IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONNIE JEAN SMITH, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 4:14-cv-435-BRW
SEECO, INC., n/k/a SWN PRODUCTION (ARKANSAS), INC.; DESOTO GATHERING COMPANY, L.L.C.; SOUTHWESTERN ENERGY SERVICES COMPANY; and SOUTHWESTERN ENERGY COMPANY,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S SECOND MOTION TO DISMISS
OR, IN THE ALTERNATIVE, ABSTAIN FROM DECIDING
THE COUNTERCLAIM FILED BY
DEFENDANT SWN PRODUCTION (ARKANSAS), LLC (f/k/a SEECO, INC.)

Plaintiff and Counterclaim Defendant Connie Jean Smith ("Plaintiff") respectfully submits this memorandum of law in support of her Second Motion to Dismiss or, in the alternative, abstain from Deciding the Counterclaim filed by Defendant SWN Production (Arkansas), LLC, f/k/a SEECO, Inc. ("SEECO" or "Defendant"). *See* ECF No. 72, at 1, 10-23.

I. INTRODUCTION

"Counterclaims against absent class members are generally anathema to class suits, and courts rarely entertain them directly; this is so because absent class members do not play an active role in the litigation and are not treated as an 'opposing party' against whom counterclaims may be lodged and because class action courts do not necessarily have personal jurisdiction over absent class members." NEWBERG ON CLASS ACTIONS § 9:29 (5th ed.) ("NEWBERG"); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (noting

absent class members "are almost never subject to counterclaims or cross-claims, or liability for fees or costs"). "[F]ederal courts have generally not been welcoming of counterclaims in class suits. Most courts have ruled that counterclaims against absent class members – even those arising out of the same transaction and occurrence – are not authorized by Rule 13 because absent class members are not an 'opposing party' as that term is used in that Rule." NEWBERG § 9:24 (citing, *inter alia, Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 546 n.5 (W.D. Mo. 2002), *aff'd*, 339 F.3d 1001 (8th Cir. 2003) ("Rule 13 has no application in the class action context because unnamed class members are not considered 'opposing parties' under that rule . . . .")).

SEECO's Counterclaim (*see* ECF No. 72) and Motion for Class Certification of a Counter-Defendant Class and Appointment of a Class Representative and Class Counsel (*see* ECF No. 116) ("SEECO's Class Motion") have nothing to do with SEECO's ability to "defend itself." Rather than a "defense," the *mandatory* class requested in SEECO's Counterclaim and Class Motion is a thinly masked effort at forum shopping – *i.e.*, an effort to bring the *Snow* and *Stewmon* cases previously remanded to state court back within the Court's jurisdiction. Defendant's declaratory judgment action – which purports to "raise" questions that would be resolved through resolution of Plaintiff's claims, along with the affirmative defenses asserted by Defendants – not only fails to serve any legitimate or useful purpose,[1] granting Defendant's Class Motion would clearly violate the Anti-Injunction Act. This is because Defendant's Counterclaim and Class Motion request certification of a *mandatory* class of royalty owners

[1] Defendant's mandatory class in its Counterclaim would also create – not cure – piecemeal litigation. Under Defendant's Counterclaim, members of its proposed broader, mandatory class would have their rights declared under their leases without any opportunity to recover damages flowing from Defendant's breach of those rights in this action. Rather, members of Defendant's would-be mandatory class would then have to file thousands of individual suits (or additional class actions) to secure the damages to which they are entitled.

under Rule 23(b)(1)(A) and (b)(2). Unlike Plaintiff's Rule 23(b)(3) class, if the Court certifies the *mandatory* class requested by Defendant, such a certification ruling would preclude that class's members (who would in include the state court plaintiffs) from opting-out of the litigation and/or pursuing actions in other courts relating to the issues certified. Under the Eighth Circuit's opinion in *In re Federal Skywalk*, 680 F.2d 1175 (8th Cir. 1982), which is directly on point and controlling, it is this preclusive nature of the *mandatory* class in Defendant's Counterclaim and Class Motion that runs afoul of the Anti-Injunction Act. Accordingly, Defendant's Counterclaim should be dismissed.

II. ARGUMENT

A. Defendant's Counterclaim Runs Afoul of the Anti-Injunction Act and Must Be Dismissed.

The Anti–Injunction Act, first enacted in 1793, provides that

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

> The statute, we have recognized, "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). And the Act's core message is one of respect for state courts. The Act broadly commands that those tribunals "shall remain free from interference by federal courts." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 282, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). That edict is subject to only "three specifically defined exceptions." *Id.*, at 286, 90 S.Ct. 1739. And those exceptions, though designed for important purposes, "are narrow and are 'not [to] be enlarged by loose statutory construction.' " *Chick Kam Choo*, 486 U.S., at 146, 108 S.Ct. 1684 (quoting *Atlantic Coast Line*, 398 U.S., at 287, 90 S.Ct. 1739; alteration in original). Indeed, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Id.*, at 297, 90 S.Ct. 1739.

Smith v. Bayer Corp., 131 S. Ct. 2368, 2375, 180 L. Ed. 2d 341 (2011).

If this Court were to certify the mandatory class requested in the Counterclaim and in Defendant's Class Motion, that act by itself would run afoul of the Anti-Injunction Act. Where the effect of a certification order would be to enjoin the state plaintiffs from pursuing their pending state court actions, an inquiry into the propriety of such an order under the Anti-Injunction Act is necessary. *See In re Federal Skywalk,* 680 F.2d 1175, 1180-81 (8th Cir. 1982), *cert. denied sub nom.*[2]

Unlike Plaintiff's Motion for Class Certification, which requests that the Court certify a class pursuant to Rule 23(b)(3), Defendant's Counterclaim and Class Motion request that the Court, pursuant to Rule 23(b)(1)(A) and Rule 23(b)(2), certify for declaratory relief Defendant's proposed broader, mandatory class that would engulf the state court plaintiffs, including the members in *Snow* and *Stewmon*.[3] This is a significant distinction because "[c]lass members in a 23(b)(3) class are free to 'opt out' while, under the majority rule, class members in a 23(b)(1)(A) or 23(b)(1)(B) class cannot 'opt out.'" *In re Federal Skywalk Cases*, 680 F.2d at 1178 n.7 (emphasis added). According to the Eighth Circuit, parties to a mandatory class, like the Rule 23(b)(1)(A) class proposed by Defendant, also "are not free to initiate actions in other courts to litigate class certified issues." *Id.* at 1180.

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[2] *See also Samuels v. Mackell*, 401 U.S. 66, 72-73, 91 S. Ct. 764, 768, 27 L. Ed. 2d 688 (1971) ("[E]ven if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."); *Id.* at 73 ("where an injunction would be impermissible . . . , declaratory relief should ordinarily be denied as well."); *Denny's, Inc. v. Cake,* 364 F.3d 521, 528 (4th Cir.2004) (holding that where the Anti–Injunction Act bars an injunction it "also bars the issuance of a declaratory judgment that would have the same effect as an injunction."); *Insurance Co. of the State of Pennsylvania v. Sabre, Inc.*, 918 F.Supp.2d 596, 599 (N.D. Tex. 2013) (citations and quotations omitted) ("The Fifth Circuit follows the weight of authority in holding that if an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction.").

[3] *See* ECF No. 72, 116 & 117.

In *In re Federal Skywalk Cases*, the Eighth Circuit dealt with the Anti-Injunction Act in connection with numerous individual lawsuits that were filed in state and federal court after two skywalks of a hotel in Kansas City collapsed killing 114 persons and injuring hundreds of others. *Id.* at 1177. The state court cases were consolidated in state court and the federal cases were consolidated in federal court. *Id.* One of the federal court plaintiffs moved for certification and, over the objection of several federal and state court plaintiffs, the district court certified a class under Rule 23(b)(1)(A) and 23(b)(1)(B) reasoning, in part, that individual suits would create a risk of inconsistent results and that wasteful, repetitive litigation could be avoided by trying the issues only once. *Id.* at 1179. Like here, the state court actions in *In re Federal Skywalk Cases* were commenced before the motion for class certification was filed in federal court. *Id.* at 1180.

Noting that parties to a mandatory class, like the Rule 23(b)(1)(A) class proposed by Defendant here, generally cannot opt-out and are "not free to initiate actions in other courts to litigate class certified issues," the Eighth Circuit found that the substantial effect of the federal court's Rule 23(b)(1)(A) and (b)(1)(B) certification order was to enjoin the state plaintiffs from pursuing their pending state court actions, which necessitated an inquiry as to the propriety of that order under the Anti-Injunction Act. *Id.* at 1180-81.

Analyzing the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act, the Eighth Circuit noted that "[t]he Supreme Court has narrowly interpreted the 'necessary in aid of jurisdiction' exception, and a pending state suit must truly interfere with the federal court's jurisdiction." *Id.* at 1182-83. In light of the traditional notion that in personam actions in federal and state court may proceed concurrently without interference from either court and because parallel in personam actions have never been viewed as interfering with the jurisdiction of either court, the Eighth Circuit was "compelled to hold that despite [the federal court's] legitimate

concern for the efficient management of mass tort litigation, the class certification order must be vacated." *Id.* at 1183.

The Eighth Circuit's opinion in *In re Federal Skywalk* is directly on point and controlling. The Eighth Circuit held that certifying a Rule 23(b)(1)(A) *mandatory* class effectively constituted an injunction of contemporaneous state court litigation in violation of the Anti-Injunction Act. *See Skywalk*, 680 F.2d at 1180 ("the substantial effect of the order … enjoined the state plaintiffs from pursuing their pending state court actions…."). The *mandatory* relief Defendant seeks here has the same effect and, accordingly, similarly violates the Anti-Injunction Act.[4]

Because the Court is prohibited from granting the relief requested by Defendant under the Anti-Injunction Act, the Counterclaim must be dismissed for failure to state a claim upon which relief can be granted. *See id.*; *Denny's, Inc. v. Cake*, 364 F.3d 521, 531 (4th Cir. 2004) ("Because the [Anti-Injunction] Act rendered the district court powerless to issue any of the [declaratory and injunctive] relief Denny's requested, its complaint should have been dismissed for failure to state a claim upon which relief can be granted.").[5]

[4] Defendant tries to distinguish *Skywalk* by pointing out that the district court in *Skywalk* not only certified a Rule 23(b)(1)(A) class but also ordered all class members to not settle their punitive damages claims in state court. However, nothing in the *Skywalk* decision suggests that the Court's decision turned on this distinction. Defendant previously cited *In re Exxon Valdez*, 1994 WL 266519 (9th Cir. 1994), for support. But, *Exxon Valdez* involved Rule 23(b)(1)(B) class, which is not at issue in this litigation, and that decade-old, unpublished decision does not appear to have been cited by a single court – ever. Thus, *Exxon Valdez* provides no support to Defendant's argument. Defendant has provided no authority supporting its bald contention that certifying a mandatory class would not have the effect of staying or enjoining state plaintiffs from pursuing their pending state court actions.

[5] No exception to the Anti-Injunction Act would permit certification of Defendant's proposed mandatory class.

B. Even if the Anti-Injunction Act did not somehow end the matter, Dismissing or, in the alternative, Abstaining from Deciding Defendant's Counterclaim would be a sound exercise of this Court's discretion.

When a party seeks declaratory relief (as here) under the Declaratory Judgment Act, 28 U.S.C. § 2201, the court "is authorized, in the sound exercise of its discretion, to stay or to dismiss" the action. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995); *see also Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 792 (8th Cir. 2008) ("Federal courts have more discretion to abstain in an action when a party seeks relief under the Declaratory Judgment Act.").[6] Because the federal and state cases are "parallel,"[7] this Court enjoys "broad discretion" to stay or dismiss

[6] "This broader discretion arises out of the Declaratory Judgment Act's language that a court '*may* declare the rights and other legal relations of any interested party seeking such declaration.'" *Royal Indem.*, 511 F.3d at 792 (quoting 28 U.S.C. § 2201(a)) (emphasis added).

[7] Cases are "parallel" if "substantially the same parties litigate substantially the same issues in different forums." *See Lexington Ins. Co. v. Integrity Land Title Co.*, 721 F.3d 958, 968 (8th Cir. 2013). Defendant previously argued that the federal and state cases are not parallel, and therefore the Court should apply the "more stringent analysis from *Colorado River Water Conservation District v. United States*, rather than the highly discretionary abstention standard" that applies when federal and state cases are parallel. *See* ECF No. 86 at 7-8. This position, however, stands in stark contrast to the positions it has previously taken in front of this Court, *Snow* and *Stewmon* about how these cases are parallel. *See* ECF No. 21-2 at 8 ("plaintiffs bring sister class actions based on the same fact allegations and legal claims against SEECO."); ECF No. 56 at 5 (characterizing the cases as "royalty owner copycat class actions"); Ex. 1, Transcript of Motions Hearing, at 4:14-15 ("There are no logical or fact-driven distinctions among the three putative class actions."); ECF No. 21-1 at 1 ("These cases involve overlapping claims regarding the same oil and gas leases within Arkansas."); ECF No. 21-2 at 2 ("There is no dispute that the two cases [*Snow* and *Smith*] cover much of the same ground. The suits involve similar legal claims and allege many of the same causes of action."); *Id.* at 4 ("the two cases present overlapping factual allegations and claims"); *Id.* at 1 ("the plaintiffs' claims are virtually identical . . . ."); *Id.* at 7 ("the claims arise from the same alleged actions of the defendants."); Ex. 2, SEECO Motion to Dismiss *Stewmon*, at 1-4 (contending that *Snow* and *Stewmon* involve the "same parties," "same issues," "identical royalty provisions," "Stewmon is a putative class member in the *Snow* case," and "Snow is a putative member class member in [*Stewmon*]."); ECF No. 72, at 16-17 ("There is . . . no distinction in the actual controversies . . . depending on whether they are, or are not, citizens of the State of Arkansas."); *Id.* at 19 ("There are no meaningful distinctions with respect to common questions . . . between [SEECO's] Fayetteville Shale royalty owners who are not citizens of the State of Arkansas, *vis-à-vis* those who are Arkansas citizens."); Ex. 1, Transcript of Motions Hearing, at 6:23-24 ("The questions are fairly similar around the three cases."); *Id.* at 20:22-23 ("I think the same evidence and all that sort of

the declaratory relief claim, and is to be "guided by considerations of judicial economy," "practicality," and "wise judicial administration," and should seek to avoid "[g]ratuitous interference with state proceedings." *See Lexington Ins. Co.*, 721 F.3d at 967-68 (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942) and *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)). Abstaining from deciding Defendant's Counterclaim would be a sound exercise of the broad discretion this Court enjoys when a party seeks relief under the Declaratory Judgment Act in a federal case that is parallel to a state case. *See id.*

Defendant's declaratory judgment action clearly merits "a closer look" to ensure that Defendant is not motivated by forum-shopping concerns. *See Clay Regional Water v. City of Spirit Lake, Iowa*, 193 F.Supp.2d 1129, 1151 (N.D. Iowa 2002) (citing *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993)); *BASF Corp. v. Symington*, 50 F.3d 555, 558 (8th Cir. 1995); *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996) ("Forum-shopping can in some cases justify abstention."). This "closer look" is "guided by principles of comity and federalism, because it assures that the federal declaratory action was not filed in an attempt to oust the state court of the opportunity to hear a case that would otherwise be properly before it." *Clay Regional Water*, 193 F.Supp.2d at 1151. *See also International Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995) ("This sequence of events alerts us to be on guard for ties between the state and federal actions, because the Declaratory Judgment Act is not to be used either for tactical advantage by litigants or to open a new portal of entry to federal court for suits that are essentially defensive or reactive to state actions.").

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thing would apply"). Even if the *Colorado River* standard applies, factors 3, 4 and 5 clearly support abstention.

This Court remanded both *Stewmon* and *Snow* back to state court. In *Stewmon*, this Court stated:

> The Eighth Circuit has held that CAFA did not alter the long-standing edict that the plaintiff is the master of the complaint, and is free to craft its allegations so as to avoid federal jurisdiction. Although the Eighth Circuit has not addressed this particular issue, at least two circuit courts have held that a plaintiff is free to avoid federal jurisdiction by limiting the putative class to only citizens of a particular state. I see no basis to broaden the scope of Plaintiff's putative class unless Plaintiff's allegations fun afoul of Rule 19. After reviewing the Complaint, I am satisfied that complete relief can be afford in the absence of the non-Arkansas lessees and, therefore, they are not necessary or indispensable parties to this action as defined by Rule 19.

Ex. 3, *Stewmon v. SEECO, Inc. et al.*, E.D. Ark. Case 2:13-cv-00147-BRW, Order, ECF No. 32, at 3.

When remanding *Snow*, this Court concluded:

> For the same reasons set out in *Stewmon v. SEECO, Inc.*, the Motion [to Remand] is GRANTED. The two new issues raised by SEECO make no difference to the outcome. First, SEECO's issue with Plaintiff's class definition can be resolved by the state court. Second, it is undisputed that when this case was filed on May 7, 2010 SEECO was a citizen of Arkansas.
>
> Accordingly, the Clerk of the Court is directed to REMAND this case to the Circuit Court of Conway County, Arkansas. Defendant's Motion to Consolidate (Doc. No. 36) and Plaintiff's Motion to Stay (Doc. No. 40) are DENIED as MOOT.

Ex. 4, *Snow v. SEECO, Inc.*, E.D. of Ark Case 4:14-cv-00304-BRW, Order, ECF No. 47, at 1.

This Court found that *Stewmon* and *Snow* were "free to avoid federal jurisdiction by limiting the putative class to only citizens of a particular state" and saw "no basis to broaden the scope" of those classes. *See Stewmon v. SEECO, Inc. et al.*, E.D. Ark. Case 2:13-cv-00147-BRW, ECF No. 32, at 3. Now, after five years of litigation in the state courts and both cases have been certified, Defendant in its Counterclaim wants to drag *Snow* and *Stewmon* back to federal court and "bind all the royalty owners" "before either of the state cases . . . come back to life since they're now both stayed . . . while they're in the Arkansas Supreme Court." Ex. 4, Motions

Hearing Transcript, at 7:22-25; 9:2-5. It is no secret that Defendant "prefer[s] this Court,"[8] but Defendant's attempt to oust the state courts of the opportunity to hear cases that this Court previously ruled properly belong in state court, cannot be condoned. *See International Ass'n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995) ("It was only after it had been sued in state court and its removal petition had been denied . . . that [defendant] filed this declaratory action. . . . There is no need to allow state court defendants . . . to circumvent the removal statute[] . . . by using the Declaratory Judgment Act as a convenient and temporarily unlimited back door into federal court.").

Defendant does not need a mandatory class to "defend itself." A *mandatory* class is no defense at all.[9] If a *mandatory* class was a defense, Defendant would have raised it years ago in the state court litigation or at the outset of this litigation. Rather than a "defense," the *mandatory* class in the Counterclaim is a thinly masked effort at forum shopping – *i.e.*, an effort to bring the *Snow* and *Stewmon* cases previously remanded to state court back within the Court's jurisdiction. *See International Ass'n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995) ("It was only after it had been sued in state court and its removal petition had been denied . . . that [defendant] filed this declaratory action . . . . There is no need to allow state court defendants . . . to circumvent the removal statute[] . . . by using the Declaratory Judgment Act as a convenient and temporarily unlimited back door into federal court.").

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[8] Ex. 4, Motions Hearing Transcript, at 6:16.

[9] "Most courts have ruled that counterclaims against absent class members – even those arising out of the same transaction and occurrence – are not authorized by Rule 13 because absent class members are not an 'opposing party' as that term is used in that Rule." NEWBERG § 9:24 (citing, *inter alia*, *Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 546 n.5 (W.D. Mo. 2002), *aff'd*, 339 F.3d 1001 (8th Cir. 2003) ("Rule 13 has no application in the class action context because unnamed class members are not considered 'opposing parties' under that rule . . . .")).

Defendant claims its *needs* the broader, *mandatory* class it requests in the Counterclaim to put an end to piecemeal litigation. This is simply camouflage for forum shopping. If SEECO truly desired a uniform rule to which it and all royalty owners would be bound, SEECO could – indeed, should – have asked this Court to certify the questions for which it seeks declaratory relief to the Arkansas Supreme Court.[10] Such a procedure would have yielded the "prompt, once-and-for-all, judicial resolution" SEECO claims it wants and needs. *See* ECF No. 117, SEECO's Class Motion Brief, at 2. However, SEECO violently opposes such an efficient, conclusive, and binding-for-all procedure. *See* ECF No. 97 & 99. Rather, SEECO opts instead to engage in this latest forum shopping tactic that, if permitted, would have this Court "swallow up" the very cases (i.e., *Snow* and *Stewmon*) it previously determined belong in the Arkansas state court system and do so in violation of the Anti-Injunction Act.

Defendant's Counterclaim for declaratory relief – which purports to "raise" questions that would be resolved through resolution of Plaintiff's claims, along with the affirmative defenses asserted by Defendants – serves no useful purpose. *See Cincinnati Indem. Co. v. A & K Const. Co.*, 542 F.3d 623, 625 (8th Cir. 2008) (citing *Wilton*, 515 U.S. at 288, 115 S. Ct. 2137) ("A district court may exercise its discretion and determine that a declaratory judgment serves no useful purpose."). The reactive nature of Defendant's Counterclaim, which raises the concern that Defendants are attempting to utilize the Declaratory Judgment Act merely as a device for procedural fencing, the relative progress of the litigation, and the effect declaratory relief would

[10] *See* Rule 6-8 of the Rules of the Supreme Court of the State of Arkansas; *See e.g. Adams v. Cameron Mutual Ins. Co.*, 2013 WL 1876660, at *7 (W.D. Ark. May 3, 2013) (certifying to the Arkansas Supreme Court the following question which may be determinative of the cause: "Whether an insurer in determining the 'actual cash value' of a covered loss under an indemnity insurance policy may depreciate the costs of labor when the term 'actual cash value' is not defined in the policy.").

have on the state court judges' prerogative to decide the cases before them, clearly counsel in favor of abstention. *See Clay Regional Water*, 193 F.Supp.2d at 1154.

In addition, Defendant's *mandatory* class creates – not cures – piecemeal litigation. Indeed, under Defendant's Counterclaim, members of the broader, *mandatory* class will have their rights declared under their leases *without any opportunity to recover damages flowing from Defendant's breach of those rights in this action.* Rather, members of the mandatory class set forth in Defendant's Counterclaim would then have to file thousands of individual suits (or additional class actions) to secure the damages to which they are entitled. Far from streamlining litigation, the *mandatory class* proposed in Defendant's Counterclaim protracts and multiplies it by not offering complete relief which is presently offered by the three existing class cases. The multiplicity of piecemeal litigation created by Defendant's counterclaim strongly favors abstention here.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court dismiss or, in the alternative, abstain from deciding Defendant's Counterclaim.

DATED: DECEMBER 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 28, 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants and by other means to non-registered participants:

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