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. SEECO, INC., n/k/a SWN PRODUCTION (ARKANSAS), LLC; DESOTO GATHERING COMPANY, LLC; SOUTHWESTERN ENERGY SERVICES COMPANY, LLC; and SOUTHWESTERN ENERGY COMPANY, Defendants.	)	Case No. 4:14-cv-435-BRW

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

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 (1) "incurred" by SWN Production and (2) "reasonable" within the meaning of her oil and gas lease. In response to Defendants' motion for partial summary judgment (Dkt. #89), the Court correctly ruled that SWN Production "incurred costs under the meaning of the lease," resolving that issue. Dkt. #111 at 4. Now pending before the Court is a separate and discrete 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 represent 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, 328 (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' pending motion for partial summary judgment on the "affiliate return" issue, and those presented below, the Court should grant summary judgment for Defendants on all of Plaintiff's claims set forth in the Complaint.

FACTUAL BACKGROUND

I. SWN Production Discovers and Develops the Fayetteville Shale Field.

In 2002, a SWN geologist based in Fayetteville, Arkansas hypothesized that the Fayetteville Shale—a rock formation in Arkansas between 1,500 and 6,500 feet underground—might be a gas-producing formation similar to productive formations like the Barnett Shale in Texas. Ex. 2, Defs.' Statement of Undisputed Material Facts ("SMF") ¶1. At the time, an emerging technology called hydraulic fracturing or "fracking," combined with horizontal drilling, held the promise of recovering hydrocarbons from formations previously considered uneconomic to develop using traditional methods.

Based on seismic exploration and geological analysis, but before drilling a single test well, SWN Production took the risk and began leasing mineral interests throughout the region. *Id.* ¶2. Moving forward with an uncertain and risky venture, SWN Production

leased over 400,000 acres of mineral rights by the time the first well was drilled in early 2004. *Id.* SWN Production has thousands of wells in the Fayetteville Shale and has distributed hundreds of millions in royalties to royalty owners. *Id.* ¶3.

II. SWN Forms DeSoto to Build, Maintain, and Operate a Gathering System in an Unproven Field.

Recovery of natural gas not only requires tremendous risk and investment in exploration and production, but also requires the infrastructure needed to transport the gas from the wellhead to market. Each gas well is connected to a gas gathering system, which consists of a network of low-pressure pipelines that are connected to interstate pipelines. *Id.* ¶4. In the gathering system, gas is dehydrated and, where necessary, treated to control contaminants, such as excess carbon dioxide. *Id.* ¶5. This is required to render the gas compliant with the delivery specifications of the interstate pipelines. *Id.* Treatment methods include blending gas with differing CO_2 levels to achieve pipeline specifications, "amine" treatment, which involves passing the gas through a facility that "scrubs" the CO_2 from the gas, as well as membrane systems and solid adsorber beds. *Id.* ¶6.

The gas is also compressed in the gas gathering system to a pressure sufficient to allow it to enter interstate pipelines. *Id.* ¶8. All of these processes involve cost, separate and apart from the cost of building the gathering system itself. SMF ¶9; Ex. 7 (D. Dell'Osso Dep. at 84-85) (discussing DeSoto's capital investments in blending facilities and amine treating plant capacity to bring gas to within specifications); *see* Dkt. #104-2

(Pl.'s Resp. to Defs.' SMF ¶5) (admitting that "gathering, treating and compression cost money").

When SWN Production began drilling in the Fayetteville Shale, the formation was unproven and no gathering system existed. SMF ¶13; Ex. 14 (M. Boling Dep. at 65) ("[T]his was a totally green field area with absolutely no infrastructure in place . . . ."). SWN Production did not have the expertise to itself design, build, and operate such a large gathering system. SMF ¶14. Existing third-party midstream companies would have been unwilling to commit the tremendous capital expenditures involved in laying hundreds of miles of pipe, adding compressors, dehydrators, and other gas processing and treating facilities. *Id.* ¶15; Ex. 14 (M. Boling Dep. 65-66) ("[T]here was just so much risk associated for a third party to want to take . . . ."). Further, the risk was high that a third-party gatherer would charge SWN Production excessive fees and other onerous obligations. SMF ¶16. Thus to develop the field, SWN Production had to depend largely on completely new systems developed by DeSoto for gathering, treating, and compression. *Id.* ¶17.

SWN formed DeSoto Gathering Company in 2004 to fill this role, take on risks that existing midstream companies would not, and provide gathering services to third-party producers. As of December 31, 2014, DeSoto had invested nearly $1.2 billion in its Fayetteville Shale gathering system. *Id.* ¶10. Today, DeSoto's gathering system transports gas from thousands of wells to market through more the 2,000 miles of pipe. *Id.* In fact, in 2014, DeSoto transported and delivered over 812 billion cubic feet of natural gas in the Fayetteville Shale area and is now one of the largest and most

expansive systems in the United States. *Id.* DeSoto's work in the Fayetteville Shale on behalf of its affiliated and non-affiliated customers has been public knowledge for years, referenced in publicly filed 10-K documents and in newsletters distributed regularly to royalty owners, including Plaintiff. *Id.* ¶18.

DeSoto provides gathering and treatment services to numerous unaffiliated customers, not just to SWN Production. *Id.* ¶11. These customers include Chesapeake Energy Marketing, Inc. (now BHP Billiton); XTO Energy, Inc.; BP America Production Company; Alta Resources, LLC (now BHP Billiton); CEU Fayetteville, LLC (now XTO Energy); KCS Resources, Inc. (now BHP Billiton); and Flying Pig Pipeline. *Id.* In 2012-2014, DeSoto generated nearly $400 million in revenue from gathering and treatment services provided to customers other than SWN Production. *Id.* ¶12.

With respect to SWN Production, DeSoto entered into a Dedicated Field Services Agreement effective January 2006, which was later amended effective October 1, 2006 (the "Field Services Agreement"). SMF ¶19. Under the Amended Field Services Agreement, DeSoto gathers, compresses, and treats SWN Production's Fayetteville production from wells operated by SWN Production. *Id.* ¶20; Ex. 9 (K. Pearson Decl. ¶41). The "fee structure, including fuel usage, is typical for this type of midstream agreement." Ex. 9 (K. Pearson Decl. ¶42). The field services agreement and amended field services agreement were negotiated at arms' length between executives of DeSoto and SWN Production. SMF ¶29; Ex. 14 (M. Boling Dep. at 176:1-21) ("[T]he negotiations on this agreement were really tough.").

III. SWN Production Pays DeSoto a Market Rate.

Gathering companies like DeSoto charge for gathering services based on the amount of gas the customer puts into the gathering system. SMF ¶30. The gas measured is multiplied by a fixed "gathering fee" as set out in the amended field services agreement. *Id.* ¶31. The rate DeSoto charges SWN Production is less than what other gathering companies—such as Arkansas Midstream Gas Services (now owned by BHP)—charge SWN Production elsewhere in the Fayetteville Shale, providing SWN Production's royalty owners with significant savings. *Id.* ¶32. DeSoto also charges SWN Production the same or less than what DeSoto charges other, non-affiliated production companies in the Fayetteville Shale. *Id.* ¶34. Further, DeSoto's charges to SWN Production are within the range of rates charged by gathering companies in comparable basins, such as the Barnett Shale in Texas and the San Juan Basin in the Southwest. *Id.* ¶35.

Moreover, other companies charge Plaintiff more for gathering and treating services (from her same plot of land) than SWN Production. *Id.* ¶¶36-37. BHP operates the Jimmie Lewis 7-16 1-12H1, Jimmie Lewis 7-16 2-12H1, and Jimmie Lewis 7-16 3-12H1 wells, which produce gas from Plaintiff's property and generate royalties for her—just as SWN Production does. *Id.* This means that Plaintiff receives separate royalty payments from both SWN Production and BHP. SWN Production's wells from which Plaintiff derives royalties (the Foshee 7-15 1-7H and Gray William 7-15 3-18H wells) are very close to BHP's Lewis Wells. *Id.* And BHP uses third-party Crestwood to gather the Lewis Wells pursuant to an arms-length agreement. *Id.*

Plaintiff's check statements from BHP, which show itemized deductions from Plaintiff's royalties, show that fees deducted by BHP from Plaintiff's royalties for gathering, treating, compression, and fuel range from $0.84 to $1.07/Mcf. *Id.* By contrast, SWN Production's fees deducted from the Foshee and Gray William wells, for the same services, ranged from $0.75 to $.079/Mcf for a comparable period. *Id.*

IV. SWN Production Shares Post-Production Expenses with Royalty Owners When Permitted by the Lease.

Plaintiff Smith's lease provides that SWN Production may deduct from royalty reasonable post-production costs that SWN Production incurs for gathering, treating, and compression. SMF ¶44.

For gathering and treatment deductions, SWN Production deducts from royalty the same amount per Mcf that it pays DeSoto for gathering and treating. *Id.* ¶49. The deduction for compression is the value of gas burned for compression in DeSoto's gathering system. DeSoto charges SWN Production a fixed gathering rate per Mcf for all gas gathered on the DeSoto system. Thus, it is unsurprising that SWN Production deducts gathering charges from royalty (when allowed by the relevant lease) at the same amount that DeSoto charges SWN Production.

V. Plaintiff's Lawsuit.

In July 2014, Plaintiff brought suit against Defendants for underpayment of royalty, seeking to represent a class of all present and past royalty owners in gas wells in the Fayetteville Shale where SWN Production possessed an operating or non-operating working interest. Dkt. #1 (Complaint). Plaintiff's suit followed two other putative class

actions in Arkansas state court alleging that SWN Production underpaid royalties on gas produced from mineral interests it has leased in the State of Arkansas: *Snow, et al. v. SEECO, Inc.*, No. 4:14-CV-00304-KGB and *Stewmon v. SEECO, Inc. et al.*, No. 62CV-13-00141-2. At this time, there are now three more mass actions and one more class action in Arkansas federal and state courts and Oklahoma state court involving the same parties, factual allegations, and claims. *See Bell et al. v. SWN Production (Arkansas), LLC, et al.*, No. 4:15-cv-628-BRW (E.D. Ark. 2015) (filed Sept. 25, 2015); *O'Neal, et al. v. SWN Production (Arkansas), LLC, et al.*, No. 4:15-cv-629-BRW (filed Sept. 25, 2015); *Glover, et al. v. SWN Production (Arkansas), LLC, et al.*, Faulkner Cnty. Circuit Case No. 23CV-15-934 (filed Sept. 23, 2015); *Pinon Energy Co. v. SWN Production (Arkansas), LLC, et al.*, Tulsa Cnty. Dist. Court Case No. CJ-2015-04328 (filed Nov. 23, 2015).

Plaintiff asserts claims for breach of contract, fraud, conversion, unjust enrichment, conspiracy, and violations of various Arkansas statutes. Dkt. #1 at ¶¶57-85. She claims that SWN Production improperly deducts gathering, compression, and treating costs when hiring DeSoto. Smith alleges that by negotiating with an affiliate, SWN Production agreed to pay a price above DeSoto's actual costs. She argues that this higher price allowed SWN Production to make artificially low royalty payments to the owners. She also alleges that SWN Production improperly failed to pay royalty based on wellhead volume, and that it reported false or misleading information on check stubs.

Plaintiff lives in Tennessee but owns approximately 30 acres of land in Arkansas. SMF ¶38. She began exploring entering into an oil and gas lease in 2004, after receiving

mailings from various companies. *Id.* SWN Production provided the best offer. *Id.* ¶39. She entered into an oil and gas lease with SWN Production in June 2005 with respect to her Arkansas interests, with an initial term of five years. At the time, there was no gas production in Conway County, where her land is located. *Id.* ¶41. As a SWN Production royalty owner, Plaintiff regularly receives and reads SWN's *Horizon* newsletter for Fayetteville Shale royalty owners, which provides updates on the activities of SWN and its subsidiaries (including SWN Production and DeSoto) in Arkansas and provides answers to common royalty owners questions, including how to read a royalty check stubs. *Id.* ¶42.

Plaintiff's oil and gas lease provides a one-eighth royalty on gas that is produced, saved, and sold and further provides that SWN Production may deduct "all reasonable" gathering, treating, and other costs:

> Lessee shall pay Lessor one-eighth of the proceeds derived from the sale of all gas (including substances contained in such gas) produced, saved, and sold by Lessee. Proceeds are defined as the actual amount received by the Lessee for the sale said gas. In calculating the proceeds derived from the sale of gas produced, saved and sold by Lessee, Lessee shall be entitled to deduct all reasonable gathering, transportation, treatment, compression, processing and marketing costs that are incurred by Lessee in connection with the sale of such gas.

SMF ¶44.

Plaintiff's lease also contains a free-use-of-gas clause:

> Lessee shall have the right to use, free of cost, gas, oil and water found on said land for its operations, except for water from the wells of Lessor.

Id. ¶45.

Drilling began in Plaintiff's section in 2010 and she was issued her first royalty check no later than January 25, 2011. *Id.* ¶46. However, based on conversations with her current attorneys, Plaintiff came to believe that amounts charged to her by SWN Production for gathering, compression, and treatment were not "incurred." *Id.* ¶47. She was told that there were other lawsuits against SWN Production (namely *Snow* and *Stewmon*) and that "most likely" the same issues alleged in those cases applied to her. *Id.* Although, as noted above, Plaintiff also collects royalty from BHP, which deducts the same post-production expenses that SWN Production does, she is not "suspicious" of BHP because she is not aware of any lawsuits by royalty owners against that producer. *Id.* ¶48.

Whereas the class Plaintiff proposed in the Complaint excluded "citizens of the State of Arkansas," Dkt. #1 (Complaint) ¶48, in May 2015, Plaintiff revised her class definition to exclude "members of the class[es] certified" in the *Snow* and *Stewmon* state-court class actions. Dkt. #45 (Pl.'s Mot. for Class Cert. at 2). In November 2015, the Court properly rejected the proposed class as unascertainable and denied Plaintiff's motion for class certification without prejudice. Dkt. #110 at 1. Plaintiff then filed a second motion for class certification, presenting a third revised class definition. Dkt. #113 (Pl.'s 2d Mot. for Class Cert.). She now proposes a class excluding royalty owners "with an Arkansas address," or in the alternative a class of all affected royalty owners regardless of residence. *Id.* at 2 & n.3.

The Court has already granted partial summary judgment against one of Plaintiff's central positions—that SWN Production did not "incur" the costs paid to DeSoto simply

because DeSoto was an affiliate. Dkt. #111 at 1. "Regardless of whether SEECO made payment by check, cash, intercompany transfer, or never at all, SEECO incurred costs under the meaning of the lease." *Id.* at 4. Defendants have also moved for partial summary judgment on the related issue of whether SWN Production is prohibited from deducting that portion of its incurred costs that represent a rate of return, if any, that DeSoto included in its charges (the "affiliate return" motion for partial summary judgment). Here, Defendants move for summary judgment on the remaining contract, tort, and statutory claims.

STANDARD OF REVIEW

The Court well knows the standards for summary judgment. It is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The "facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quotes omitted). "To avoid summary judgment, Plaintiff must do more than simply show that there is some metaphysical doubt as to the material facts" and must come forward with "specific facts showing that there is a genuine issue for trial." *Id*.

ARGUMENT AND AUTHORITIES

I. Plaintiff's Breach of Contract Claim Should Be Dismissed (Claim 1).

SWN Production is entitled to summary judgment on Plaintiff's claim for breach of the lease. As noted above, the Court has already ruled as matter of law that SWN Production "incurred" costs within the meaning of Plaintiff's lease. Dkt. #111 at 4.

Plaintiff further alleges that SWN Production "paid Gathering Fees that greatly exceeded DeSoto Gathering's actual costs," resulting in allegedly "inflated" gathering deductions from Plaintiff's royalties, Dkt. #1 (Complaint ¶¶25-26). SWN Production and the other defendants address this issue in their pending motion for partial summary judgment, pending before the Court, which requests a ruling as a matter of law that SWN Production is not prohibited from deducting costs incurred simply because they include some rate of return for DeSoto.

Here, SWN Production seeks summary judgment on the remaining issues relating to Plaintiff's breach of contract claim. First, SWN Production is entitled to a ruling that there exists no genuine dispute of material fact that SWN Production's cost deductions are "reasonable" within the meaning of the lease because they are comparable to market rates for gathering and related services in the Fayetteville Shale. Second, Defendants are entitled to summary judgment regarding Plaintiff's unsupported allegation that "no 'treatment' is being performed by DeSoto," and that those costs are likewise allegedly "inflated," and therefore may not be deducted from her royalties. Dkt. #1 at ¶¶27-30. Finally, Defendants are entitled to summary judgment regarding Plaintiff's allegation that SWN Production improperly deducts charges for compression, gathering, and treating on "Fuel and Lost and Unaccounted for Gas." *Id.* ¶¶31-34. Plaintiff's positions are foreclosed by the plain language of the lease and the undisputed material facts.

A. Plaintiff's breach of contract claim fails because there exists no genuine dispute that SWN Production's deductions are "reasonable" compared to comparable rates for such services.

Although Plaintiff generally claims (without supporting facts or law) that SWN Production's deductions are "inflated," Dkt. #1 (Complaint ¶26), she does not specifically allege that these deductions are higher than comparable rates in the Fayetteville Shale. Nevertheless, there exists no genuine dispute that SWN Production's deductions are "reasonable" compared to the market rates for gathering, compression, and treating services in the Fayetteville Shale. *See In re Strong*, 356 B.R. 121, 152-53 (Bankr. E.D. Penn. 2004) ("The term 'reasonable' has been defined as whether the charge was for a service 'actually performed,' and whether 'the disputed charges are comparable to the prevailing rates of the industry at the time of the transaction . . . .'") (citations omitted).

The undisputed facts show that SWN Production's deductions for these services are "reasonable," when compared to comparable rates. SWN Production is not the only company producing from Plaintiff's acreage in Conway County. Non-party BHP also produces from Plaintiff's land, pays Plaintiff royalties, and deducts post-production charges from her royalties—just like SWN Production. SMF ¶¶48, 36-37. Further, BHP uses *non-affiliate* Crestwood Midstream Partners for gathering services. *Id.* Nevertheless, Plaintiff's royalty checks from BHP show that BHP deducted from $0.84/Mcf to $1.07/Mcf for gathering, treating, and compression. *Id.* By comparison, SWN Production's deductions for the same period for the same services ranged from $0.75/Mcf to $0.79/Mcf—more than *35% less*. *Id.* Plaintiff is getting a significantly better deal from

SWN Production than she gets from BHP, whom she has not sued, and who is using a non-affiliated gathering company.

Further, SWN Production (and, in turn, Plaintiff) is getting a significantly better deal from its affiliate DeSoto for gathering, compression, and treating services than it can get from comparable gathering companies in the Fayetteville Shale. DeSoto is not the only gathering company that SWN Production uses in the Fayetteville Shale to perform midstream services. As it does with DeSoto, SWN Production has a gathering agreement with Arkansas Midstream Services, which is now an affiliate of producer BHP. SMF ¶¶32-33; *see* Ex. 43 (SEE-ES-00697). Arkansas Midstream charges SWN Production $0.68/MMBtu for gathering and compression. SMF ¶33. Because the typical BTU factor of gas in DeSoto's gathering system is 0.98, *id.*, this means that Arkansas Midstream charges SWN Production the equivalent of $0.67/Mcf for gathering and compression. By contrast, DeSoto charges SWN Production $0.57/Mcf—over *17% less* than what SWN Production is charged by non-affiliate Arkansas Midstream. *Id.* Again, Plaintiff is getting a significantly better deal through SWN Production's gathering agreement with DeSoto than she could get anywhere else. SWN Production's deductions are "reasonable" as a matter of undisputed fact and law.

Although this is enough to show that SWN Production's deductions for DeSoto's charges are "reasonable," the undisputed material facts also show that DeSoto charges SWN Production *the same or less* than DeSoto charges other production companies in the Fayetteville Shale, as shown by the following table:

DeSoto's Gathering/Treating Fees with Fayetteville Shale Producers							
SWN Production	**Chesapeake (now BHP)**	**XTO**	**BP**	**Alta (now BHP)**	**CEU (now XTO)**	**KCS (now BHP)**	**Flying Pig Pipeline**
$0.74-$0.79	$0.78	$0.78	$0.78	$0.74	$0.76	$0.76-$0.79	$0.79

SMF ¶34.

The above rates do not even take into account the "high level of services provided" to SWN Production under its gathering agreement, compared to those offered by DeSoto to its non-affiliated customers. Ex. 9 (K. Pearson Decl. at 4). These include "rapid speed of wellhead meter connections, excellent history of 'Waiting On Pipeline,' and good coordination with interconnections to transmission pipelines." *Id.* Further, DeSoto's large gathering system, with multiple downstream connections to interstate and intrastate pipelines, provides DeSoto's customers with reliable gas flow and marketing flexibility in seeking the best prices for natural gas. *Id.* ¶41. SWN Production gets *more* from DeSoto, and is charged the same *or less* than other production companies in the Fayetteville Shale. There is accordingly no genuine issue of material fact that SWN Production's costs are "reasonable" under Plaintiff's lease and may be deducted in full.

B. There is no genuine dispute that treating services are performed and deductible under the lease.

In addition to challenging SWN Production's cost deductions generally, Plaintiff also alleges that SWN Production is in breach of the lease as to treating deductions. According to Plaintiff: (1) no treating is allegedly being performed by DeSoto, and DeSoto's blending of high-CO_2 gas with low-CO_2 gas allegedly is not "a separate treatment process that would justify the treatment fee," Dkt. #1 (Complaint ¶¶27-29); and

(2) the treatment costs deducted by SWN Production allegedly "did not enhance the marketability of the gas." *Id.* at ¶30. Plaintiff is wrong on both of these points. Accordingly, SWN Production is entitled to summary judgment on Plaintiff's breach of contract claim as it relates to treating.

1. Treating is control of CO_2, not just "amine" treating—as Plaintiff claims.

First, there is no dispute that Plaintiff's gas contains extremely high levels of contaminants that required treatment before entering the interstate pipelines. The gas from Plaintiff's wells contained a high percentage of CO_2, from 5% to 9%; interstate pipelines generally require CO_2 levels below 2%. SMF ¶7. In exchange for SWN Production's payment of the Treating Fee, DeSoto is required under the gathering agreement to "condition" the gas "as required to meet the Interconnecting Pipeline's carbon dioxide quality requirements." *Id.* ¶22. There is no requirement that any specific method of CO_2 reduction be used—DeSoto must simply bring the gas to within the levels required by the interstate pipelines. *Id.* ¶23.

The undisputed evidence shows that treating is being performed by DeSoto, despite Plaintiff's contrived and unsupported narrowing of the meaning of "treating" to exclude every other CO_2 control method other than amine. According to Defendants' industry expert, Kyle Pearson, treating takes a number of forms, including "gas blending, amine based systems, membrane systems, and solid adsorber beds." SMF ¶6; Ex. 9 (K. Pearson Decl. ¶20). DeSoto in fact uses, and invests in, multiple methods to control CO_2—including amine treating. The facts show that there are two operational amine

treatment plants on DeSoto's gathering system, with two others coming online. SMF ¶25. At various points in time, there have been four other locations on the system with operational amine plants. *Id.* These plants cost millions of dollars for DeSoto to purchase or lease, remove gas during operation that results in less gas to sell, and cost hundreds of thousands more per year to operate and maintain. *Id.*

It is likewise undisputed that DeSoto has invested in expensive pipeline infrastructure projects *specifically* for the purpose of blending high-CO_2 gas with low-CO_2 gas, to control CO_2 levels and meet the specifications of the interstate pipelines. *Id.* ¶26. These projects include construction of five new discharge lines connecting central processing facilities in high-CO_2 areas with regions of the gathering system where CO_2 content is much lower. *Id.* DeSoto has also reconfigured delivery points into downstream pipelines to increase its ability to blend gas to meet required CO_2 specifications. *Id.* This has cost DeSoto millions of dollars. *Id.*

Further, the undisputed evidence shows that these projects would not have been undertaken without the need to facilitate the blending of gas to meet downstream CO_2 specifications. As David Dell'Osso, DeSoto's former Director of Development, Planning, and Technology, testified:

> Q. You said "blending infrastructure"?
>
> A. Yes.
>
> Q. What does that consist of?
>
> A. Consists of building a pipe network that allows CO_2 content that exceeds the thresholds to be blended with gas that has CO_2 content below the threshold. So it's a form of capital investment in order to

> treat or condition the gas to get it to be within the spec of the contract.
>
> Q. This blending infrastructure, is it separate and apart from the gathering system?
>
> A. It ultimately is connected to the gathering system; so, no, I would not say it's – it's apart from it. It's not discrete and separate. It's part of it. But those investments are made *specifically for purposes of blending* the CO_2; and were it not for the need to treat that -- that CO_2 content, *those investments would not have otherwise been made*.

Ex. 7 (D. Dell'Osso Dep. at 84-85) (emphasis added). Tom Ukens, DeSoto's Engineering Manager, gave the same testimony regarding the need for pipeline infrastructure projects to permit control of CO_2 via blending. Ex. 22 (T. Ukens Dep. at 60-61, 68, 73, 77-78). Plaintiff's own expert testified that one of the factors he would consider in determining whether the treating fee that DeSoto charges SWN Production was reasonable would be "to take a look to see what the equipment that was put into the field to do the treating." Ex. 44 (D. Reineke *Snow* Dep. at 89). Accordingly, there is no genuine dispute that DeSoto is performing necessary treating services for SWN Production in the Fayetteville Shale, and that those costs are deductible from Plaintiff's royalties under the plain language of the lease.

2. Plaintiff's claim that DeSoto's treating does not make her gas valuable is wrong.

Second, Plaintiff is wrong as a matter of law that DeSoto's treating activities do not enhance the value of her gas. Dkt. #1 (Complaint ¶30). Interstate pipelines will not accept gas that is outside of their quality specifications, which are in place for safety reasons and to avoid corrosion. SMF ¶22. Typically, gas entering interstate pipelines

must have a CO_2 content of less than 2%. *Id.* Interstate pipelines can refuse to accept gas that exceeds these specifications, preventing downstream sales. *Id.* Indeed, Plaintiff's gas has high levels of CO_2 that make it worthless without DeSoto's treating services. *Id.* ¶7. It is undisputed that treatment is necessary to render Plaintiff's gas marketable, and DeSoto has used both blending and amine to achieve the required specifications. *See, e.g.*, Ex. 22 (T. Ukens Dep. at 39-40, 48, 49, 51, 53-54); Ex. 45 (DeSoto's Obj. and Resp. to Plaintiff's ROGS Nos. 8, 9); Ex. 10 (SMITH_DGC004164).

Accordingly, SWN Production is entitled to summary judgment on Plaintiff's breach of contract claim as it relates to treating deductions.

C. Plaintiff's breach of contract claim as to "Fuel, Lost, and Unaccounted-For Gas" ("FL&U") fails as a matter of law.

Plaintiff claims that SWN Production breached her lease by failing to "pay royalty on gas consumed for fuel while at the same time charging Plaintiff . . . Gathering and Treatment Fees on the gas consumed for fuel." Dkt. #1 (Complaint ¶34). She also claims that SWN Production breaches the lease by charging gathering and treating fees on gas volumes that are ultimately "lost and unaccounted-for" as they pass through the gathering system. *Id.* at ¶33. FL&U refers to the amount of gas used to power the compression, dehydration, and treating equipment along the gathering system, as well as the difference recorded in all gathering systems (in the form of a gain or loss of gas) between the volumes measured at the Receipt Points and, later on, at Delivery Points. Once again, SWN Production's practices are specifically authorized by the unambiguous language of the lease.

1. Plaintiff is not entitled to royalties on unsold volumes.

First, the lease does not entitle Plaintiff to the payment of royalties on FL&U volumes. It provides that Plaintiff is entitled to one-eighth "of the proceeds derived from the sale of all gas produced, saved, ***and sold***." SMF ¶44. Thus, Plaintiff is not entitled to payment of royalties on unsold volumes, such as gas that is utilized as fuel for gathering system equipment or otherwise lost and unaccounted-for. *See ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 855 (N.M. 2012) ("Lessees point out that in the standard form field service contracts, the service-provider bargains to retain a small percentage of the gas produced from the leases for use as field and plant fuel. This fuel is used as partial compensation for post-production service providers. Lessees contend that because field and plant fuel is used as partial compensation for post-production service providers and because they do not derive proceeds from such use, they do not have to pay royalties on such fuel. We agree."); *W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp. 2d 790, 817 (S.D. W.Va. 2013) ("[L]essees have no general duty to pay for unsold volumes. This includes fuel gas consumed in compressor stations. Like volumes of gas lost or unaccounted for due to pipeline leaks or metering inaccuracies, gas consumed as fuel to power compressors is not sold or marketed. Lessees are not generally obligated to pay royalties on unsold gas because lessees receive no payment for this gas. Further, the individual leases at issue each require payment of royalties only on volumes that are *sold* at market.") (emphasis added); *Tana Oil & Gas Corp. v. Cernosek*, 188 S.W.3d 354, 362 (Tex. App.—Austin 2006, pet. denied) ("Tana is not required to pay royalties based on

the value of gas that was never sold downstream. Accordingly, Tana did not breach the lease agreements by failing to pay royalties on gas consumed by the processor.")

2. Plaintiff's claim that no deductions are permitted for gathering and treating performed on FL&U ignores the lease and the facts.

Second, the lease authorizes SWN Production to deduct gathering and treating fees from Plaintiff's royalties for FL&U. Again, the royalty clause says that SWN Production "shall be entitled to deduct ***all*** reasonable gathering . . . treatment . . . [and] compression . . . costs" that are incurred by SWN Production "***in connection with*** the sale of such gas." SMF ¶45. SWN Production necessarily incurs gathering, treating, and compression costs on ***all*** gas that leaves the wellhead, regardless of whether it is ultimately sold, used as fuel, or other lost and unaccounted-for. Those costs are required to enable the sale of *any* gas from Plaintiff's land. As Plaintiff's expert has testified, FL&U is an inherent part of any gathering system:

> Q. Okay. So it's not unusual for a gathering system to lose gas in the gathering system? I mean there's nothing unusual going on in this case with respect to that?
>
> A. I think that it's *inherent with a gathering system to use fuel and to lose gas*.
>
> Q. And to have some unaccounted for --
>
> A. *Absolutely*.
>
> Q. -- gas? Okay.

Ex. 44 (D. Reineke *Snow* Dep. at 56) (emphasis added); Ex. 11 (D. Reineke *Smith* Dep. at 284) ("Most gathering systems do use gas produced from the mineral estate in order to run their facilities."). Accordingly, there is no genuine dispute that the lease authorizes

SWN Production to deduct gathering, compression, and treating costs from FL&U volumes. These are costs incurred "in connection with" the sale of Plaintiff's gas, as a matter of law.

D. Plaintiff's breach of contract claim is barred by the statute of limitation as to royalty owners who first received royalty before July 25, 2009.

Although Plaintiff first received royalty no later than January 25, 2011, it is undisputed that other putative class members first received royalty more than 5 years prior to Plaintiff's filing of the Complaint. Arkansas's statute of limitations for breach of contract is five years. Ark. Code §16-56-111(b); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 935 S.W.2d 258, 261 (Ark. 1996). The statute begins to run on the date the breach occurs, not when it is discovered, unless the limitations period is tolled. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 935 S.W.2d 258, 261 (Ark. 1996). Accordingly, the statute of limitations has run on Plaintiff's breach of contract claim as to putative class members who first received royalty before July 25, 2009—five years before Plaintiff filed the Complaint.

Further, no basis exists under Arkansas law or otherwise to toll the statute of limitations. To toll a limitations period based on fraudulent concealment, Plaintiff has the burden to prove by a preponderance of the evidence that there exists "(1) a positive act of fraud (2) that is actively concealed, and (3) is not discoverable by reasonable diligence." *Paine v. Jefferson Nat'l Life Ins. Co.*, 594 F.3d 989, 992 (8th Cir. 2010) (applying Arkansas law). Fraud sufficient to toll the statute of limitations requires evidence of active concealment: "No mere ignorance on the part of the plaintiff of his rights, nor the

mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, *something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed* or perpetrated in a way that it conceals itself." *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 843 S.W.2d 842, 844 (Ark. 1992).

Plaintiff has not alleged and has no evidence to support tolling of the statute. A plaintiff seeking to rely upon fraudulent concealment bears the "burden to plead, with particularity, *facts* to support his claim that the doctrine of fraudulent concealment tolls applicable statutes of limitations." *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 881 (8th Cir. 2011). This includes the *when* and *how* Plaintiff discovered the alleged fraud. Otherwise, Plaintiff has "failed to meet [her] burden of sufficiently pleading that the doctrine of fraudulent concealment saves [her] otherwise time barred claims." *Id.* (citing *Wood v. Carpenter*, 101 U.S. 135, 140-41 (1879) ("If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner . . . . The circumstances of the discovery much be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.").

Plaintiff has no evidence of any active fraud by Defendants. The essence of her case is that Defendants did not pay her what she allegedly is entitled to receive under her lease with SWN Production. This is not a valid basis for fraud. Under Arkansas law, "fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties alike, nor upon

representations as to what the law will allow to be done . . . ." *Adkins v. Hoskins*, 3 S.W.2d 322, 326 (Ark. 1928) (internal quotation and citation omitted). Therefore, "fraud cannot be predicated on misrepresentations as to the legal effect of a written instrument, as, for example, a deed, or a Federal land warrant, or a contract of insurance." *Id.* Further, fraudulent concealment requires that the party making the allegedly false representation of material fact have "knowledge that the representation is false[.]" *McGill v. Lafayette Cnty.*, No. 4:07-cv-4003, at *6 (W.D. Ark. 2007) (applying Arkansas law). Plaintiff has no evidence that any Defendant knew, in 2006 or otherwise, that the lease or Arkansas law prohibited any portion of Plaintiff's deductions.

Nor did any defendant *conceal* the alleged "fraud." "[F]raud is a necessary, but alone not a sufficient, condition for suspension of the statute of limitations." *Delanno, Inc. v. Peace*, 366 Ark. 542, 546 (Ark. 2006). "Concealed fraud means fraud which is furtively planned and secretly executed." *Shelton v. Fiser*, 8 S.W.3d 557, 562-63 (Ark. 2000). Plaintiff just says in conclusory fashion that Defendants engaged in "unlawful and deceptive scheme" to overcharge royalty owners and "intentionally and fraudulent concealed" their actions, without any supporting *facts*. Dkt. #1 (Complaint ¶¶1, 43).

Not only does Plaintiff have no evidence to support any claim of fraudulent concealment that would toll the statute of limitations, but her claim is contradicted by the evidence. Plaintiff claims that SWN Production "failed to disclose" that gathering deductions were related to affiliated transactions, Dkt. #1 (Complaint ¶43(f)), ignoring the fact that SWN Production's use of affiliate gatherer DeSoto was public knowledge and communicated to royalty owners, including Plaintiff, via SWN's royalty newsletters.

SMF ¶18. DeSoto's role as SWN's gathering subsidiary in the Fayetteville Shale has been public knowledge for years. *Id.*; Ex. 46 (SWN 2012 10-K at 3) ("We engage in natural gas gathering activities in Arkansas . . . through our gathering subsidiar[y], DeSoto . . . . DeSoto Gathering and Angelia Gathering primarily support our E&P operations . . . ."); *id.* at 16 ("During 2012, DeSoto Gathering gathered approximately 780.7 Bcf gas volumes in the Fayetteville Shale play area, including 56.0 Bcf of natural gas from third-party operated wells."). Plaintiff's "fraudulent concealment" allegations are unsupported as a matter of law and fail to toll the statute of limitations.

Further, to the extent Plaintiff claims that the "continuing tort" doctrine also somehow tolls the statute of limitations, that theory "is not recognized in Arkansas." *Chalmers v. Toyota Motor Sales, USA, Inc.*, 935 S.W.3d 258, 264 (Ark. 1996). Plaintiff's breach of contract claim is barred by statute of limitations as to putative class members who first received royalty before July 25, 2009.

II. The Court Should Dismiss Plaintiff's Prudent Operator "Claim" Because the Arkansas Statute Does Not Create a Cause of Action (Claim 2).

SWN Production is entitled to summary judgment against Plaintiff's claim that SWN Production violated the prudent operator standard of Ark. Code § 15-73-207. Arkansas law is clear: there is no independent cause of action for violation of Section 15-73-207. *May v. BHP Billiton Petroleum (Fayetteville) LLC*, 2015 WL 4592684, at *3 (E.D. Ark. 2015) ("The statute that [defendant] allegedly violated [§ 15-72-207] doesn't create an independent cause of action.");*Wallace v. XTO Energy, Inc.*, 2014 WL 4202536, at *4 (E.D. Ark. 2014) (granting defendant's motion to dismiss and holding that

"[t]he 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") *Collins v. SEECO, Inc.*, 2012 WL 2309080, at *1 (E.D. Ark. 2012) ("[T]here is no independent cause of action here. Whether [defendant] operated prudently is an oil-and-gas specific version of the duty of good faith and fair dealing inhering in all contracts.").

The Court should dismiss the claim.

III. The Court Should Dismiss Plaintiff's Fraud Claim, Which Arises Entirely from the Same Facts as Her Contract Claim (Claim 3).

SWN Production is entitled to summary judgment on Plaintiff's fraud claim. First, the claim arises entirely from the parties' disagreement over the meaning of Plaintiff's lease. Tort claims, including fraud, cannot arise from legitimate disagreements over interpretation of a contract. Second, the claim is barred by the statute of limitations. Third, Plaintiff cannot raise a genuine issue of material fact regarding each and every element of her fraud claim.

A. Plaintiff's claim improperly attempts to use a disagreement over contract interpretation as the basis for fraud.

First, Plaintiff's fraud allegations simply repackage her breach of contract allegations. She alleges in support of her fraud claim that SWN Production:

- "secretly and knowingly ***underpaid royalties***," Dkt. #1 (Complaint ¶63);
- "sent out false and misleading statements" that "represented that '***this is the amount we owe you***,' when, in fact, the amount was insufficient," *id.* ¶64;
- took deductions that "were inflated, unreasonable, and/or fictitious (*i.e.*, not incurred)," *id.* ¶65;
- failed to "fully and properly disclose all information upon which deductions are taken and royalty is calculated," *id.* ¶66; and

- "fail[ed] to disclose that the deductions ***were related to affiliated transactions***." *Id.*

These allegations depend entirely on the contract interpretation questions at the center of Plaintiff's breach of contract claim. If the Court (as it should) rejects Plaintiff's interpretation of the meaning of her lease, none of the above "misrepresentations" or "omissions" will be false or material. If the Court agrees with Plaintiff's interpretation, that does not somehow transform a debate over the language of the contract into "fraud." "[A] legitimate disagreement as the interpretation of a contract cannot support a claim of fraud." *Davis v. Conn. Cmty. Bank, N.A.*, 937 F. Supp. 2d 217, 241 (D. Conn. 2013) (granting summary judgment against plaintiff's fraud claim); *Baughman v. U.S. Liability Ins. Co.*, 662 F. Supp. 2d 386, 400-401 (D.N.J. 2009) (granting summary judgment on plaintiff's fraud claim based on scope of insurance policy's coverage provisions, which was "fairly debatable"); *Ashbury Square, L.L.C. v. Amoco Oil Co.*, 221 F.R.D. 497, 508-09 (S.D. Iowa 2004) ("[D]etermination of the correct interpretation where differing interpretations are held by the parties seems to be part of the contract action and not a basis for a separate claim of fraud."); *Mass. Bay Ins. Co. v. Stamm*, 683 N.Y.S.2d 20, 22 (N.Y. App. Div. 1998) ("[W]e find no sound basis to derive a fraud claim from an agreement . . . specifically turning on whether medical expenses were reasonable and necessary . . . ."); *Glynwill Invs., N.V. v. Prudential Sec., Inc.*, 1995 WL 362500, at *8 n.4 (S.D.N.Y. 1995) ("Plaintiff has offered no support for its proposition that the misrepresentation of a party's *interpretation* of its obligations under a contract constitutes fraud distinct from a breach of contract cause of action. Such an allegation concerning the

parties' differing constructions of the contract terms, in the absence of false promises regarding any other matter *collateral* to the contract, is part and parcel of the contract claim, not a separate cause of action sounding in fraud."). The Arkansas Supreme Court has stated clearly that "fraud *cannot be predicated* on misrepresentations as to the legal effect of a legal instrument, as, for example, a deed, a federal land warrant, or a contract of insurance." *Adkins v. Hoskins*, 3 S.W.2d 322, 326 (Ark. 1928) (emphasis added).

To cite just one example from this case, one of Plaintiff's "fraud" allegations is that SWN Production took deductions that were "not incurred." Dkt. #1 (Complaint ¶65). But that allegation hinged entirely on Plaintiff's incorrect interpretation of the lease, and the Court correctly granted Defendants' motion for partial summary judgment on that issue. Dkt. #111 at 4. This necessarily requires that Plaintiff's "fraud" claim as to the "incurred" issue be dismissed as well, since there exists no actionable misrepresentation to support the claim—Plaintiff's claim required *misreading* the terms of her lease. A fraud claim that stands or falls with a *legal* interpretation of a contract is not a fraud claim at all.

The same is true regarding Plaintiff's other "fraud" allegations relating to Plaintiff's lease and royalty deductions. Indeed, there is no genuine dispute that the only source of SWN Production's duty to pay Plaintiff royalties is the lease. Her allegations uniformly describe SWN Production's payment obligation as flowing from the lease. *See* Dkt. #1 (Complaint ¶36) ("Under the leases . . . , Plaintiff and the Class Members own royalty interests . . . ."); *id.* ¶38 ("The Plaintiff's and Class Members' leases do not allow for the deduction of costs that are not the actual, reasonable costs incurred by [SWN

Production] . . . ."); *id.* ¶57 ("Plaintiff and the Class Members have a direct contractual relationship with [SWN Production] by virtue of their leases.").

Accordingly, Plaintiff's fraud claim (along with her other tort claims, which also entirely turn on the core issue contract interpretation) should be dismissed as a matter of law.

B. Plaintiff's fraud claim is barred by the statute of limitations.

Plaintiff fraud claim is also barred by Arkansas's three-year statute of limitations. *See Stoltz v. Friday*, 926 S.W.2d 438, 442 (Ark. 1996). Plaintiff first received royalty no later than January 25, 2011, but did not file suit until July 25, 2014—more than three years after her alleged injury. SMF ¶46. Further, as explained above, *see supra* at 30-33, no basis exists in facts or law to toll the running of the statute, and the claim should be dismissed as a matter of law.

C. Plaintiff cannot raise a genuine issue of material fact with respect to each and every element of her claim.

Plaintiff's fraud claim against SWN Production should also be dismissed because she cannot establish that there is a factual dispute for trial on every element of her claim. To prove fraud, Plaintiff must show: "(1) a false representation of a material fact; (2) knowledge that the representation is false, or an assertion of fact which he or she does not know to be true; (3) intent to induce action or inaction in reliance upon the representations; (4) justifiable reliance on the representation; and (5) damages suffered as a result of the reliance." *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1186 (8th Cir. 1996) (citing *Grendell v. Kiehl*, 723 S.W.2d 830, 832 (Ark. 1987)).

First, *all* of Plaintiff allegations of "misrepresentations" stand or fall with her breach of contract claim. Accordingly, and as set forth above with respect to Plaintiff's claim for breach of contract, Plaintiff cannot raise a genuine issue of material fact that SWN Production's representations were "false," let alone that SWN Production had "knowledge" of their falsity, as is required to prove fraud. *Morrison*, 91 F.3d at 1186.

Second, Plaintiff's allegations of "omission" or "failures to disclose" do not give rise to a fraud claim. A plaintiff asserting fraud based on omission must prove that the defendant had a legal duty to speak. *Wochos v. Woolverton*, 378 S.W.3d 280, 288 (Ark. Ct. App. 2010) ("[L]iability for nondisclosure may be found only in special circumstances, where there is a duty to communicate the purportedly concealed material fact."); *Axtell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 744 F. Supp. 194, 196 (E.D. Ark. 1989) ("We know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract.").

There exists no fiduciary or confidential relationship between SWN Production and Plaintiff that might give rise to a duty to speak. "Failure to speak is the equivalent of fraudulent concealment only in circumstances involving a confidential relationship . . . ." *Ward v. Worthen Bank & Trust Co.*, 681 S.W.2d 365, 359 (Ark.1984). Further, "[t]he general rule is that a contract between two parties does not give rise to a fiduciary relationship or trigger a duty to disclose material facts." *LG & E Capital Corp. v. Tenaska VI, L.P.*, 289 F.3d 1059, 1063 (8th Cir. 2002). Arkansas's prudent operator statute specifically states that a "mineral lessee under an oil and gas lease ***does not owe a fiduciary duty or a fiduciary obligation*** to the mineral lessor." Ark. Code §15-73-207

(emphasis added); *see also Mitchell Energy Corp. v. Samson Res. Co.*, 80 F.3d 976, 985 (5th Cir. 1996) (noting that, under Texas law, there exists no fiduciary relationship between lessors and lessees that would give rise to a duty to disclose).

For these reasons, Plaintiff's fraud claim against SWN Production should be dismissed as a matter of law.

IV. The Court Should Dismiss Plaintiff's DTPA Claim Against SWN Production for the Same Reasons that Her Fraud Claim Should Be Dismissed (Claim 4).

Plaintiff's Arkansas DTPA claim fails for the same reasons as her fraud claim. First, her DTPA allegations simply reference the fraud allegations, which are insufficient as a matter of law to establish fraud. Dkt. #1 (Complaint ¶70) ("As alleged above, [SWN Production] knowingly made false representations as to the nature and amounts of royalties owed."). Second, Plaintiff's DTPA claim is barred by the five-year statute of limitations as to royalty owners who first received royalty before July 25, 2009—five years before Plaintiff filed the Complaint. *See Hipp v. Vernon L. Smith & Assocs., Inc.*, 386 S.W.3d 526, 530 (Ark. Ct. App. 2011) (noting Arkansas's five-year statute of limitations for DTPA claims). Finally, Plaintiff cannot meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

Accordingly, the Court should dismiss Plaintiff's claim against SWN Production for violations of the Arkansas DTPA.

V. Plaintiff's Claim for Conversion Against All Defendants Fails as a Matter of Law (Claim 5).

As with Plaintiff's other tort claims, her conversion claim against all Defendants fails because it is based on the same allegations underlying her breach of contract claim.

As noted recently by a New Mexico federal court considering breach of contract, unjust enrichment, and tort claims brought by mineral lessors:

> The Plaintiffs may not proceed in tort or equity because of the Defendants' breach of duties that the parties' leases impose on them. The leases, as Plaintiffs allege, govern the Defendants' royalty payment obligations. The Plaintiffs may not, therefore, allege that the same actions that breach the terms of the lease constitute unjust enrichment and conversion.

Anderson Living Trust v. ConocoPhillips Co., 952 F. Supp. 2d 979, 1036 (D.N.M. 2013). Further, for the reasons stated above with respect to Plaintiff's breach of contract claim, Plaintiff is not entitled to the amounts she claims were improperly deducted from her royalties. *See Dickard v. Okla. Mgmt. Servs. for Physicians, LLC*, 2007 WL 3025020, at *2 (W.D. Ark. 2007) ("Conversion is ordinarily said to consist of the exercise of dominion over the property in violation of the rights of the owner or person ***entitled to*** possession.") (quoting *Thomas v. Westbrook*, 177 S.W.2d 931, 932 (Ark. 1944)) (emphasis added). Nor is there any evidence that defendants SWN or SES exercised dominion over any of Plaintiff's allegedly wrongfully withheld royalties.

Also, as is the case with her other tort claims, Plaintiff's conversion claim was brought more than three years since she first began receiving royalty and was allegedly injured, and therefore is barred by the three-year statute of limitations. Ark. Code §16-56-105. Further, Plaintiff cannot meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

Accordingly, Plaintiff's conversion claim against all Defendants should be dismissed.

VI. Plaintiff's Unjust Enrichment Claim Is Barred Because It Arises From the Same Subject Matter as Plaintiff's Lease with SWN Production (Claim 6).

The Court should dismiss Plaintiff's unjust enrichment claim against all defendants for the same reason that her breach of contract claim fails. But the Court should also dismiss the claim as to DeSoto, SES, and SWN because there is no dispute that Plaintiff and SWN Production are parties to an enforceable, written agreement regarding payment of royalties: the lease. Arkansas law does not permit unjust enrichment claims in these circumstances. Unjust enrichment is "quasi-contractual in nature," and "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same 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)).

It makes no difference, as Plaintiff claims in her Complaint, that "Plaintiff and the Class have no contract with DeSoto Gathering, SES or SWN." Dkt. #1 (Complaint ¶78). "The existence of a valid and enforceable written contract usually precludes recovery in quasi-contract, ***even against a third party***." *King v. Homeward Residential, Inc.*, 2014 WL 6485665, at *2 (E.D. Ark. 2014) (citing *Servewell*, 210 S.W.3d at 112) (emphasis added). Although Arkansas law recognizes some limited exceptions to the rule that a claim for unjust enrichment will not apply when there is a valid contract—including where there has been a rescission, where the contract was discharged by impossibility or frustration of purpose, or where the parties find they have made some fundamental

mistake about their contract, *Varner*, 371 F.3d at 1018 n.4—none of these exceptions applies here, nor does the Complaint allege any of them.

Even if Plaintiff's claim were not barred by Arkansas law (which it is), Plaintiff cannot demonstrate that Defendants are not entitled to the amounts she claims, as set forth above with respect to Plaintiff's breach of contract claim. Further, there is no evidence that SES nor SWN received anything of value from the alleged "wrongful acts" discussed in Plaintiff's Complaint. "To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore." *Hatchell v. Wren*, 211 S.W.3d 516, 522 (Ark. 2005).

Finally, Plaintiff's unjust enrichment claim, brought more than three years since she first began receiving royalty and was allegedly injured, is barred by the three-year statute of limitations. Ark. Code §16-56-105. Nor can Plaintiff meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

VII. Plaintiff's Claim Against All Defendants for Violation of the Arkansas Royalty Payment Statute Should Be Dismissed (Claim 7).

There exists no genuine issue of material fact with respect to Plaintiff's allegations of Defendants' violation of the Arkansas royalty payment statute, and the claim should be dismissed. First, the statute only requires payment of proceeds to "persons legally entitled thereto." Ark. Code. § 15-74-601(a). As stated above with respect to Plaintiff's breach of contract claim, Plaintiff is not entitled to the amounts she claims under the lease.

Second, regardless of whether she is entitled to the amounts or not, this claim should be dismissed against DeSoto, SES, and SWN. Neither DeSoto nor SWN is a "first

purchaser" or an "owner of the right to drill and to produce under an oil and gas lease or force pooling order," the only two types of potential defendants under the statute. *Id.* §15-74-601(b)(1) ("The payment of proceeds under subsection (a) of this section is to be made to persons entitled thereto by the first purchasers of the production.").

Plaintiff cannot bring this claim against SES either, because although SES is the first commercial purchaser of the gas, the statute exempts SES from liability. SWN Production and SES have an agreement where SES pays SWN Production, who then pays royalties to Plaintiff and other lessors in the Fayetteville Shale. This exempts SES from liability. *Id.* §15-74-601(f) (exempting the first purchaser from liability in favor of "the owner of the right to drill and to produce under an oil and gas lease or force pooling order" in situations where "the owner and purchaser have entered into arrangements in which the proceeds are paid by the purchaser to the owner, who assumes the responsibility of paying the proceeds to persons legally entitled thereto."). Plaintiff's claim against SES should also be dismissed because she failed to provide the statute's required notice to SES. *Id.* §15-74-603(b) (stating that the "first purchaser or the owner of the right to produce under an oil and gas lease or force pooling order *shall be furnished with written notice* of the failure *as a prerequisite to commencing judicial action* for the nonpayment"); *see* Ex. 47 (7/21/14 Letter from Caruth) (Plaintiff's letter providing notice only to SWN Production, DeSoto, and SWN).

Finally, Plaintiff's claim, brought more than three years since she first began receiving royalty and was allegedly injured, is barred by the three-year statute of

limitations. Ark. Code §16-56-105. Nor can Plaintiff meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

Accordingly, Plaintiff's claim against all Defendants for violations of Ark. Code §§15-74-601 to 604 should be dismissed a matter of law. At a minimum, the claim should be dismissed as to all defendants other than SWN Production.

VIII. Plaintiff's Claim for Violation of Ark. Code §15-74-708 Against DeSoto and SES Should Be Dismissed.

DeSoto and SES are entitled to summary judgment against Plaintiff's claim that they violated Ark. Code § 15-74-708. As set forth above regarding Plaintiff's breach of contract claim, no gas was "wrongfully taken" from Plaintiff's royalty interest, as required by the statute.

In addition, Plaintiff's claim, brought more than three years since she first began receiving royalty and was allegedly injured, is barred by the three-year statute of limitations. Ark. Code §16-56-105. Nor can Plaintiff meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

Finally, DeSoto is not subject to liability under the statute's plain terms. It is neither a "leaseholder or operator who contracts for the sale of gas or oil to any pipeline company," nor a "pipeline company *or other purchaser* of oil and gas who contracts with any lessee . . . ." It is undisputed that DeSoto gathers gas for SWN Production; it does not purchase any gas. Accordingly, Plaintiff's claim should be dismissed against DeSoto for this additional reason.

IX. Plaintiff's Civil Conspiracy Claim Fails Because She Cannot Show An Underlying Tort or Raise A Genuine Issue of Material Fact (Claim 9).

Finally, the Court should dismiss Plaintiff's unsupported conspiracy claim against all Defendants. Dkt. #1 (Complaint ¶¶82-85). There is no independent liability for civil conspiracy. *Dodson v. Allstate Ins. Co.*, 47 S.W.3d 866, 876 (2001) ("[A] conspiracy is not actionable in and of itself, but recovery may be had for damages caused by acts committed pursuant to the conspiracy."). Because all of Plaintiff's other claims fail as a matter of law, her conspiracy claim should be dismissed as well.

Further, Plaintiff cannot show a genuine issue of material fact concerning each and every Defendants' "agreement" to the alleged conspiracy and "specific intent to accomplish the contemplated wrong." *Faulkner v. Arkansas Children's Hosp.*, 69 S.W.3d 393, 406 (Ark. 2002); *Stouffer v. Kralicek Realty Co.*, 2005 WL 605597, at *4 (Ark. Ct. App. 2005). Her allegations on Defendants' alleged conspiracy are conclusory, confusing, and insufficient as a matter of law:

> Q. So is that what you're saying, [Defendants] entered into a conspiracy against you?
>
> A. I believe so. I believe so, yeah.
>
> Q. When did they enter into this conspiracy against you?
>
> A. I don't – you know, I guess from the beginning.
>
> Q. And when was that?
>
> A. Whenever they incorporated.

Ex. 34 (C. Smith Dep. at 23-24). But SWN Production was incorporated in 1977; SES in 1996; and DeSoto in 2004. SMF ¶53. Conspiracies admittedly may be proved with

circumstantial evidence, but conspiracy claims that point in conclusory fashion to "an express or tacit agreement," Dkt. #1 (Complaint ¶82), without any specific evidence in support, should be dismissed as a matter of law. This claim is, again, entirely dependent on the same facts and circumstances as Plaintiff's breach of contract claim and should be dismissed.

Further, Plaintiff's conspiracy claim, brought more than three years since she first began receiving royalty, is barred by the three-year statute of limitations. *Varner v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004) ("[C]ivil conspiracy . . . borrows its statute of limitations from the fraud cause of action."). Finally, Plaintiff cannot meet her burden to establish that the statute of limitations should be tolled. *See supra* at 30-33.

The Court should dismiss the conspiracy claim as a matter of law.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should grant summary judgment for Defendants.

Respectfully submitted,

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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.

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