation had been waived, the Tenth Circuit disregarded the undisputed evidence at the fairness hearing and in the documentary record of intra-class conflicts and inadequate representation of absent class members.

V. WHERE THE MAGISTRATE FAILED TO ANALYZE OR MAKE FACT FINDINGS REGARDING THE SCOPE OF THE RELEASE, THE COURT OF APPEALS IMPROPERLY AFFIRMED APPROVAL OF THE CLASS SETTLEMENT BASED ON ITS OWN FACT FINDINGS AND CONCLUSIONS REGARDING THE RELEASE.

To obtain a fair and reasonable result for absent class members, the courts are required to "police a proposed settlement agreement to ensure that the release . . . does not release claims outside the factual predicate of the class claims." 6 NEWBERG ON CLASS ACTIONS §18.19 (5th ed.). Petitioners objected that the *Sefcovic* release was unfair and overbroad, but the Magistrate did not comment on this disputed issue. The Tenth Circuit then misconstrued and misapplied the "identical factual predicate" rule based on its own purported fact findings. *Cf. Harper*, 746 Fed. Appx. at 722 (remand is the proper course when fact findings are not made by the district court)

The "identical factual predicate" rule was first applied to class action releases by the Second Circuit.

> [To] achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action… (Emphasis supplied).

TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982); *TVPX ARS, Inc. v. Genworth Life & Annuity Ins. Co.*, 959 F.3d 1318, 1326 (11th Cir. 2020) ("[A]n 'identical factual predicate' cannot exist unless the defendant was engaged in the same offending conduct during the prior action.").

TBK followed Judge Friendly's reasoning in *Super Spuds*, that "if a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such action should not be able to do so either."

TBK, 675 F.2d at 462 (quoting *Super Spuds*, 660 F.2d at 18). Judge Friendly explained that a class judgment can only determine certified common questions, and not any other claims that class members may have against the defendant. *Super Spuds*, 660 F.2d at 18. The "identical factual predicate" rule applies this same limit to class action releases in class action settlements—which can only release claims that have the "identical factual predicate" as the certified common class claims at the core of the class action.

The certified class claims issue also defines the boundaries of the due process authority of class representatives and class counsel to represent absent class members. The class representatives are empowered by Rule 23 to represent members of the class solely with respect to those matters certified as common class claims by the court and in which all members have a common interest. *Super Spuds*, 660 F.2d at 17. "This means that [class representatives] have no authority to release claims beyond those that are common to the class." *Soranno v. New York Life Ins. Co.*, No. 96 C 7882, 2001 WL 290303, at *4 (N.D. Ill. 2001).

Rule 23(c)(1)(B), requires that the order certifying the class "must define . . . the class claims, issues or defenses." "[A] sufficient certification order must, in some clear and cogent form, define the claims, issues, or defenses to be treated on a class basis." *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 189 (3d Cir. 2006). In this case, the district court's order does not comply with Rule 23(c)(1)(B) because the order does not define the common certified class claims, disputed issues, nor TEP's defenses which are to be treated on a class basis.

Although objections to the overbroad release were raised, the district court made no comment nor fact findings regarding the "identical factual predicate" of the undefined certified claims, the scope of release, nor the objections. Thus, the Tenth Circuit had no factual nor legal basis on which to review the district court's exercise of its discretion to approve the TEP release as a part of the settlement, and remand was required. *TVPX ARS*, 2020 WL 2730789 at *6; *Corrugated Container*, 643 F.2d at 218; *Sarfaty v. City of Los Angeles*, 765 Fed. Appx. 280, 281 (9th Cir. 2019); *Reing v. RBS Citizens, N.A.,* 912 F.3d 115, 126-27 (3d Cir. 2018); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 369 (3d Cir. 2015).

Rather than remanding, the Tenth Circuit developed and substituted its own conception of the class claims together with its own legal analysis and entered its own fact findings to fill the void left by the district court. App. 25-27. Such a substitution of the appellate court's judgment for that of the district court is improper. *See Harper*, 746 Fed. Appx. at 722.

Contrary to the Tenth Circuit's purported fact findings, TEP and the *Sefcovic* Class Representatives conceded, and the district court agreed, that their lawsuit was limited to the claims for alleged breaches of a formula for calculating royalties that was established in the *Lindauer* Settlement. App. 34-35.

The only claims actually investigated, settled and compensated in the *Sefcovic* Settlement are claims to recover TEP's improper gathering, fuel and processing cost deductions. The facts that prove TEP's offending conduct are those which prove these alleged improper gathering, fuel and processing costs. These are the actually-settled

claims for which the class was compensated, and form the actual "factual predicate" of the *Sefcovic* Class Action.

It is also clear that, contrary to the Tenth Circuit's opinion, the certified claims do not extend to all claims "arising from [TEP's] calculation and/or payment of royalties . . . to Plaintiffs and the Class . . . ." App. 25. The Class Representatives did not, and in fact could not, assert all possible claims, both individual and common, both known and unknown, both existent and non-existent, arising from TEP's calculation and payment of royalties, but rather asserted and settled only defined improper gathering, fuel and processing deduction claims. TEP did not breach all possible claims arising from royalty calculation and payments at one time, and the Class Representatives did not allege, certify, settle nor distribute compensation to the Class for such a broad universe of all possible claims. Therefore, TEP can properly obtain a release of the actually settled and certified common core claims in the *Sefcovic* Class Action, but is precluded from obtaining a release of all possible claims arising from royalty calculation and payment by the "identical factual predicate" rule.

> [T]o strip [any] individual of their rights to sue the defendants upon a wide range of offenses that have nothing to do with the misconduct . . . in the present action, for no more consideration . . . is an offense to the principle of due process so egregious as to render the proposed settlement untenable . . . .

Karvaly v. eBay, Inc., 245 F.R.D. 71, 88-89 (E.D.N.Y. 2007).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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