

**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), LLC; DESOTO	)	
GATHERING COMPANY, LLC;	)	
SOUTHWESTERN ENERGY SERVICES	)	
COMPANY, LLC; and SOUTHWESTERN	)	
ENERGY COMPANY,	)	
	)	
Defendants.	)	

**DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

This is an omnibus motion for summary judgment concerning factual and legal deficiencies with Plaintiff’s claims that have not been addressed by Defendants in previously filed or pending motions for summary judgment.

Although Plaintiff has asserted a host of statutory and tort claims against four companies, this is fundamentally a contract case between Plaintiff and one defendant (SWN Production) concerning whether her royalty deductions reflect costs that (1) were “incurred” by SWN Production and (2) were “reasonable” within the meaning of her oil and gas lease. In response to Defendants’ motion for partial summary judgment (Dkt. #89), the Court ruled that SWN Production “incurred costs under the meaning of the lease,” resolving that issue. Dkt. #111 at 4. Pending before the Court is a separate and discrete Second Motion for Partial Summary Judgment—the “affiliate return” MSJ—

concerning the purely legal issue of whether SWN Production is prohibited under the lease or Arkansas law from deducting that portion of its incurred costs that represents a rate of return, if any, that DeSoto included in its charges.

Here, Defendants seek summary judgment on Plaintiff's remaining contractual, statutory, and tort claims, which are unsupported, barred by statute of limitations or otherwise, not applicable to particular defendants, or not even actionable under Arkansas law. To summarize their key flaws:

- ***Claim 1: Breach of contract.*** SWN Production is entitled to judgment as a matter of law on what remains of Plaintiff's breach of contract claim. Plaintiff's royalty deductions for gathering, treating, and compression are expressly permitted by the lease and the *same or lower than* comparable rates. Indeed, Plaintiff's deductions are significantly higher from producer BHP (whom Plaintiff has not sued), which produces gas from the *same acreage* and which uses a *non-affiliated* gathering company; (ii) SWN Production pays *less* to DeSoto than it pays other, non-affiliated midstream companies in the Fayetteville Shale; and (iii) DeSoto charges SWN Production the *same* and typically *less* than it charges non-affiliated production companies.
- ***Claim 2: "Violation" of Arkansas Code §15-73-207.*** Plaintiff's "claim" against SWN Production for violation of Arkansas's prudent operator standard should be dismissed. Arkansas does not recognize an independent cause of action for "violation" of the prudent operator standard. *Wallace v. XTO Energy, Inc.*, 2014 WL 4202536, at \*4 (E.D. Ark. 2014) ("The controlling statute creates no independent cause of action; it is merely an oil-and-gas specific version of the duty of good faith and fair dealing inherent in all contracts.").
- ***Claims 3, 4, and 5: Fraud, Deceptive Trade Practices, and Conversion.*** Plaintiff's tort claims against Defendants are supported *only* by the parties' disagreement over interpretation of the lease. Differing interpretations of a contract cannot give rise to a distinct tort claim. *Adkins v. Hoskins*, 3 S.W.2d 322, 326 (Ark. 1928) ("[F]raud cannot be predicated on misrepresentations as to the legal effect of a written instrument, as, for example, a deed, a federal land warrant, or a contract of insurance.") (quotation marks omitted). Further, her claims are barred by statutes of

limitations and no genuine issues of material fact exist with respect to essential elements of Plaintiff's claims.

- ***Claim 6: Unjust enrichment.*** Plaintiff's unjust enrichment claim should be dismissed against all defendants for the same reasons that her breach of contract claim fails. In addition, it should be dismissed as to SWN, SES, and DeSoto because there exists "a valid and enforceable written contract governing [the] subject matter . . ." *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1201 (8th Cir. 2015) (citing *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 210 S.W.3d 101, 112 (Ark. 2005)). This bar also applies where, as here, the claim is brought against third parties to a contract. Further, her claim is also barred by unjust enrichment's three-year statute of limitations.
- ***Claims 7 and 8: Violation of Arkansas Code §§15-74-601 to 604 and 708.*** Plaintiff's statutory claims for alleged wrongfully withheld royalties fails for the same reason as her breach of contract claim: Plaintiff is not entitled to the claimed amounts under her lease. Further, although Plaintiff brings her Section 15-74-601 claim against all Defendants, the plain language of the statute requires dismissal of this claim against DeSoto, SES, and SWN. Likewise, her Section 15-74-708 claim does not apply and should be dismissed as to DeSoto.
- ***Claim 9: Civil Conspiracy.*** The conspiracy claim fails because Plaintiff fails to raise a genuine issue of material fact with respect to the elements of any underlying tort, let alone with respect to the elements of conspiracy as to each and every Defendant. Further, as is the case with her tort and unjust enrichment claims, Plaintiff's conspiracy claim is barred by the three-year statute of limitations.

For these reasons, those set forth in Defendants' memorandum in support, and in Defendants' pending Second Motion for Summary Judgment on the "affiliate return" issue, the Court should grant summary judgment for Defendants on all of Plaintiff's claims set forth in the Complaint. Defendants also seek all other relief to which they are entitled.

Respectfully submitted,

By: /s/Paul Yetter

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#### **CERTIFICATE OF SERVICE**

I certify that, on January 4, 2016, this brief was filed electronically through the Court's CM/ECF system and served on Plaintiff by transmission of the Notice of Electronic Filing through the Court's CM/ECF system to Plaintiff's counsel of record.

/s/Paul Yetter

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