IN THE DISTRICT COURT OF BEAVER COUNTY, OKLAHOMA

John W. Fitzgerald, on behalf of himself and all others similarly situated, Plaintiff, v. Chesapeake Operating Inc. (including affiliated predecessors and successors), Defendants.	* * * * * * * * * * * *	Case No. CJ-10-38

NON-PARTY THE MCDONALD LAW FIRM'S RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION AND BRIEF IN SUPPORT

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TO THE HONORABLE JUDGE JON K. PARSLEY:

Non-party the McDonald Law Firm ("McDonald") hereby files this Response in Opposition to Movant John W. Fitzgerald's Motion for Temporary Restraining Order, filed on February 13, 2015 ("Motion"), and the subsequent Motion for Order to Restrain Mass Communication with Settlement Class Members and, in the Alternative for, Temporary Injunction and Brief in Support, filed on February 17, 2015 ("Second Motion") (collectively referred to herein as "Motions") and respectfully states:

I.
OVERVIEW

Through the serious misuse of injunctive relief, the Settling Plaintiff is attempting to squelch third-party discussion of options for conditional Settlement Class members. Plaintiff is retaliating against the one lawyer so far having the temerity to question a deal that has a number of the hallmarks of a collusive, inadequate settlement.[1]

A. Badges of Collusion: Clear-Sailing provisions, secret fee applications, and limited opt-out rights.

The proposed class settlement should be able to stand on its own merits. But apparently it cannot, in part because the upper courts have already said that the described class cannot be certified under Oklahoma law. Plaintiff's Counsel is no doubt concerned about jeopardizing a potential extraordinary $48 million fee payment Chesapeake has agreed not to contest by a "Clear-

[1] Given the lack of discovery on the issue to date, McDonald cannot state that Plaintiff's counsel has engaged in an affirmative, conscious collusive settlement, yet several of the badges of collusive settlement exist, as discussed below.

Sailing" provision, a disfavored provision that often signals a collusive settlement. Indeed, the actual fee application has still not been filed, and the putative Settlement Class is not informed, and will not be informed prior to the objection deadline (or any opt-out deadline that can be discerned), of the actual fees Settlement Class counsel will be obtaining from the settlement common fund. Fearing scrutiny of these and other shortcomings, Plaintiff's requested injunctive relief is an attempt to prevent McDonald from doing what the Parties have not: informing potential Class Member of their rights and options in pursuing their own claims.

B. The Constitutional hurdles are high before a court may enjoin free speech, even commercial speech.

The Settling Parties—through the Plaintiff—have invited the Court to join them in shutting down Constitutionally-protected free speech that does no more than suggest that the potential class members should strongly consider as "one of their options" whether to opt out of the fast-track deal the Settling Parties propose, and whether to hire counsel, given the numerous conflicts on the part of Plaintiff's counsel. Prior restraint of free speech, even of commercial speech, is constitutionally suspect and disfavored. That is especially true at this stage of a conditional "settlement class" certification process, and even more so when the proposed settlement is not "opt-in," but is "opt-out," like the one here.

Numerous attempts to squelch dissent through injunctions, as Plaintiff seeks here under the putative guise of "management of the class notice process," have been reversed, and the few cases that sustainably enjoin free speech almost always involve *defendants'* improper communications with putative class members, in an effort to cut them out of any recovery. Those rare facts are not present here and do not justify prior restraint in this case.

C. The Preliminary, Conditional Settlement Order and Notice conflate objection and opt-out, with no clear deadlines.

Of course, because of the onerous Blow-up/Tip-over provision in the Settlement Agreement—with a 10% opt out threshold, at which point Plaintiff's counsel's huge payday goes away—well-informed putative class members are the very last thing the Parties want. This is confirmed by the confusing, "objection" and "opt-out" language in the Preliminary Approval Order and Class Notice the Settling Parties have put before the Court. The Settling Parties further obscure what may be the actual "opt-out" date as a well-disguised "objection" deadline of April 1, 2015. Under Oklahoma Statute 2023 (and the corresponding Federal Rule 23 upon which it is patterned) one can opt-out, or object, but not both, and so that distinction must be clear to class member, with the accompanying deadlines prominent. Here, they simply are not.

D. The Proposed Settlement has numerous defects that should be considered by the conditional Settlement Class.

A vigorous class action settlement approval process, with full disclosure to potential class members of the benefits and pitfalls of remaining in the class, encourages a questioning of the proposed deal on the table. That is the one thing these Settling Parties are trying to avoid, likely due to the numerous problems with the proposed Settlement Agreement in addition to inadequate amount, including, (1) the pro rata nature of the proposed distribution to a class that cannot be certified for trial according to the law of this case; (2) the preferential treatment given to a large group of potential class members who have unfavorable leases as far as deductions, yet who appear to get the same pro rata as those royalty owners with highly favorable leases; (3) serious deficiencies in the class notice regarding the amount of proposed distributions—no putative Settlement Class member can hope to understand how much they would receive if they do not opt out; (4) inappropriate hurdles placed on potential objectors to the settlement, such as requiring personal appearance for any objections, and the posting of a $6 million bond to appeal; (5) a disfavored "Clear Sailing agreement" related to Plaintiff's counsel's excessive fees being recovered from the Common Fund; and (6) the excessive and conflict-laden "incentive" award to the Class Representative.

E. McDonald's conduct and communications are proper.

Plaintiff ignores the defects in the preliminary settlement approval and class notice papers and process, as well as fatal defects in the Plan of Distribution, all of which are contrary to admonitions of the Oklahoma Appellate Court's *in this very case*. To sidestep these numerous defects, the First Amendment infirmities and to prevent the informed disclosure to members of the Settlement Class, the Plaintiff raises several straw men. One straw man is that McDonald has somehow behaved unethically in his newspaper ads and direct targeted mail pieces. As will be seen, not only are the McDonald communications proper under Oklahoma law, they exceed the standards in the ABA Model Rules and of even the most stringent state lawyer-advertising regulatory schemes.

In addition, prior to final class certification, Plaintiff claims that the putative Settlement Class members who have not even been notified that they are part of a possible conditional class, are somehow locked into a sacrosanct attorney-client relationship with Settlement Class Counsel that precludes them from even attending a Royalty Owner Meeting to learn of their actual options from different counsel. This is wrong as a matter of class action law, and as an ethical matter.

An invitation to attend a Royalty Owner Meeting, and an invitation there to voluntary attendees to hire McDonald as counsel, in no way violates any rules against "personal solicitation." In fact, McDonald said repeatedly that the choice whether to hire him was the client's to make, and that regardless of their choice, they should hire their own lawyer and consider whether to opt out (McDonald repeatedly urged "whether you hire us or not," "if you choose to hire us," and "whether you hire us or not, you need a lawyer.") Plaintiff's position that the putative Settlement

Class should not be allowed to talk to McDonald is also directly contrary to what Plaintiff put into its proposed Class Notice: "You May Retain Your Own Attorney to Represent you at the Settlement Fairness Hearing."

In contrast to Plaintiff's position, ABA Ethics Committee Opinion 445 clearly states: "Therefore, putative class members **are not represented parties** [by Class Counsel]…**prior to certification** of the class **<u>and</u>** the **expiration of the opt-out period**." (emphasis added) The Oklahoma rule is modeled after this ABA Rule, and the law is clear: only after *final* class certification and only *after* the opt-out period has expired, does class counsel represent absent class members. Plaintiff's claim that conditional, Settlement Class members are represented by Plaintiff's counsel is wrong.

F. There have been no misrepresentations by McDonald.

To distract the Court from the numerous defects in the proposed settlement, Plaintiff stretches and strains to contend McDonald's communications are somehow misleading. Plaintiff makes McDonald's statements about the proposed settlement representing potentially "pennies on the dollar" the bedrock of its Motions for TRO. "Pennies on the dollar," however correctly sums up a proper view of this proposed class action settlement for two reasons: first, the statement is a common idiom, well understood to mean that something is "much cheaper than it cost originally." Second, even if taken literally, the statement accurately captures the value of this settlement because even Plaintiff admits that after deducting "up to 40%" attorneys' fees and other expenses and an additional extraordinary "incentive award" to the class representative, the settlement only yields about 35 cents on the dollar to the Settlement Class under Plaintiff's own math ($71 million on an alleged claim worth over $200 million, according to Plaintiff's expert). And this is before considering the other royalty underpayment claims counsel failed to ever allege and pursue. One such claim is for using the incorrect net "effective" price to calculate royalty ("hedging"), among many others. When those strong and viable claims against Chesapeake are factored in—claims Plaintiff's counsel now wholly ignores—the settlement is deficient by over $1 per mcf, ***or by over <u>one billion</u> dollars using Plaintiff's own alleged production numbers***. None of these facts are disclosed in the Class Notice--indeed, even Plaintiff's counsel's experts' $215 million valuation of the claims is not provided to those conditional Settlement Class members needing to figure out whether to opt-out. McDonald's communications raise these uncomfortable facts, facts that the conditional Settlement Class should know before determining whether to participate in the Settlement Class, or to opt out. "Pennies on the dollar" correctly sums up a proper view of the settlement's shortcomings the putative Settlement Class should be allowed to consider.

The request for injunctive relief must be denied. The defects in the Preliminary Approval Order and the Class Notice should be cured right away. An appropriate, much longer period allowing objections and opt-outs should be adopted, with clear delineations and un-muddled deadlines for same. And ultimately, after a full and lengthy hearing on what should be numerous valid objections to this proposed settlement, the settlement (and final class certification) should both be disapproved, in accordance with the appellate rulings in this very case.

II.
FACTUAL BACKGROUND

A. Class Petition filed; class certification initially granted, but reversed by Court of Appeals.

The underlying Class Action Petition was filed in November 2010. On February 11, 2013, the Court entered an Order Certifying Class. The Defendant appealed that Class Certification. The Oklahoma Court of Appeals reversed the Order Certifying Class on February 14, 2014 and remanded the case back to this Court. *See Fitzgerald Farms, LLC v. Chesapeake Op., Inc.*, No.

111,566, 2014 WL 813861 (Okla. Civ. App., Div. 1, Feb. 14, 2014). Plaintiff filed a Petition for Writ of Certiorari with the Oklahoma Supreme Court, though the Oklahoma Supreme Court denied Plaintiff's Petition on June 2, 2014. The Court of Appeals opinion is clear that the Class, as purportedly constituted, could not be certified for trial, and "reverse[d] the finding that common issues predominate and that a class proceeding is the superior method for adjudicating these claims." *Fizgerald*, 2014 WL 813861, at *2.

Specifically, the Court found "common lease language and common gas quality are essential to class treatment of Fitzgerald's claims," but that such commonality did not exist. *Id.* at *3. The Court further found that "counsel [for Plaintiff] essentially conceded the **question of damages was not common to the whole class**." *Id.* at *5 (emphasis added). Though the "question of damages was not common to the whole class," Plaintiff now seeks a *pro rata* settlement payment to each putative Settlement Class Member, regardless of the specific language in their leases. Put simply, the Court of Appeals held that this class lacked the cohesiveness that would enable adjudication of its claims in the aggregate: there were not "common issues" among the class concerning the overpaid royalties, individual resolution of the claims would be required, and therefore a class action was not a "superior" form of adjudication, as required by 12 Okla. Stat. § 2023(b)(3).

B. The McDonald firm markets in Oklahoma beginning in March 2014, and is engaged by numerous Oklahoma royalty owners.

After the Order Certifying Class was reversed by the Court of Appeals, beginning in March 2014, the McDonald Law Firm sent a direct mail piece to several thousand royalty owners in

Washita County, Oklahoma.[2] McDonald is an attorney licensed to practice in Oklahoma, and derived the list of Chesapeake royalty owners from publicly available county clerk records.

The March 2014 mailer prominently noted that it was an "ADVERTISEMENT," and stated that "over the last many months, a number of lawsuits have been filed against Chesapeake Energy Corporation and its affiliates…alleging that these companies have failed to pay or have improperly calculated the royalties due on oil and gas produced from leases operated by Chesapeake." *See* Exhibit B. The mailer concluded, "Concerned about your Chesapeake royalty history? Contact us to schedule a complimentary Chesapeake royalty analysis…If we find that your royalty has been underpaid or improperly calculated, you may engage us to represent you against Chesapeake on a contingency basis… ." *See id.*

The McDonald Law Firm was engaged by 37 individual Oklahoma royalty owners by January 1, 2015—after Class certification was reversed, but before the preliminary settlement was publicized by Plaintiff and Chesapeake.

C. Conditional Class Settlement preliminarily approved in January 2015.

After the McDonald Law Firm began marketing in Oklahoma, after it was engaged by approximately 10,000 Chesapeake royalty owners throughout the country suing Chesapeake for underpayment of royalties, and after the Oklahoma Court of Appeals reversed the Order Certifying Class, on January 5, 2015, Plaintiff filed a Motion for Preliminary Approval of Class-Wide Settlement.[3] The next day, on January 6, 2015, the Court entered an Order Preliminarily

[2] In April 2014, the McDonald Law Firm filed the first of over one-hundred lawsuits in the State of Texas against Chesapeake, based on Chesapeake's alleged underpayment of royalties in the Barnett Shale. The McDonald Law Firm now represents several thousand Chesapeake royalty owners in Texas, Oklahoma, Louisiana, and Pennsylvania.

[3] Plaintiff claims the parties "first broached the subject of settlement" in "early 2014," and had their first of at least three unsuccessful mediations on April 17, 2014. Brief in Support of Motion for Preliminary Approval of Class Action Settlement at 10. Based on an alleged mediator's proposal, Plaintiff and Chesapeake agreed to a settlement on December 18, 2014. *Id.*

Approving Class Settlement—it is unclear from the Court's docket entries whether there was an actual hearing. The Court stated that "Plaintiff, as a result of the Settlement Agreement and **for purposes of settlement**, through the existing extensive record, has satisfied the…requirements under Ok1ahoma Code of Civil Procedure § 2023 for **conditional** certification of the Settlement Class as defined in the Settlement Agreement." Preliminary Settlement Order at ¶3 (emphasis added). ***The Order does not actually state that a conditional class—settlement or otherwise—is being certified.***

Subsequently, beginning February 3, 2015, the McDonald Law Firm ran a series of public advertisements in Oklahoma newspapers inviting Chesapeake royalty owners to attend a royalty owners meeting on February 10 or 11, 2015 in Lawton, Elk City, Shawnee, or Oklahoma City ("Royalty Owner Meeting"). *See* Exhibit C. Royalty Owner Meetings occurred in Oklahoma on those dates, and apparently, Chesapeake, Plaintiff's counsel, or both, secretly recorded one or more of the Royalty Owner Meetings, and planted questioners in the audience, without providing their true identities or disclosing that they were making a surreptitious recording.

D. Plaintiff's counsel obtains an ex parte restraining order against McDonald.

On February 13, 2015, Plaintiff's Counsel sought and obtained an *ex parte* Temporary Restraining Order ("TRO") against the McDonald Law Firm and "unknown persons assisting the McDonald Law Firm" (collectively referred to herein as "McDonald").

The TRO was not supported by any bond or explanation as to why a bond would not be required, and purports to enjoin McDonald from (1) soliciting Settlement Class Members to opt-out of the Settlement that this Court preliminarily approved on January 6, 2015; (2) communicating with Settlement Class Members, whether written, in-person, or electronic, including communications on websites, radio, newspapers, telephone, direct mail, internet and other public, private or social media, without this Court's approval; and (3) destroying evidence of any documents or electronic emails, presentations, recordings or data associated with the Enjoined Activities so that, if later ordered to do so, it can produce said materials.

On February 17, 2015, Plaintiff filed a Motion to Restrain Mass Communication with Settlement Class Members and, in the Alternative for, Temporary Injunction and Brief in Support. Plaintiff included a purported transcript of a secret recording of one of McDonald's Oklahoma Royalty Owner Meetings. In that briefing, Plaintiff sought additional remedies, including requiring McDonald to pay for a corrective Court-approved notice (even though at the time the notice deadline of February 25, 2015 had not passed); voiding any fee agreements with McDonald signed after January 6, 2015; and disqualifying McDonald from representing any potential class members who opt out of or object to the Settlement.

III.
ARGUMENTS AND AUTHORITIES

A. Plaintiff's TRO actions implicate paramount First Amendment concerns.

Plaintiff wholly ignores the serious First Amendment rights trampled by the requested injunctive relief. The rights affect not only McDonald, but also the conditional Settlement Class' right to be informed and right to access to counsel.

Court orders restricting communications with absent class members constitute governmental regulation of speech and disfavored prior restraint on speech, and thereby trigger First Amendment concerns. *See* U.S. Const. amend I; *see also In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988) ("Orders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech."). While courts have the power to issue orders to manage the class action process, "a district court's discretion to issue such orders must be exercised within the bounds of the first amendment and the Federal Rules." *See* 12 O.S. 2023(D)(2); *In re Sch. Asbestos Litig.*, 842 F.2d at 680.

1. Prior restraint, even of commercial speech, is strongly disfavored.

As a preliminary matter, not all of McDonald's restrained speech constitutes "commercial speech," but actually involves political speech of the highest protected order. Specifically, McDonald made clear to voluntary attendees that they should consider hiring their own attorneys to examine their rights under the preliminary Class Settlement, even if they **did not hire McDonald**. *See* Purported Transcript of Royalty Owner Meeting, attached as Ex. D. to Plaintiff's Second Motion for TRO at pp. 13, 23, 26, (McDonald repeatedly urged "whether you hire us or not," "if you choose to hires us," "whether you hire us or not, you need a lawyer," And "look, there are other lawyers you can hire…").

Even for the aspects of McDonald's restrained speech that may constitute commercial speech, the Supreme Court has held that lawyer advertising is recognized as a constitutionally-protected form of commercial speech. *Fla. Bar v. Went for It*, 515 U.S. 618, 623 (1995); *see also Mason v. Fla. Bar*, 208 F.3d 952, 955 (11th Cir. 2000) ("Commercial speech is. . . undeniably entitled to substantial protection under the First and Fourteenth Amendments of the United States Constitution."). Courts have further recognized that "[b]ecause of the value inherent in truthful, relevant information, a state may ban only false, deceptive, or misleading commercial speech." *Mason v. Fla. Bar*, 208 F.3d at 955. If commercial communication is neither misleading, nor related to unlawful activity, the power to regulate that speech is considerably constrained. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980).

Courts may place *limited* restrictions on commercial speech that is false, deceptive or misleading, if it is first shown that the restriction directly and materially advances a substantial state interest and is *no more extensive than necessary to serve that interest*. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 566 (1980); *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142-43 (1994) (noting that the burden on those seeking restrictions is "not slight"). Importantly, any such restrictions on speech must be "narrowly drawn" and must be the least intrusive means of protecting the interest. *Central Hudson*, 447 U.S. at 565; *see also Gulf Oil*, 452 U.S. at 104 (refusing to uphold expansive ban when "[o]ther less burdensome remedies may be appropriate").

Here, the Plaintiff has requested a ***complete ban*** on McDonald's communications with the Settlement Class—including clients who engaged Mr. McDonald before a conditional class settlement was ever publicized. Such a blanket ban is rarely, if ever, justifiable and even a targeted limitation can only be justified if the Plaintiff can show the specific speech to be restrained is false, deceptive or misleading. Plaintiff has not and cannot meet this requirement. *See infra* Parts III.A. (addressing Plaintiffs' allegations of false or misleading statements by McDonald).

Moreover, the Plaintiff has not articulated a valid "substantial state interest" in need of protection. Plaintiff simply wants to stop what it mischaracterizes as a "solicitation" campaign. In doing so, Plaintiff discusses the importance of an "informed choice," but the relief requested by Plaintiff prevents just that. *See* Second Motion, p. 11. Plaintiff's relief asks this Court to eliminate a valid view opposing the settlement and effectively prevents class members from making an informed choice. Moreover, even if the interest advanced by Plaintiff was arguably proper and "substantial," Plaintiff does not seek "narrowly drawn" relief, but instead seeks an impermissibly broad, blanket ban on all communications between McDonald and the potential class members (including his own clients who retained him before the Class Settlement was ever preliminarily approved). This extraordinary injunctive relief should be denied.

2. This is not one of the rare, extreme circumstances warranting constitutionally suspect prior restraint.

In class contexts, First Amendment protection must be balanced against the district court's need to oversee the management of the class action. *See* FED. R. CIV. P. 23(D); 12 O.S. 2023 (giving a court authority to issue orders to manage the class action). However, even analyzed under this context, courts have refused to uphold similar orders that improperly regulate communications. *See, e.g.*, *Gulf Oil*, 452 U.S. at 103-04; *In re Sch. Asbestos Litig.*, 842 F.2d at 683-84. More importantly, while courts have occasionally restricted certain *post-certification* communication between ***defendants*** and class members (upon the proper showing), the injunction requested here, in contrast, involves protected communications by a ***non-party attorney*** to members of a *conditionally-certified* settlement class**.** *See, e.g.*, *KIeiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985) (articulating a test to quell First Amendment concerns for orders limiting communications regarding ongoing litigation ***between class and class opponents***); *see also supra* Section C(2) (discussing status of class). In cases involving defendant communications, courts have considered restrictions in light of the potential for abuse by a Defendant seeking to keep settlement amounts low by keeping members out of the class; however, those concerns are not present here. Plaintiff fails to identify a single case that restricts communications between a *non-party* attorney and settlement class members—and certainly none with the expansive relief requested here.

The seminal case concerning the regulation of communications among attorneys and prospective class members in a class action suit is *Gulf Oil Co. v. Bernard*. *See Gulf Oil*, 452 U.S. (1981). There, an attorney for the plaintiffs allegedly met with seventy-five class members and recommended they abstain from signing releases and return any checks to the defendant. *Id.* at 92-93. The district court issued a complete ban on all communications between the parties or their counsel and class members. *Id.* at 93-95. The Supreme Court determined the district court had abused its discretion under the Federal Rules of Civil Procedure in entering such a sweeping order. *See id.* at 102-04. In articulating its decision, the Court identified the potential First Amendment concerns related to this type of ban on communication, stating: "Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved **serious restraints on expression**. This fact, at minimum, **counsels caution** on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses." *Id.* at 103-04 (emphasis added).

The Court then set forth the test for determining when an order limiting communications between parties and potential class members is appropriate:

> Because of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id. at 101–02.

Here—much like class counsel in *Gulf Oil*—Plaintiff requests a permanent and impermissibly expansive bar to communications between McDonald and all *potential* Settlement Members. In fact, the injunction sought here is even more expansive than the impermissibly broad order in *Gulf Oil*. Plaintiff requests that the Court bar McDonald from "communicating . . . with Chesapeake royalty owners who are or may be members of the certified Settlement Class." Second

Motion, p. 19. This request effectively prevents McDonald from contacting clients he currently represents and further prohibits him from contacting *anyone* in who may potentially be conditional Settlement Class members, even for reasons unrelated to the litigation. *See* Okla. R. Prof. Conduct 4.2. Courts have found similar restrictions on speech impermissibly overbroad, breaching *Gulf Oil*'s stricture to limit speech as little as possible. *See In re Sch. Asbestos Litig.*, 842 F.2d at 683-84.

3. Outside communications--especially about the Opt-Out option--with Putative Class Members at this stage are proper--and to be encouraged in a vigorous Class Action process.

Plaintiff bases its request for a broad restraint on McDonald's communications on the notion that the Class Notice is the "best" vehicle for communicating with putative class members because, in their view, Class Notice will more fully inform the settlement class of the pros and cons of opting out. But, even were that the case, the position that Class Notice is the best vehicle is not enough to support an order of restraint against McDonald's communications with putative class members to provide additional information. Under the procedural posture and facts of this case, strong policies to promote the protection of class members actually weigh in favor of denying the requested broad restraint against McDonald's communications with putative class members and instead weigh decidedly in favor of permitting and encouraging such communications.

Here, the Court's earlier certification of the class was reversed, and the current class certification is of a settlement class. But the certification of a settlement class offers the potential for the named representatives and the defendant to enter into agreements that are to the benefit of them and their attorneys, but that do not provide sufficient benefits to the putative class members. 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797.2.

Indeed, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the United States Supreme Court warned that district courts should be particularly mindful of the requirements of the class action rule because of the potential dangers that were presented when settlement classes are involved—"those designed to protect absentees by blocking unwarranted or overbroad class definitions." *Id.* at 620. Thus, when a certifying a settlement class, the other requirements "demand undiluted, even heightened attention in the settlement context." *Id.* Those same concerns should guide this Court in determining the propriety of continuing the Plaintiff's requested broad restraint on McDonald's communications with putative class members about the pros and cons of opting out or staying in the settlement class.

And these concerns are squarely presented by the facts here. This Court's prior certification of the class was reversed as improper. Yet, this Court is now being asked to certify a class for purposes of settlement. But, as discussed below in detail, the proposed class settlement has several badges of collusion between the defendant, the class representative, and their attorneys. *See infra* part ___. These same players crafted the Class Notice (due to be mailed out on or before February 25, 2015). As will be seen, it is not a model of clarity, especially as to key rights like opt-put and objection, and prominently features onerous restrictions on those rights (in person/counsel requirement, outrageous bond, etc.).

Because the proposed class settlement bears several badges of a collusive settlement, this Court should exercise even greater caution in responding to the Plaintiff's request to restrain the speech of McDonald. The Plaintiff has not identified any manner in which McDonald's communications are misleading. The lack of evidence that McDonald's communications are misleading supports denying the motion for restraining or continuing the restraint on McDonald's communications, including the requirement that of advance review by this Court of any future proposed communications. *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 1990 WL 252131, at *2-3 (D. Kan. Oct. 30, 1990) (rejecting motion to require advance review of communications by plaintiffs with potential class members because of the lack of evidence indicating the likelihood of misleading communications); *see Babbitt v. Albertson's, Inc.*, No. C–92–1883, 1993 WL 150300, at *5 (N.D. Cal. Mar. 31, 1993) (applying *Gulf Oil v. Bernard*, and holding that, because a communication from plaintiff's counsel to prospective class members did not contain factual misrepresentations, it was permissible, even if it was slanted).

Without any showing that the communications sought to be restrained are misleading, such communications actually promote the interests of putative class members by enhancing the quality of the information to the putative class members, thus serving as a ballast against inadequate information provided by the parties to the potentially collusive settlement. Indeed, by ameliorating the concerns about a collusive settlement and about inadequate Class Notice crafted by the parties to that proposed settlement, McDonald's communications serve a vital role and should be encouraged as part of a vigorous class action process.

Plaintiff's request to continue the broad temporary restraining order improperly suppresses all communications with McDonald and the settlement class without the necessary showing that the communications are inaccurate or misleading and without showing that this blanket restraint is the least restrictive means available to provide any necessary protection to the settlement class. Even if the Plaintiff could show an isolated statement was somehow misleading—which it cannot—the only narrow remedy would be to address that narrow statement, not enjoin all communications. This Court should deny the requested relief.

4. Plaintiff's Counsel does not have an attorney-client relationship with conditional Settlement Class members.

Properly evaluating the relationship between class counsel and absent class members requires an examination of the status of the class certification. Plaintiff fails to fully conduct this examination, and instead simply claims that this Court's January 6, 2015 Order creates this relationship. *See* Response at p. 12. Plaintiff is wrong.

As the Plaintiff is aware, on February 14, 2014, the Oklahoma Court of Appeals reversed the district court's Order certifying the Class, and the Oklahoma Supreme Court denied the petition for review. *See Fitzgerald Farms, LLC v. Chesapeake Op., Inc.,* No. 111,566, 2014 WL 813861 (Okla. Civ. App., Div. 1, Feb. 14, 2014). Plaintiff then approached the Court in an attempt to accelerate settlement and asked the Court to "conditionally" certify a settlement class. Courts often use the term "conditional," as was used here, to indicate that class certification is "conditioned" upon final approval of the settlement and class (after notice to the class, objections, a fairness hearing, and the expiration of the opt-out period). Rubenstein, 4 Newberg on Class Actions §13:17 (5th ed.). As recognized by one court:

> Preliminary certification of settlement classes is . . . not really "certification" at all. It does not follow a Rule 23 motion for certification, it has no binding effect on class members, and, even if granted, it still has no effect on the motion for class certification that the plaintiffs must make in order bind the absent class members to the finally approved settlement.

Schoenbaum v. E.I. Dupont De Nemours and Co., 2009 WL 4782082, *5 (E.D. Mo. 2009). Even the Settlement Agreement itself repeatedly describes the certification as "preliminary" and "for the purposes of this Settlement only." *See* Ex. A, Settlement Agreement, ¶2.1. Moreover, the Settlement Agreement anticipates that the actual "certification" will occur ***after*** the Settlement

Fairness Hearing and Judgment approving the settlement. *See id.* at ¶2.3 (stating that the Court will certify the settlement class for "settlement purposes only" after the Settlement Fairness Hearing). Conditional settlement certification is just that—conditional—and is terminated should the settlement fall through. *Id.* at ¶6.1 (noting that if the settlement is not ultimately approved, then the tentative class certification is withdrawn and the parties "shall return to their respective status in the Class Action Litigation as of December 1, 2014"). And this settlement could fail—and likely will given its numerous legal and factual defects, as well as the simple fact that the Defendant may walk away if more than 10% of the potential class opts out. Such "conditional" certification does not create an attorney-client relationship between class counsel and absent class members.

Until the opt-out deadline has passed and the class has been certified, there is no attorney-client relationship between putative class members and class counsel. *See In re Community Bank of Northern Va.*, 418 F.3d 277, 313 (3d Cir. 2005) (recognizing that class counsel does not possess a traditional attorney-client relationship with absent class members); *see also In re McKesson HBOC Secs. Litig.*, 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) (putative class members are not "represented," thus communications were not unethical as communications with represented parties); *In re Chicago Flood Litig.*, 682 N.E.2d 421, 425 (Ill. App. Ct. 1997) (class counsel will be deemed to fully represent all class members ***only after*** court has *certified class* and *opt-out time period has expired*); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 15:16 (4th ed.2002) (stating that ***once opt-out period ends*** "[t]he attorneys for the class have assumed fiduciary obligations or constructive attorney-client status with respect to the class").

The Third Circuit recognized that while class counsel owes a fiduciary duty to the putative class, "the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with [class counsel and] each and every member of the putative class. Taken to an extreme, [this position] suggests that putative class members are ***forever walled off from any effort at solicitation, a proposition that seems unsupportable.***" *In re Community Bank*, 418 F.3d at 313 (quoting *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.Supp.2d 1239 (N.D.Cal. 2000)) (emphasis added).

Notably, the ABA confirms that class counsel does not represent absent class members prior to certification, stating:

> ***A client-lawyer relationship with a potential member of the class does not begin until the class has been certified*** and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, ***putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period***.

ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 07-445, at 3 (2007) (emphasis added). The class has only been conditionally certified and the deadline to opt out has not yet passed. Plaintiff's assertion that the Settlement Class is represented by Plaintiff's counsel is wrong.

5. Advertising and invitations to Royalty Owner Meetings are not unethical "Personal Solicitation."

Plaintiff has contended the McDonald advertisements that invite royalty owners to a meeting to hear McDonald's opinions about the royalty claims "potentially run[] afoul" of Rule 7.3(a). Mot. for TRO at 3. Plaintiff's assertion of the mere *potential* to violate a rule does not, of course, assert an actual violation of the rule.

Moreover, consideration of the terms of Rule 7.3(a), and its accompanying comments, demonstrates that Plaintiff's suggestion lacks credence. The rule does not preclude mailings like the McDonald direct mail piece, but instead bars "in-person, live telephone or real-time electronic contact [to] solicit professional employment from a prospective client when a significant motive . . . is the lawyer's pecuniary gain," except for certain categories of individuals not applicable here. OKLA. R. PROF. CONDUCT 7.3(a). The comments to this rule make clear that the rule is addressing direct contact with prospective clients, that is, communications that are "private" and "direct interpersonal encounter[s]." *Id.*, cmt. 1. The rule is concerned with the potential for abuse in such uninvited, "direct" solicitations. *See id.*, cmts. 1 & 2. The concerns behind Rule 7.3(a) are simply not at issue in the mailings, literature or voluntarily-attended informational meetings at issue in this case.

Indeed, courts have recognized that a printed advertisement or even targeted, direct mailing "poses much less risk of overreaching or undue influence". *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) ("In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."). This is so because letters and printed advertisements "can readily be put in a drawer to be considered later, ignored, or discarded" and these types of written solicitation "'convey information about legal services by means that are more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.'" *Id.* at 475-76 (citation, quotation, and brackets omitted). Likewise, the comments to Rule 7.3 appear to favor this type of impersonal communication: "The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely." OKLA. R. PROF. CONDUCT 7.3 cmt. 3.[1]

Once potential clients, responding to advertising such as here, *voluntarily* attend an informational meeting like the ones that have occurred here, and given that the information which was presented was truthful and not misleading, and was presented in a non-coercive fashion (attendees were told they were free to hire other counsel if they wished to do so). The key is the volitional nature of the attendance and the manner of presentation and options offered. The attendees have clearly sought out the lawyer's insight and expertise by attending the meeting. None of the concerns attendant to cold-call personal solicitation—like door to door solicitation or accosting a stranger on the street—are present in the informational meeting context. See *Ohralik v. Ohio State Bar Assn*, 436 U.S. 447, 472 n.3 (1978).

Texas' ethical rule on in-person solicitation is almost identical to the Oklahoma rule, as well as the ABA Model Rule. The comments to Texas Rule of Professional Conduct 7.03 make clear the concerns addressed by the Rule, and also make it clear that once interested persons have gone to the trouble of attending a lawyer-conducted meeting, those concerns do not apply. *See* Tex. R. Prof'l Conduct 7.03, cmt. 1 (concern is personal contacts "if they are initiated by or on behalf of a lawyer or law firm"… "Those [communications] that do not present such opportunities for abuse, such as pre-recorded telephone messages *requiring a separate return call to speak to or retain an attorney,* or websites *that must be accessed by an interested person* and that provide relevant and truthful information concerning a lawyer or law firm, are permitted."). Thus, the

[1] Under the Model Rules of Professional Conduct a lawyer's communication "typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches." MODEL R. PROF. CONDUCT 7.3 cmt. 1, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/comment_on_rule_7_3.html.

communication by counsel at the voluntary Royalty Owner Meetings is not the "solicitation" prohibited by the rules. Even if it were somehow considered to be "solicitation," the Supreme Court of the United States has left open the question whether such "benign" commercial solicitation might even be protected speech under the First Amendment to the Constitution of the United States. See *Ohralik v. Ohio State Bar Assn*, 436 U.S. at 472 n.3.

6. Statements about the potential problems with the Class Settlement are true and do violate any ethical rules.

Another critical straw man in Plaintiff's argument is that McDonald has made untrue or unfair statements about the conditional Class Settlement. In examining McDonald's actual statements (including those surreptitiously recorded by Plaintiff's counsel), and the readily available facts, it is clear that McDonald's statements are both true and completely appropriate in the context of informing potential Settlement Class members of the pros and cons of accepting the proposed class settlement.

a. **McDonald's opinion statements about the sufficiency of the class settlement do not implicate any ethical violations.**

As a preliminary matter, Plaintiff suggests that certain of McDonald's opinion statements can be regarded as misleading under Rule 7.1's provision that "[a] communication is false or misleading if it . . . omits a fact necessary to make the communication considered as a whole not materially misleading." OKLA. R. PROF. CONDUCT 7.1; *see* Mot. for Order to Restrain at 14; Mot. for TRO at 3. The Plaintiff ignores, however, a key component of Rule 7.1: it regulates communications "concerning a *lawyer's services*." OKLA. R. PROF. CONDUCT 7.1. The rule targets "false or misleading communication *about the lawyer or the lawyer's services*," *id.*, rather than regulating any communication by an attorney.[4] The rule does not necessarily foreclose attorneys

[4] The Model Rules also explain that the rule governs communications about attorneys' services. *See* MODEL R. PROF. CONDUCT 7.1 cmt. 1 ("This Rule governs all communications about a lawyer's services, including advertising

from expressing evaluative opinions, but instead, misleading statements about legal services. *Id.*, cmt. 1 ("Whatever means are used to make known a lawyer's services, statements about them must be truthful."). In addition, Plaintiff merely invokes the specter of Rule 7.1, and fails to explain how or why the advertisement's criticism of the settlement (e.g., that it represents "pennies on the dollar") is untruthful. Nor does the Plaintiff point to any omitted facts or additional, qualifying language that might make the identified statements sufficiently clear under the Plaintiff's urged view of the rule. Plaintiff fails to substantiate his claim that material facts were omitted and Rule 7.1 was violated.

b. The Proposed Settlement has the badges of a collusive settlement and appears inadequate; the conditional Settlement Class should be allowed to consider these facts.

As noted, the Proposed Settlement was entered after McDonald began marketing in Oklahoma, after McDonald was engaged by over three dozen Oklahoma Chesapeake royalty owners, after McDonald was engaged by thousands of Chesapeake royalty owners throughout the country, and after the Oklahoma Court of Appeals reversed the Order Certifying Class. The suspicious timing of the agreement is coupled with numerous red flags in the actual Settlement Agreement that bear the badges of a collusive settlement.

i. The Plan of Distribution means claims cannot be certified

The plan of distribution appears to pay class members simply their *pro rata* share of the settlement fund, with the division based on the size of their wells.[5] This completely contradicts

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permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.").

[5] *See* https://secure.ntcsol.com/softniche/easyclaim/Forms2011/SettlementBenefits.aspx ("Generally, the allocation of the Net Common Fund Amount (as defined in Paragraph 1.15 of the Settlement Agreement which can be found on the Key Dates/Docs page) shall be proportionately allocated among Class Members based upon the percentage of the royalty owner's interest and volume of Chesapeake's gas

the Oklahoma Appellate Court's certification reversal, which decreed that a class could not be certified because of the different types of claims that class members had, driven largely by different leases, and of the different methods of damage calculation that would be required for each.[6] While parties may settle on terms that are distinct from what would have been litigated, here two red flags are raised.

First, class counsel and the class representative likely cannot represent this whole class for purposes of a uniform settlement because there are fundamental conflicts of interest between class members. Per the Oklahoma appellate decision, some class members will surely benefit from the *pro rata* approach while others will lose by it. By attempting to represent class members with conflicting relationships to this approach, counsel has acted in ways that cannot comport with the adequate representation requirement. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (rejecting settlement class certification because "the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability" and holding that "the settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected"). Perhaps a tiered settlement approach which takes into account the various lease and other positions of the potential class members could work, but that is not this settlement.

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produced from the owner's well during the Claim Period.").

[6] *Fitzgerald v. Chesapeake Operating, Inc.*, No. 111,566, 2014 WL 813861, at *6 (Okla. Civ. App. Feb. 14, 2014) ("Our review of the record shows a class action is not the superior method of adjudicating these claims due to two material questions which will have to be proved individually: whether a particular lease allows some or all GCDTP costs to be born by the royalty owners and at what point the gas in a particular field or gathering system is marketable (and therefore what GCDTP services and costs are necessary and whether they may be passed on to the royalty owner). The question of liability is not common to the whole class, and counsel essentially conceded the question of damages was not common to the whole class. If a class proceeding would require thousands of mini trials on the questions of liability and damages, it is difficult to perceive what might be accomplished by class certification.").

Second, this Court cannot certify this class for a uniform, pro rata settlement given the Court of Appeals' decision that it could not be certified for trial. The Supreme Court's decision in the *Amchem* case held that: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule . . . demand undiluted, ***even heightened***, attention in the settlement context."[7] What this means is that if class certification is rejected on *manageability* grounds, it may later be certified for settlement purposes; but if it is rejected on other grounds, those grounds are not cured by settlement.

Here, the Oklahoma Appellate Court said that there were not common issues of fact concerning liability or damages and that a class action was a not a superior means of adjudication – nothing about a settlement can cure those problems and the *pro rata* approach fails for that reason.

ii. The proposed class notice is improper

At least two problems plague the class notice. *First*, the plan of allocation simply says the fund will be distributed *pro rata* but it gives class members absolutely no information about what they will be getting individually. Without knowing the dollar value of their claims, class members lack the key information they need to make a decision of whether to stay in, object, or opt out. The situation is not aided by the fact that ¶ 3.2 says that "after the judgment becomes final and unappealable," the distribution plan will be posted for 30 days for class members to review, as (a) the opt out deadline will have passed (b) the objection deadline will

[7] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (emphasis added).

have passed and (c) that paragraph provides no means for class members to do anything but look at the number they are getting. Even the supposed $205 million damage model Plaintiff now touts is omitted from the Notice.

Second, the notice does not make clear when and if class counsel will file its fee petition. Class members are entitled to all information about counsel's fee – its hours, rates, basis of fee, etc., – far in advance of the opt out or objection deadline so that they can meaningfully respond to counsel's request for up to 40% of their money.[8]

iii. The significant hurdles placed before objectors and opt-outs is inappropriate.

Next, the settlement agreement discourages class members from objecting to the settlement and places significant hurdles in their path, thus attempting to decrease the information that the Court receives about the fairness settlement.

First, a class member wishing to object must state that he or she will travel to Beaver County, or hire a lawyer to do so, to register an objection. See Order Preliminarily Approving Class Settlement at ¶9 ("any objector who does not appear, either in person or by counsel, at the Settlement Fairness Hearing to present his, her, or its objections shall be deemed to have waived the right to object, and any such non-compliant objection by such person shall be deemed withdrawn and no effect."). Given the state-wide nature of the conditional Settlement Class, the required in-person objection is overly broad and inappropriate.

[8] *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) ("We hold that the district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in setting the objection deadline for class members on a date before the deadline for lead counsel to file their fee motion. Moreover, the practice borders on a denial of due process because it deprives objecting class members of a full and fair opportunity to contest class counsel's fee motion."); *but see Cassese v. Williams*, 503 Fed. Appx. 55 (2d Cir. 2012), cert. denied, 133 S. Ct. 2023 (2013) (upholding fee procedure hereby the general settlement notice contained the fee that counsel would seek, the class had several months after receiving that general notice to file objections, and the fee motion itself was filed only after the objection deadline). *See generally,* Rubenstein, 3 **Newberg on Class Actions** § 8:24 (5th ed.).

Second, any class member who objects and then wishes to appeal that objection is required, by the settlement agreement, to post a bond of 5% of the Common Fund. That amounts to roughly $6 million. That requirement creates a significant barrier to any appeals of objection denials, hence artificially insulating this settlement from meaningful appellate review (a review that will no doubt be meticulous given the earlier appellate decisions in this case). Typically, appeal bonds are much more modest and are tailored solely to the recoverable costs on appeal.[9]

iv. The Settlement Agreement contains a disfavored "Clear Sailing agreement."

The Settlement Agreement includes a clause whereby the Chesapeake agrees not to contest a fee request up to 40% of the common fund, or $47.6 million. This is a so-called "Clear Sailing agreements." Clear-sailing agreements are disfavored and often a sign of a collusive settlement. First, since the fee is coming out of the Fund, and not being paid by Chesapeake, Chesapeake has no particular interest in what the fee will be. That raises the question of why the parties therefore bargained over it and included it in the Settlement Agreement.

The second core concern about a Clear Sailing agreement is that as part of a bargain, it implies that class counsel gave up something of the Settlement Class's interest to secure this agreement with the Defendant, serving only their own purposes, not the Class's. Clear Sailing agreements therefore create a conflict of interest between class counsel and the class. Third, the Clear Sailing agreement is often the way a defendant secures a cheap settlement– by agreeing not to contest a nearly $50 million dollar fee, it can get class counsel to agree to a smaller

[9] *See* Rubenstein, 4 **Newberg on Class Actions** § 14:16 (5th ed.).

Common Fund. As the Supreme Court has stated: "In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."[10]

Finally, Clear Sailing agreements are particularly problematic when coupled with high fee requests, discussed in the next section.

v. Under the circumstances, the fees requested are excessive and cut deeply into the settlement fund.

The settlement agreement enables class counsel to seek "up to 40%" of the common fund, or $47.6 million. This is an absolutely extraordinary and surely excessive fee measured in several ways.

First, empirical studies show that the mean fee award in class actions is 24% (and in the Tenth Circuit it is 22%)[11] These numbers decrease as the fund size increases, with the mean fee award for funds in the $119 million range being 19.4%.[12] This means that counsel has the right to seek an award DOUBLE the size of the mean fee award.

Second, courts typically compare the percentage award (here $47.6 million) to counsel's lodestar, that is, its hours times its billing rate. Two firms worked on this case for about four years. If you ascribe a generous 1,000 hrs/year per firm (which is unlikely considering how little litigation took place), that's 2,000 total hours/yr or 8,000 total hours; at a generous

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[10] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 853 (1999).

[11] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 260 (2010) (Table 4).

[12] *Id.* at 265 Table 7.

billing rate of $500/hr,[13] counsel's lodestar would be $4 million. A $47.6 million fee would be 12 times higher than their lodestar, or a multiplier of 12. The mean multiplier in class action cases is between 1.5-2[14] and 2.7 in cases with settlements this size.[15] The 12 multiplier would be off the charts, about 10 times greater than what courts normally approve. And all of that assumes that these lawyers spent 8,000 hours on this case at $500/hr. There is no indication that is the case and given the paltry entries on the docket, it appears that very little litigation took place here at all and basically none occurred after the Court of Appeals' class certification reversal.

vi. There are excessive and conflicting incentive awards in the Settlement Agreement.

The Settlement Agreement states that counsel will seek an "incentive award" for the class representative of up to .3% of the settlement fund, which amounts to $357,000. This is shockingly excessive for several reasons.

First, Courts approve incentives awards only in about one quarter of all cases[16] and the mean incentive award for a class representative is roughly $15,000.[17] This incentive award is

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[13] The proper billing rate is the prevailing rate in the community where the class action is filed, here Beaver County, OK.

[14] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833-34 (2010) (mean is 1.65); Eisenberg & Miller, *supra* at 272 (mean is 1.81) (Table 14).

[15] Eisenberg & Miller, *supra* note [ ], at 274 (Table 15).

[16] *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.LA. L. REV. 1303, 1323 (2006) (Table 2).

[17] *Id.* at 1346 ("With respect to incentive-award levels, Wiliging et al. report median awards of $7500, $12,000, $7500, and $17,000 for four districts. The median total incentive award in our sample was $18,191, which is not strikingly different from Willging et al.'s findings.") (citing Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 101 (1996) (based on THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996)).

almost 25 times greater than the average.

Second, the incentive award is expressed as a percentage of the class's recovery. Percentage incentive awards are disfavored and may suggest a significant conflict of interest between the class representative and the class.[18]

Third, it would be important to depose the class representative and/or class counsel to ascertain any agreements made in connection with an incentive award promise. If there were, class counsel had an obligation to disclose these to the court at the time of certification and settlement.[19]

Numerous other problems with the Settlement Agreement exist, and underscore the importance of allowing Oklahoma citizens to have access to independent counsel from whom they can be remain informed and understand the potential downsides of remaining in the conditional Settlement Class.

7. McDonald's statements that the conditional Class Settlement represents a potential "pennies on the dollar" settlement claim are true.

a. **Plaintiff's own alleged damage model shows the settlement could present a "pennies on the dollar settlement" for many Class Members.**

Plaintiff makes McDonald's statements about the proposed settlement representing potentially "pennies on the dollar" the bedrock of its Motions for TRO. "Pennies on the dollar," is a common idiom, understood to mean that something is substantially "cheaper than it cost originally." Second, even if taken literally, the statement accurately captures the value of this settlement because even Plaintiff admits that after deducting "up to 40%" attorneys' fees and other expenses and an additional extraordinary "incentive award" to the class representative, the

[18] *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009) (disqualifying class representative under similar circumstances).

[19] *Id.*

settlement only yields about 35 cents on the dollar to the Settlement Class under Plaintiff's own math ($71 million on an alleged claim worth over $200 million, according to Plaintiff's expert). This is before considering the other royalty underpayment claims counsel failed to ever allege or pursue, discussed below. These different, unraised claims are not disclosed in the Class Notice--indeed, even Plaintiff's counsel's experts' $215 million valuation of the claims is not provided to the conditional Settlement Class members. And the actual percentage recovery of even Plaintiff's damages model is much lower for a huge number of the royalty owners with favorable leases, given their dilution due to the pro rata, equal treatment of all class members.

"Pennies on the dollar" correctly sums up a proper view of the settlement's shortcomings the Settlement Class should be allowed to consider.

b. A hedging claim alone—wholly ignored by conditional Settlement Class Counsel--increases the claims by $1/mcf or more.

i. Proper royalty underpayment claims should include Chesapeake using the wrong "effective" price.

For years Chesapeake has obtained a much higher price each month for its Oklahoma gas "production" than the price Chesapeake used to calculate its royalty payments. Chesapeake uses an artificial price to calculate royalties, called the Weighted Average Sales Price ("WASP").[20] This price undervalued and underpriced the gas sold by Chesapeake each month. There are several aspects to the claim that the lower "WASP" price used each month for calculating royalty was the wrong price, but a key one—ignored by Plaintiff's counsel here—is that Chesapeake locked in

[20] WASP takes some proceeds received by Chesapeake for gas, adds them together, and divides by volumes "sold" to arrive at a monthly per mcf sale price. See Exhibit K. *See* also Plaintiff's Brief in Support of Motion to Certify Class at p. 7-9 (confirming Oklahoma royalty payments are based on "WASP for each delivery point less" deductions attributable to seller).

higher prices for its gas "***production***" by trading in covered gas *futures* (mainly "derivatives" of same); it calls this activity "hedging" its gas "***production***."[21] *See* Exhibit G.

ii. Chesapeake uses hedging to lock in higher prices for its "production" of royalty owners' gas.

Simply stated, and stripped down to the essence of the "hedging" transactions, Chesapeake locked in higher prices (than WASP) for future months of gas "***production.***"[22] These were "covered" futures, in that Chesapeake was in no way "speculating" on future prices, since it had the gas being physically "***produced***" from Plaintiffs' and others' leases to deliver (to "cover" if it ever had to) at the future, locked-in prices. Essentially, Chesapeake was selling Plaintiffs' gas to be "***produced***" in the future for higher prices, and then paying Oklahoma royalty owner after those out-months based on significantly lower "prompt month," or shorter future, prices: WASP.[23]

Chesapeake describes the derivative instruments it uses for hedging on page 60 of its 2010 10-K. *See* Exhibit H. These instruments include swaps, call options, put options, knockout swaps, and basis protection swaps. *Id*. All are designed to allow Chesapeake to lock in higher "effective prices" for its production. *See* Exhibit I. Chesapeake is simply using puts and calls, through derivatives of same (collars, swaptions, etc.) to sell gas production on further forward ("future") sales contracts, almost always for more than WASP yields. Then-CEO Aubrey McClendon

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[21] "Commercials [***non***-speculators in the futures markets like Chesapeake] are those market participants who own or will own actual commodities [such as gas] and are motivated to use futures markets to reduce risk of price variation in those commodities. This is called hedging . . . Hedging in commodity futures markets is undertaken to reduce the risk of price fluctuations." Steven Errera & Stewart L. Brown, Fundamentals of Trading Energy Futures and Options 2–3 (2nd ed. 2002) (hereinafter "**Fundamentals**.").

[22] **Fundamentals**, *supra* note 3, at 3–6; ch.7. "Commodities futures contracts are traded for a variety of commodities . . . Yet, the most exciting development in recent years was the introduction of contracts on energy products such as…natural gas . . . Energy futures contracts are . . . changing *the way petroleum is priced worldwide*." **Fundamentals**, p. 2 (emphasis added).

[23] Chesapeake apparently paid royalty each month on a WASP price that was about a dollar an mcf, on average, less than the published prices.

summed this up in a 2011 CNBC interview: "So how I've described it is…is we only need 2 or 3 weeks of kind of good gas prices during the course of the year. We'll run out and hedge. *And by hedge, of course, I'm talking about the locking in of the future price of our future* ***production***." *See* Exhibit J (emphasis added). McClendon went on to explain: "We don't gamble. We don't bet. We're physically long gas. We sell it every day. We're going to get what the gas price is on that day ***or*** *we can lock our price in by entering into a financial transaction with a bank or an investment bank and lock in that price going forward*." *Id*. at 1:52-55 (emphasis added).

The Tenth Circuit Court of Appeals discussed how Chesapeake's hedging strategy was used to manage price volatility in the market for natural gas. That Court stated that Chesapeake's hedging strategy "enables a seller [like Chesapeake] to lock down how much it will earn *when it sells natural gas in the future* so that it does not have to worry about dramatic fluctuations in price." *United Food & Comm. Workers Union Local 880 Pension Fund v. Chesapeake En. Corp.*, 762 F.3d 1158, 1163 (10th Cir. 2014) (emphasis added). The Court explained that Chesapeake entered into contracts called "swaps" which represented bets that the price of natural gas would not exceed the fixed price. *Id*. Under these contracts, Chesapeake would receive from a third party the difference between the market price of that quantity of gas on the sale date and the cost of that quantity at the fixed price. *Id*. If the market price dropped below the fixed price, a third party would pay Chesapeake the difference between what it was paid on the market and what the market price would have been. *Id*. As such, Chesapeake's "hedging strategy allows [them] to predict with great certainty the ***effective natural gas and oil prices*** to be ***received*** from [their] hedged ***production***…" *Id*. at 1164 (emphasis added). This conclusion by the Tenth Circuit is fully supported by Chesapeake's own statements about the true "effective prices" it receives for gas sold (including the Settlement Class' gas).

iii. Chesapeake directly ties its hedging "Proceeds" to gas "production."

Chesapeake repeatedly admits under oath and to various federal agencies, that "***proceeds***" from that "***production***" include the proceeds from its hedging activities. For example, Chambers' states in a 2011 letter to the Federal Reserve, FDIC, and other agencies that "Chesapeake "utilize[s] over-the-counter ("OTC") derivative contracts to sell [their] ***future production*** at prices above the cost to produce [their] reserves. *See* Exhibit L; *see also See* Exhibit I (affirming that hedging gains and losses "takes the same volume, the same physical sales and then also adds the proceeds from hedging"); *Id*. p. 87:9–25 (affirming that Chesapeake utilizes hedging strategies to hedge the price of a portion of their future natural gas and oil production).

iv. Chesapeake's hedging resulted in much higher "effective prices" for Oklahoma royalty owners' gas.

a. Chesapeake's hedging results in higher "effective prices" than WASP yields.

Chesapeake also admits that it's hedging results in higher "effective prices" for its "gas ***production***." "We actively seek to manage our exposure to adverse market prices for natural gas and oil through our hedging program. Hedging allows us to predict with greater certainty the <u>***effective prices***</u> we ***will receive*** for our hedged ***natural gas*** and oil ***production***." *See* Exhibit H (emphasis added).[24] Later in the same filing Chesapeake states: "Hedging allows us to predict with greater certainty the <u>***effective prices***</u> we ***will receive*** for our ***natural gas*** *and oil* <u>**production**</u>." *Id* p. 46 (emphasis added). In other words, Chesapeake explicitly ties its hedging ***proceeds*** to its "***gas production***." *See also id*. p. 59.

[24] Chesapeake also touts that its hedging "gains" since 1999 up to the end of 2010 have been $6.478 *billion*. *See* Exhibit H. In 2013 it was stated that in the last 10 years Chesapeake had realized hedging gains/proceeds of $9.2 billion. See Exhibit D; *see also* See Exhibit E.

Any doubt about the "proceeds" that Chesapeake's received for the natural gas produced in 2010 is removed by a dispositive admission on page 49 of the 2010 10-K: "For 2010 we ***realized*** an average price per mcf of natural gas of $5.57, compared to $5.93 in 2009 and $8.09 in 2008…" *See* Exhibit H. Of course this "price" includes the proceeds from the hedging of gas ***produced*** in those years. The same page from the 2010 10K shows the dramatic effect of including all ***proceeds*** Chesapeake received for its gas production, by displaying the much lower average price excluding hedging ***proceeds***: $2.13 an mcf in 2010 and $2.11 in 2009, or differences of over $3.00 an mcf in 2010 and almost $4.00 an mcf in 2009. *Id.* p. 49–50.

Chesapeake does not do hedging that is "not covered." *See* Exhibit M. It "only hedges when it owns the minerals." *Id*. p. 31. Chesapeake's company hedging policy is "they ***only sell production*** ***that they own*** and they don't speculate" (emphasis added). *Id*. (quoting the question to which Chambers agreed, affirming that policy "continues to be [in place] today"). *Id*.

Mr. Chambers also testified under oath in 2009 to the Commodity Futures Trading Commission. There he again admitted that through hedging, Chesapeake had received in many cases double current market prices "for our production."

Q: Will you—will you read the—the part that you told the government—or the CFTC?

A: "Specifically to date, our portfolio of OTC derivatives has allowed us to receive in many cases double the current market price for ***production***—for ***our production***."

Q: Okay. Was that a true statement?

A: Yes.

See Exhibit M. Chambers also told the CFTC in his testimony: "In the second quarter, end of June 30, 2009, for example, we received $5.56 *per MCF of natural gas* ***sold*** of which $2.88 or *52% came from our hedging contracts*." *See* Exhibit F (emphasis added). Chambers then admitted that this was a true statement.

Q: So back to my question. When you say we received 5.56 per MCF of natural gas sold, in those—in that price were the hedging proceeds included?

A: They were.

Q: Okay. So you told the CFTC, that is what we got *when we sold the gas*, 5.56?

A: That's what we said to them.

Q: Okay. Is that a true statement?

A: It is.

See Exhibit M (emphasis added).

Chambers also admitted that hedging "***proceeds***" were included in Chesapeake's financial statements as "sales ***proceeds***." *Id.*

b. CHK's "Effective Price" is Much Higher than Actually Paid to Royalty Owners

For the past six years Chesapeake's hedging resulted in a much higher true, "**effective**" price each month, averaged over six years, of over $1.10 an mcf (or more) over the WASP prices Chesapeake used to calculate royalty, as set forth below:

Per CHK 10-K's and 10-Q's

	2014[25]	**2013**	**2012**	**2011**	**2010**	**2009**
Average Sales Price/mcf (*including* proceeds from hedging)	2.59	2.23	2.07	4.77	5.57	5.93
Average Sales Price/mcf (*excluding* proceeds from hedging)	2.86	2.22	1.77	3.12	3.43	3.16

[25] For the nine months ended September 30, 2014. *See* Exhibit N.

Average Gain/Loss from hedging[26]	**(0.27)**	**0.01**	**0.30**	**1.65**	**2.14**	**2.77**

c. Chesapeake repeatedly admits it hedges "sales" of actual physical "production."

Chesapeake describes the Master Hedging Facility (against which its production is pledged) in terms of ***production*** volumes ("12 counterparties have committed to provide approximately 5.6 tcfe of hedging capacity…"). *See* Exhibit H.[27] It admits in the next sentence it is "hedging our anticipated ***production***." *Id*. "The maximum [production] volume-based hedging capacity under the facility is governed by the ***expected production*** of the pledged reserve collateral." *Id*.

Chesapeake's hedging is completely driven by its "estimated future ***production*** levels." *Id*. p. 59 (emphasis added). These "are derived from extensive examination of existing ***producing*** reserve estimates and estimates of likely ***production*** (risked) from future drilling." *Id* (emphasis added). These estimates are updated "at least monthly and adjusted if necessary to actual results [i.e., actual ***production***] and activity levels." *Id*.

Chesapeake never hedges more than its future production and its hedges are tied inextricably to physical production. "We do not hedge more volumes than we expect to produce, and if production estimates are lowered for future periods" the hedges are unwound. *Id*. Of course the phrase "volumes" refers to volumes of "***production***."

Chesapeake's Elliott Chambers admitted in a different context that Chesapeake's hedging was even tied to "expected ***production***" from additional leases and wells that had been acquired

[26] "CHK Average Gain/Loss from hedging" = "Average Sales Price (*including* proceeds from hedging)" – "Average Sales Price (*excluding* proceeds from hedging)"

[27] "TCFE" means trillion cubic feet equivalent. Exhibit H.

("There's expected ***production*** with these wells that we want to take that [price] risk off of the table"). *See* Exhibit M. Chesapeake also touted that it had locked in higher "effective prices" for future production from this acquisition: "…[T]he company has hedged 100% of the projected 2007 and 2008 natural gas ***production*** *volumes* from the Four Sevens/Sinclair properties at an average NYMEX natural gas price of $10.50 per mmbtu…" *Id*. p. 149:5–13 (emphasis added).

Mr. Chambers' admissions aside from the *Malouf* case about Chesapeake's hedging included a letter he wrote to the Department of Treasury, FDIC and other government agencies in 2011. *See* Exhibit L. Written to oppose additional margin and capital requirements for derivatives trading by those actually producing commodities, like gas, Chambers' letter is candid about Chesapeake's ties of hedging to actual physical ***production***: "Because we are highly exposed to natural gas and oil prices that are often times volatile, we utilize over-the-counter ("OTC") derivative contracts ***to <u>sell</u> our future <u>production</u>*** at prices above the cost to produce our reserves…" *Id*. Chambers' 2011 Letter continues: "With respect to the latter [limitations related to the production volumes Chesapeake can hedge in any given period of time], we are strictly prohibited from hedging more than our **estimated <u>underlying *production*</u>** *for any given month*, meaning *we cannot and do not speculate." Id*.

Chesapeake then-CEO Aubrey McClendon also admitted that Chesapeake was hedging its "***production***." *See* Exhibit G.[28] Then-CEO McClendon elaborated in a 2011 CNBC interview:

"Q: …At $4 or $4.50, does natural gas become unprofitable for you?

A: Not for us because *we don't produce* any $4 and $4.50 gas. We're hedged. Last year, we were hedged at over $6 in MCF this year…almost $6…goal is always to *whatever the gas price is to try and be* ***producing*** *gas at $1 or $1.50 higher* as a result of our hedging programs…."

[28] McClendon has also stated that because of Chesapeake's extensive hedging strategy it *wants* lower prices, which explains why Chesapeake uses WASP to pay royalties. "So once we get hedged, we kind of want lower gas prices." See Exhibit J.

See Exhibit G (emphasis added). In that same interview then-CEO McClendon also summarized what Chesapeake was really doing: "All we've done [by hedging] is locked in the price ***that we're going to receive <u>for our gas production</u>.*** " *See* Exhibit G (emphasis added).

d. Other Chesapeake filings show it hedges actual production resulting in dramatically higher prices for the gas it produces and sells.

Chesapeake includes its proceeds from hedging in "sales" of natural gas in its SEC filings. *See* Ex. I; Exs. N-Q. When hedging proceeds are included, the "average sales price" for gas sold goes up appreciably in all years (with 2014 perhaps losing a few cents—that hasn't been reported yet). Id. For example, in 2011 Chesapeake took in $1.65 more per MCF of gas when including hedging proceeds, than when they are excluded. "We hedge substantial amounts of future production based on future prices." *See* Ex. I.

e. The Tenth Circuit supports McDonald's position on hedging.

As previously discussed, in *United Food v. Chesapeake Energy Corp.* the Tenth Circuit had reasons to consider Chesapeake's hedging activities, not those of a different operator or producer. Though the context was a claim for securities fraud based on how Chesapeake publicly reported its hedging activity, in deciding the claim the Court extensively analyzed what Chesapeake was doing with its hedging transactions.[29] *United Food*, 762 F.3d at 1163–68. The Tenth Circuit confirmed that Chesapeake uses hedging to "lock down how much it will earn when it sells gas in the future," and that hedging results are part of the "effective natural gas prices" Chesapeake receives. *Id*. at 1163–64.

f. Chesapeake admits that although it uses hedging of the Class's "production" to obtain "effective" gas price

[29] The claim revolved around Chesapeake's use of and exposure to "knockout swaps." Chesapeake has since largely discontinued the use of knockout swaps, and the outcome of that decision in no way affects the analysis here.

higher than WASP, it fails to include those "proceeds" in royalty calculations.

Chesapeake admits that although it obtains "effective" gas prices which are higher than WASP, it does not include those extra proceeds in royalty calculations. See Exhibit I. Moreover, since Chesapeake has been hedging production, there has not been one year in which Chesapeake did not receive a higher effective price for the gas than the WASP price, except perhaps 2014—that report has not been made public. *Id*.; see also Chart, infra, p. 6. However, Chesapeake elsewhere admits that if Chesapeake is receiving extra proceeds, the royalty owner should also share in those extra proceeds according to the terms of the lease. See Exhibit M. Chesapeake refuses to pay the royalty owners on these "proceeds."

Plaintiff's counsel here has overlooked or ignored this incredibly valuable claim against Chesapeake, worth over a billion dollars ($1,000,000,000). McDonald disclosed this claim in the Royalty Owner Meeting transcript, further supporting his "pennies on the dollar" statements. *See* Purported Transcript of Royalty Owner Meeting, attached as Ex. D. to Plaintiff's Second Motion for TRO at pp. 32-33.

B. Enjoining McDonald without proper Joinder is impermissible.

1. The Court lacks a jurisdictional basis to enjoin non-party McDonald.

Plaintiff fails to identify a proper basis for the Court's jurisdiction over McDonald, in either their Motion for Temporary Restraining Order or in their more recent Settlement Class's Motion for Order to Restrain Mass Communication with Settlement Class Members and, in the Alternative for, Temporary Injunction.

In their petition, Plaintiff has asserted jurisdiction over only Chesapeake Operating, Inc. *See* Class Action Pet. (Nov. 29, 2010). Plaintiff has not set forth a jurisdictional basis for the Court's authority over McDonald or its attorneys. *See Ford v. Ford,* 766 P.2d 950, 954 (Okla.

1988) ("A fundamental concept in our system of jurisprudence is that a court must have jurisdiction to render an effective order.").

In addition, Plaintiff has not sought to join McDonald under the joinder rules. *See* OKLA. STAT. tit. 12 ch. 39, §§ 2018-21. McDonald has a sufficiently substantial interest in the dispute at issue to prompt necessary joinder. Plaintiff seeks restraint of the firm's legal practice and seek findings and an order from this Court that would impair the firm's interests by negatively impacting its reputation as well as its ability to represent and communicate with clients and potential clients. *See id.* § 2019(A)[30]; *see also, e.g., Liberty Bank & Trust Co. of Okla. City, N.A. v. Perimeter Ctr. Ltd. P'ship*, 958 P.2d 814, 817 (Okla. Civ. App. 1998) (holding that city was an indispensable party because action intertwined with city's review of a development and its ability to enforce an action of the Board of Adjustment). In addition, the relief sought represents a substantial risk of inconsistent obligations for the firm under the Oklahoma Rules of Professional Conduct. In short, McDonald is an indispensable party and needed for just adjudication of this dispute. Plaintiff's failure to join it as an indispensable party under the necessary joinder rule, § 2019(A), precludes the requested relief.

2. The Court's authority to supervise a class after its certification under § 2023(D) does not authorize injunctive relief against McDonald.

[30] Section 2019(A) provides as follows:

> A person who is subject to service of process shall be joined as a party in the action if:
>
> 1. In his absence complete relief cannot be accorded among those already parties; or
>
> 2. He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> a. as a practical matter, impair or impede his ability to protect that interest, or
>
> b. leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

OKLA. STAT. tit. 12, § 2019.

Plaintiff invokes § 2023(D) as the basis for the Court's authority for the requested relief, and the Court did as well in its temporary restraining order. Order at 2; Mot. for Order to Restrain at 8-11. The controlling plain text of this provision for supervisory authority, however, limits the scope of that authority to certain, limited circumstances concerning notice to class members.[31] As this Court is aware, it must respect the plain meaning of a statutory provision and give it the effect dictated by its language. *See, e.g., Yocum v. Greenbriar Nursing Home*, 130 P.3d 213, 219 (Okla. 2005).

Plaintiff specifically relies on § 2023(D)(2) and § 2023(D)(7) as justification for their request to restrain McDonald. Mot. for Order to Restrain at 8 & n.3. A review of the plain text of these provisions demonstrates that the provisions do not provide the expansive basis of authority presumed by Plaintiff. First, as made clear in by its text, § 2023(D)(2) is limited to permitting courts to order the provision of notice to class members in certain circumstances. The provision authorizes appropriate orders requiring notice of certain categories of information to members of a class in order to protect them or for the fair conduct of the case:

> D. ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this section applies, the court may make appropriate orders:
>
> …
>
> 2. *Requiring*, for the protection of the members of the class or otherwise for the fair conduct of the action, that *notice be given* in such manner as the court may direct to some or all of the members of *any step in the action*, or of *the proposed extent of the judgment*, or of *the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action*;

[31] The Court has concluded that its supervisory authority under § 2023(D) exists only once a class is certified. Order at 2-3. As a result, for purposes of this argument only, the Respondent assumes that the proposed settlement class in this action was certified by the order of January 6, 2015 order. Even assuming that the settlement class was properly certified, as explained, § 2023(D) does not provide the expansive supervisory authority asserted by the Court. In addition, it should be noted that because the settlement class was only preliminarily approved, as indicated in the title of the order of January 6, 2015, the Court lacks any identified separate basis for its authority.

OKLA. STAT. tit. 12, § 2023(D)(2) (emphasis added). The authorization of notice for a set of circumstances (any step in the action, the proposed extent of the judgment, and the opportunity for class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action) in no way also authorizes action by courts to enjoin or otherwise restrain or compel nonparties to an action. The Court can find no basis in § 2023(D)(2) for authority to issue the relief requested by Plaintiff.

Plaintiff also relies on § 2023(D)(7) as a justification for the requested relief. Mot. for Order to Restrain at 8, n.3. That subsection, however, permits courts only to issue appropriate orders "[d]ealing with similar procedural matters" as the types of matters listed in the prior subsections. Thus, that subsection limits the court's authority to similar procedural matters, which include: avoidance of repetition or complication at hearings and trial, notice requirements, certain statutory limits on class membership related to residency, requiring the parties to provide contact information for class members, imposing conditions of the representative parties or intervenors, and amendments to pleadings to eliminate allegations rehearing the representation of absent persons. The restraint of nonparty McDonald as sought by Plaintiff's motion is not simply a "*procedural*" matter, as required for authority under § 2023(D)(7). Nor is there any valid basis to characterize the relief sought by order from this Court as any type of "*similar*" procedural matter to those procedural matters listed in § 2023(D)(1)-(6), which serve as the defining measuring stick for authority under § 2023(D)(7).

The court decisions cited by Plaintiff fail to alter the plain understanding of the § 2023(D). In fact, they are inapposite because they concern managing the conduct of parties to a case or counsel for such parties, not the conduct of nonparties. *See* Mot. for Order to Restrain at 9-11. Moreover, Plaintiff offers no authority for their particular brand of requested relief and instead omit the far-different remedies identified by the Manual for Complex Litigation for improper communications to class members about opting out: "If improper communications occur, curative action might be necessary, such as extending deadlines for opting out . . . or voiding improperly solicited opt outs and providing a new opportunity to opt out." MANUAL FOR COMPLEX LITIGATION § 21.33 (4th ed.).

Because Plaintiff relies on § 2023(D) as their sole justification for the Court's exercise of authority for their requested relief, their request lacks a permissible basis and must be rejected.

3. Purported violations of the Oklahoma Rules of Professional Conduct do not support the requested relief.

Plaintiff bases its request for injunctive relief against McDonald almost exclusively on alleged violations of various provisions of the Oklahoma Rules of Professional Conduct. The proper authority to consider and determine any such violations, however, is not this Court, but the entities designated by the rules. The rules themselves provide that violations are regulated through disciplinary agencies and are not intended to be used by opposing parties as "procedural weapons."

> Violation of a Rule should not give rise to a cause of action nor should it create presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

OKLA. R. PROF'L CONDUCT, Scope ¶ 20, OKLA. STAT. tit. 5, ch. 1, app. 3-A[32]; *see also Okla. Turnpike Auth. v. Horn*, 861 P.2d 304, 307-08 (Okla. 1993) (quoting same and disallowing

[32] The ABA's Model Rules of Professional Conduct include the same recognition. *See* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

violation of a rule to form the basis of a defense to responsibility for attorney's fees).[33] This Court is not the proper authority to adjudicate any possible violation of the rules, nor is it the proper authority to impose any consequence of a possible violation. Instead, the regulatory scheme and appropriate authoritative bodies are established in the Rules Governing Disciplinary Proceedings. *See* OKLA. STAT. tit. 5, ch. 1, app. 1-A; *see also id.* Scope ¶¶ 16, 19, app. 3-A (noting that compliance achieved when necessary through disciplinary proceedings and a failure to comply with a rule is a basis for invoking disciplinary process); *see also, e.g.*, *id.*, R. 4 (establishing Professional Responsibility Tribunal), R. 5 (procedures for grievances and requests for investigation), R. 6 (formal proceedings before Supreme Court and Professional Responsibility Tribunal).

Plaintiff conspicuously fails to cite a single case or authority that supports the use of the disciplinary rules in the manner they urge. Nor were we able to find such an example. The Court cannot base the contemplated injunctive relief on alleged violations of these rules.

C. The injunction should be denied and the TRO should be dissolved.

Plaintiff has not and cannot meet its burden to secure a temporary injunction. First and foremost, courts have refused to allow parties to "do indirectly through the injunction request, what would be impermissible if sought within the confines of the class action procedure." *See House of Sight & Sound v. Faulkner*, 912 P.2d 357, 362 (Okla. App. 1995) (citing *Gulf Oil*)).

The Court must consider four factors in determining whether to issue a temporary injunction: (1) the applicant's likelihood of success on the merits; (2) irreparable harm to the party seeking relief if injunctive relief is denied; (3) the relative effect on the other interested parties;

[33] *See also, e.g.*, *Trinity Mortgage Cos., Inc. v. Dryer*, No. 11-5007, 451 Fed. App'x 776, 780 (10th Cir. Dec. 19, 2011) (affirming the rejection of a breach-of-contract claim premised on alleged violations of the Oklahoma Rules of Professional Conduct because violation of a professional rule of responsibility could not support a claim).

and (4) public policy concerns arising out of the issuance of injunctive relief. *Coxcom, Inc. v. Okla. Secondary Schools Athletic Ass'n*, 143 P.3d 525, 528 (Okla. 2006). If a party fails to meet *any* of these four requirements by clear and convincing evidence, the court cannot grant the temporary restraining order or preliminary injunction. *Id.*

An injunction has been recognized as an "extraordinary remedy" which "is not to be lightly granted." *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 745 (Okla. 1980). Because it is an extraordinary remedy, "the power to issue injunctions should be exercised 'sparingly and cautiously, and only in cases reasonably free from doubt.'" *Loewen Grp. Acquisition Corp. v. Matthews*, 12 P.3d 977, 980 (Okla. App. 2000) (internal citation omitted). Plaintiff fails to meet their burden for the "extraordinary" remedy of injunctive relief.

1. Plaintiff will not likely succeed on the merits.

As discussed in more detail above, McDonald in no way violated any Oklahoma Rules of Professional Conduct or class action authority governing third party contact with members of a preliminary, conditional settlement class. Class counsel does not have an attorney-client relationship with putative members of a preliminarily-certified class until the settlement is approved and the opt-out deadline has passed. *See id.* (and authorities cited therein).

2. Plaintiff has failed to show irreparable harm.

Plaintiff has failed to show irreparable harm. Mere fear or apprehension of injury is not sufficient for granting a temporary injunction. *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1277 (Okla. 1991). Plaintiff states a concern that the putative class members will "hear only the McDonald Law Firm's view of the proposed Settlement *before receiving Notice of the Settlement and related documents on the website*." Second Motion, p. 16 (emphasis added). Implicit in the stated concern is the notion that the class members will hear the "other side of the story" regarding the potential benefits to settlement upon receipt of the Notice of Settlement, thereby remedying any alleged harm. Courts are clear: "The injunction avenue of redress is misused if there is no real emergency, no irreparable harm or there is truly an adequate remedy at law." *First Am. Bank & Trust v. Sawyer*, 865 P.2d 347, 352-53 (Okla. App. 1993).

3. The requested injunctive relief would directly and negatively impact the absent conditional Settlement Class members.

Enjoining McDonald from communicating with absent class members will prevent potential class members from making an informed decision regarding participation in the proposed class settlement. At least one court has acknowledged the potential harm to putative class members that can accompany an order enjoining communications by counsel. *See House of Sight*, 912 P.2d 357, 361-62 (Okla. App. 1995) (refusing to issue injunction prohibiting counsel from publishing advertisements seeking additional claimants for potential class action).

4. Public Policy strongly favors denying the requested relief.

The First Amendment right to free speech has been recognized as a "public policy concern by virtue of the Constitution of the State of Oklahoma." *First Am. Bank & Trust v. Sawyer*, 865 P.2d at 352-53 (reversing the order of temporary injunction and noting that while an "injunction is a discretionary action," the "freedom of speech is a constitutional guarantee"). In *House of Sight & Sound v. Faulkner*, the applicant sought injunctive relief to prohibit the respondent's advertisement of a lawsuit as a class action before the class obtained final certification. *House of Sight*, 912 P.2d 357, 359-60 (Okla. App. 1995). The court affirmed the trial court's denial of a temporary injunction, concluding that such restraint of commercial speech, "would violate Appellees' constitutional rights." *Id.* at 363. The court also noted the Appellants were improperly "attempt[ing] to do indirectly through the injunction request, what would be impermissible if sought within the confines of the class action procedure." *Id.* at 362.

The Court should not entertain the Plaintiff's attempt to circumvent the class action procedure and seek injunctive relief. Even should the Court consider this relief, however, Plaintiff wholly failed to meet the requirements necessary for injunctive relief. Plaintiff request for injunctive relief should be denied.

5. Movant failed to post adequate bond (or any bond) as required by Oklahoma Rules of Civil Procedure and Beavery County Local Rules.

Movant's request for a temporary injunction must also be denied for the independent reason that Movant failed to post a bond pursuant to Oklahoma Rule of Civil Procedure §12-1392, which states:

> [N]o injunction shall operate until the party obtaining the same shall give an undertaking, with sufficient surety, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party injured the damages he may sustain, including reasonable attorney's fees, if it be finally decided that the injunction ought not to have been granted.

Local Rule 22 also requires a bond, unless there is an affirmative showing that only a preservation of the "status quo" is desired and there is no likelihood of damage to the party restrained. Movants made no such showing and have not properly posted a bond. A temporary injunction issued without a bond is of no legal force or effect. *Neil v. Penn. Life Ins. Co.*, 474 P.2d 961, 965 (Okla. 1970).

IV.
CONCLUSION

In conclusion, the Movant's requested relief will deprive potential Settlement Class members of their right to be fully informed about the pros and cons of the preliminary class settlement and triggers important First Amendment and Due Process implications for both

McDonald and the potential Settlement Class members. McDonald's statements to his clients and to potential Settlement Class members are true, and the numerous badges of a collusive settlement that exist in this case warrant close inspection by potential Settlement Class members and this Court.

V.
REQUEST FOR RELIEF

WHEREFORE, McDonald respectfully requests that the Court:

1) Enter an Order revoking the Temporary Restraining Order entered on February 13, 2015, and denying all other relief requested by Plaintiff;

2) Remedy the Notice to address the numerous deficiencies raised herein, and extend the objection and opt-out deadlines to no earlier than July, 2015;

3) Rescind preliminary approval of the Settlement and any conditional class certification; and

4) Grant such other and further relief to which it may be entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served on this the 20th day of February, 2015 as follows:

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