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 — **PLAINTIFFS**

v. — **CASE NO. 4:14CV00435 BSM**

SEECO, INC. n/k/a SWN Production (Arkansas), LLC., et al. — **DEFENDANTS**

ORDER

Smith's second motion for class certification [Doc. No. 113] is granted, and defendants' motion for counter-defendant class certification [Doc. No. 116] is denied.

I. BACKGROUND

Defendant Southwestern Energy Company ("SWN") develops onshore natural gas in the Fayetteville Shale formation in Arkansas. SWN uses three of its subsidiaries to conduct the three steps making up the development process. At step one, SWN has SWN Production, LLC, f/k/a SEECO, Inc. (hereinafter referred to as "SEECO") explore and produce the natural gas reserves. At step two, DeSoto Gathering gathers, compresses, and conditions the gas from drilling sites. At step three, Southwestern Energy Services ("SES") markets the gas and sells it to third parties. SEECO, DeSoto, and SES are all affiliates of one another and sued together as co-defendants.

While SEECO contracts with land owners to drill on their land, SEECO also contracts with its two affiliates – DeSoto and SES – for the gathering, compressing, conditioning, and marketing activities (collectively referred to as "post-production activities"). SEECO's

agreements with DeSoto and SES set standards for fees and costs associated with these post-production activities. For example, DeSoto will perform its services and then bill various charges back to SEECO for its cost of service. This cost of service will also contain a certain profit margin in excess of the actual cost of service. In turn, SEECO pays that billed cost and deducts that expense from the proceeds generated from the sale of the gas. After these bills are paid, any remaining proceeds are distributed to royalty owners.

Plaintiff Connie Jean Smith, a Tennessee resident, signed an oil and gas lease with SEECO. The lease entitles her to a fraction of royalties generated from the sale of the gas from her well, but it also allows SEECO "to deduct all reasonable gathering, transportation, treatment, compression, processing, and marketing costs that are incurred by [SEECO] in connection with the sale of such gas." Compl. ¶ 37, Doc. No. 1. Her complaint is that SEECO's use of affiliates for steps two and three violates this lease provision because it allows the affiliates to realize a profit while skimming away money from royalty owners through unreasonable expenses. Thus, she seeks to recover underpaid royalties on behalf of herself and others similarly situated.

This is Smith's second attempt to certify a class. Initially, Smith sought to create a class of all royalty owners that excluded any owner who was also part of classes certified in two Arkansas state court cases, *Snow v. SEECO* and *Stewmon v. SEECO*. In *Snow*, the state court certified a class of royalty owners that were citizens of the State of Arkansas. *Snow v. SEECO, Inc.*, Case No. CV-2010-126 (Conway Cty. Cir. Ct. Ark. Oct. 14, 2014). Similarly,

in *Stewmon*, the state court certified a class of Arkansas residents, and specifically excluded any leases that contained non-Arkansas residents as parties to the lease. Smith recognized that not all royalty owners would find relief in these state class actions, and she filed this case to represent all remaining owners. Class Cert. Hr'g (Oct. 1, 2015) Tr. ("Tr.") 37:14–37:25, Doc. No. 96. Ultimately, Smith's motion was denied because it was not readily ascertainable who were members of the *Snow* and *Stewmon* classes, which became more problematic because both cases are still on appeal or are awaiting further action.

Other than Smith's case, *Snow*, and *Stewmon*, four other largely identical cases have been filed. *See Pinon Energy Co. v. SWN Prod. (Ark.), LLC, et al.*, Case No. CJ-2015-04328 (Tulsa Cnty. Ct. Okla. 2015); *Bell v. SWN Prod. (Ark.), LLC*, No. 4:15-CV-628 BSM (E.D. Ark. 2015); *O'Neal, et al. v. SWN Prod. (Ark.), LLC, et al.*, No. 4:15-CV-629 BSM (E.D. Ark. 2015); *Glover, et al. v. SWN Prod. (Ark.), LLC, et al.*, No. 23CV-15-934 (Faulkner Cty. Cir. Ct. Ark. 2015). The cases are all in different stages and allege slightly different theories. Some are stayed pending the outcome of this case and another is just beginning.

Recently, this case was reassigned. *See* Doc. No. 169. The parties were expecting trial 20 days later, which was later delayed two months to address pending motions. *See* Doc. No. 171. The parties had already filed motions in limine and motions for summary judgment, and the defendants represented that the case was "95% ready for trial" [Doc. No. 172]. Nearly all significant deadlines have passed, the parties have engaged in extensive discovery, and the case is essentially ready for trial. Thus, this case is near its conclusion.

II. LEGAL STANDARD

District courts have broad discretion in determining whether to certify a class. *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1399 (8th Cir. 1983). To obtain class certification, plaintiffs must show that the class meets the requirements of Federal Rule of Civil Procedure 23. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). To obtain class certification under Rule 23(a), plaintiffs must show that: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequate representation"). Fed. R. Civ. P. 23(a); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982).

In addition to meeting these requirements, the proposed class must fall into one of three categories provided in subsection (b). The first type of class action is one in which the prosecution of individual actions would result in "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1). The second type of class action is appropriate when the defendants have "acted or refused to act on grounds generally applicable to the whole class," making declaratory relief appropriate "with respect to the class as a whole." *Id.*, 23(b)(2). The third type of class action is preferred if questions of law or fact common to the members of the class predominate over individualized consideration,

and the class action is the superior method for adjudication. *Id.*, 23(b)(3).

III. DISCUSSION

Smith's motion for certifying her "alternative class" is granted, with Smith named representative, because she and the class members satisfy the requirements of Rule 23. The defendants' motion to certify a class is denied because it fails to have commonality.

A. Smith's Motion for Class Certification

Smith seeks to certify one of two proposed classes of royalty owners who have the same lease provisions and had deductions taken for post-production activities. The two classes are practically identical, with her preferred class excluding royalty owners with Arkansas addresses.

Smith does not explain the purpose of the Arkansas exclusion, though it is likely related to the two state court actions involving the same claims. In Smith's first class certification motion, she recognized that the state courts had initially certified classes that limited their class definitions to Arkansas citizens or residents. *See* Doc. No. 48 at 2. Except for Smith's testimony that she had hoped to represent any royalty owners who did not already have representation, Tr. at 37:8–37:13, she does not offer any other reason for excluding Arkansas addresses in this case.

The defendants do not oppose class certification, but insist that the Arkansas exclusion undercuts the purpose of a class action. *See* Resp. Pl.'s Second Mot. for Class Cert. 1, Doc. No. 125 ("The [c]ourt should deny the invitation [to certify with the exclusion] and certify

the plaintiff's "alternative" class."). Courts have recognized that the crux of the class action device is judicial economy, efficiency, and consistent judgments. *See, e.g., Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 189 (N.D. Ill. 1992); *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D. Cal. 1987). These purposes are significantly weakened by the Arkansas exclusion, which enables Arkansas citizens to file additional lawsuits when this suit could decide it for them. This reason is not just hot air; rather, it has serious practical effects that cannot be understated. Many leases have multiple royalty interest owners; the same lease for the same land requires payments to individuals both in and outside of Arkansas. *See, e.g.,* Lease Spreadsheet with Emerson Lease, Doc. No. 125 Ex. 6 (showing lease containing owners from California, Missouri, Washington, Texas, Oklahoma, and Arkansas). With the Arkansas exclusion in place, non-Arkansas residents/citizens would receive notice and judgment in this case, while others on the same lease sit wondering when their suit will make it through the proverbial pipeline. If their rights are eventually recognized in *Snow* or *Stewmon* (or some other case filed at a later date), their outcome could be very different than the relief obtained here, for reasons unrelated to SEECO's activity. This promotes the potential for inconsistent judgments and undercuts the very purpose of the class action.

The proposed class definition not containing the Arkansas exclusion is the better option. Both parties agree that a broad definition is a viable one. *See* Doc. Nos. 117, 125. Admittedly, adopting this broader definition overlaps this case's affiliate cases in *Snow* and *Stewmon*, which some scholars have cautioned against. *See generally,* Rhonda Wasserman,

Dueling Class Actions, 80 B.U.L. REV. 461 (2000) (discussing problems with overlapping cases). The unique stature of this case, however, reduces the concerns with such overlap. The state-court cases are in limbo on whether a class can be certified, whereas the parties in this case concede that certification is appropriate. This case is nearing its conclusion and the parties have already narrowed their issues. *See, e.g.,* Doc. No. 111 (granting summary judgment on issue). Importantly, a royalty owner's address has no impact on the underlying claims; it is thus a difference without distinction.

Therefore, the broader class Smith styles as her "alternative class" is the preferred definition because it fulfills the purpose of the federal class action, while also seeking to protect the rights of unnamed parties. The definition analyzed for certification purposes is as follows:

> Proposed Class
>
> All royalty owners of SEECO, Inc., now known as SWN Production (Arkansas), L.L.C. ("SEECO") (i) in wells producing natural gas from the Fayetteville Shale Field in Arkansas that was gathered by DeSoto Gathering Company, L.L.C. ("DeSoto") and purchased by Southwestern Energy Services Company ("SES"), (ii) from whose royalty payments on such gas SEECO took deductions for gathering, compression and/or treating at any time since January 1, 2006, and (iii) who were paid such royalty payments under oil and gas leases which provide for the payment of royalty as follows:
>
> a. "Lessee shall pay Lessor [stated fraction or %] 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 of 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"
>
> b. "Lessee shall have the right to use, free of cost, gas, oil and water found on said land for its operations, except water from the wells of the lessor."
>
> *Exclusions:* Excluded from the Proposed Class are: (a) overriding royalty interest owners who derive their itnerest through the oil and gas lease; (b) all governmental entities, including federal, staet and local governments and their respective agencies, departmetns, or instrumentalities; (c) Southwestern Energy Company, SEECO, DeSoto, and SES and their subsidiaries and affiliates; (d) owners of any interests and/or leases located on or within any federally creatd units, including the Ozark Highlands Unit; (e) owners of any non-operating working interest for which SEECO or its agents or representatives, as operating working interest for which SEECO or its agents or representatives, as operator, disburses royalty; (f) SEECO's counsel, their firms, and members of their firms; and (g) members of the judiciary and their staff to whom this action is assigned.

See Doc. No. 113 at 7–8.

1. Implicit Requirements

As an initial matter, Rule 23(a) has two implicit requirements for class certification: "That membership in the class definition be ascertainable by some objective standard and that the class representatives be members of the proposed class." *Wallace v. XTO Energy, Inc.*, No. 4:13-CV-00608 KGB, 2014 U.S. Dist. LEXIS 117286, at *14 (E.D. Ark. Aug. 22, 2014). To be ascertainable, some objective standard must allow for identifying members of the class, and thus, who is bound by a ruling. *Walls v. Sagamore Ins. Co.*, 274 F.R.D. 248, 257 (W.D. Ark. 2011). There cannot be subjective standards or terms that depend on the resolution of the merits, nor should there be lengthy, individualized inquiries to determine

class membership. *See* Manual for Complex Litigation (4th Ed.) § 21.222.

The proposed class definition is ascertainable because members may be identified by objective data, namely defendants' royalty records. Roger Hood, the plaintiff's lease expert, testified that he was able to determine which leases contained the quoted lease provision by reviewing the leases themselves. Tr. 57:18–61:7; *see also* Hood Report, Doc. No. 46 Ex. 5 at 3. The defendants' records provide the owners who had the post-production deductions, which can be cross-referenced against the exclusions to determine class membership. Finally, Smith is a member of the proposed class because she owns an interest in land under lease to SEECO, had post-production deductions from her royalty checks, and her lease contains the royalty provisions. Tr. 33:13–36:12.

2. Numerosity

A class may only be maintained if the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no specific number required to meet this threshold, but consideration is given to the type of case involved and the claims presented. "In general, a putative class with over forty members meets [the numerosity] requirement." *Ebert v. Gen. Mills, Inc.*, No. CIV. 13-3341, 2015 U.S. Dist. LEXIS 23736, at *9 (D. Minn. Feb. 27, 2015). Here, John Ogden, a manager at SWN, reported that there are approximately 16,900 SEECO royalty owners for SEECO's wells in Arkansas. Ogden Aff. ¶ 2, Doc. No. 46 Ex. 10. While Ogden did not specify whether these wells would directly fall under the class definition, Hood reported that over 11,000 leases contained the

lease provisions in the class definition. *See* Hood Report 3, Doc. No. 46 Ex. 5. Thus, there is sufficient evidence that the class is so numerous that joinder would be impracticable.

3. Commonality

The proposed class satisfies the commonality requirement because questions of law or fact common to the proposed class exist. A common contention must "be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011). "Commonality may be satisfied where the question[s] of law linking the class members [are] substantially related to the resolution of the litigation even though the individuals are not identically situated." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 207 (W.D. Mo. 2006) (internal quotations omitted).

The class definition satisfies commonality because Smith set forth several common questions of law and fact. *See* Compl. ¶ 54 (listing common questions tied to the complaint's allegations). Most notably, the class alleges that the defendants engaged in an "unlawful and deceptive scheme to deprive [Smith] and other royalty owners of millions of dollars in royalty payments." *Id.* ¶ 1. The essence of this scheme was such that SEECO engaged its affiliates to generate impermissible profits and charge impermissible fees. *Id.* ¶¶ 38–42. Whether this behavior meets the legal threshold for a violation is the common factual and legal question necessary to the resolution of the litigation and it is common to all class

members. That is, at a minimum, the class members must show that the defendants breached their lease agreements or engaged in fraudulent conduct. The plaintiffs have shown commonality because deciding the truth of this assertion "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451, 2551 (2011).

4. Typicality

Smith satisfies typicality because her claims are the same as those of the other class members. The requirement of typicality is satisfied when "the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561–62 (8th Cir. 1982). Here, Smith and the proposed class members are all royalty owners with the same lease provisions with SEECO. Smith's claim is that SEECO wrongfully withheld royalties owed to her under the lease, which is the same complaint as all other class members would raise. Thus, she has shown typicality because she seeks the same relief as the class.

5. Adequacy

The party moving for class certification bears the burden of proving that it will adequately protect the interests of the class. *Rattray v. Woodbury Cnty., IA*, 614 F.3d 831, 835 (8th Cir. 2010). Thus, plaintiffs must show that the class representative has common interests with all class members, and that the representatives will "vigorously prosecute" those interests via qualified counsel. *Paxton*, 688 F.2d at 563. As discussed above, Smith's

claims are typical of those of the class, and a review of the submitted résumés of class counsel indicates that counsel are well qualified to handle this case. Smith has demonstrated a fundamental knowledge of her claims and has expressed a commitment to standing up for royalty owners who need representation. Tr. 35:13–39:23. Thus, she has shown adequacy.

6. Rule 23(b)(3)

Certification is appropriate pursuant to Rule 23(b)(3) because plaintiffs can establish both predominance and superiority. "To determine whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). Such an inquiry can be satisfied if the plaintiff produces common evidence to show that common issues predominate on a "systematic, class-wide basis." *Id.* at 566, 569. Thus, the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 531 U.S. 591, 623 (1997).

Predominance is established because all claims focus on SEECO's obligation to royalty owners through lease agreements with the same provisions. Class members would rely on the same evidence – the setup of post-production companies, profit margins, and deductions – to prove the cases if they were tried individually rather than in the aggregate.

Although individual class members might have different damage amounts, individualized damages do not preclude class certification, especially in cases where a single methodology can easily determine damage amounts. *See Guyton v. Tyson Foods, Inc.*, 767

F.3d 754, 762 (8th Cir. 2014) (referencing *Concast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and holding that "individual damage calculations may vary among class members"); *Pipes v. Life Inv'rs Ins. Co. of Am.*, 254 F.R.D. 544, 552 (E.D. Ark. 2008) ("Although individualized damages inquiries do not preclude class certification in all cases, the predominance requirement is not met where damage determinations will involve variations in proof for each plaintiff."). Daniel Reineke, plaintiff's expert witness, reported that "damages can be calculated pursuant to a common methodology with common evidence, including the very databases that [d]efendants use each month to calculate royalties and deductions for each [c]lass member." Reineke Report, Doc. No. 46 Ex. 4, at 7. As Reineke described during the class certification hearing, a method exists to review improper charges and calculate how much is owed to each owner, which is the same method used in other class actions. *See* Tr. 94:17–97:25. Although class members may have different amounts, a methodology exists that results in class-wide determination. Should class-wide damages ultimately prove unworkable, a damages class can be decertified and damages questions stayed for determination after the liability phase concludes. *See* Fed. R. Civ. P. 23(c)(4).

Additionally, the plaintiffs must prove that a class action is the superior method of adjudication. Rule 23(b)(3) provides four factors to assess both predominance and superiority: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability

of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Certainly, this one action brought on the behalf of thousands of royalty owners is far superior than each owner bringing his or her own case in state or federal court. This is supported by the filings of several related cases – all class actions themselves – seeking to vindicate royalty owners' rights. As demonstrated by the various experts already employed to prosecute this action, individual litigants would be required to hire expert witness to advance their cases. Aggregating the class members into this one class action saves both federal and state courts time and expense and it limits individual royalty owners' exposure to legal fees and expert witness charges. In one action, the royalty owners' remedies can be quickly and efficiently decided. Accordingly, plaintiffs have satisfied the requirements of Rule 23(b)(3).

Smith has demonstrated a valid class pursuant to Rule 23. Therefore, her motion to certify a class on her claims is granted.

B. Defendant's Counter-Defendant Class

The defendants propose a broad counter-defendant class defined as follows:

Proposed Counter-Defendant Class

> All persons and entities who are, or were, royalty owners in wells producing natural gas from the Fayetteville Shale Field in Arkansas from whose royalty payments SWN Production (formerly SEECO, Inc.) deducted since January 1, 2006, or is now deducting, gathering, compression, or treating costs.

Doc. No. 117 at 3. The definition has a number of exclusions, which are essentially the

same exclusions applied to the plaintiffs' class. *Id.* at 4. The plaintiffs oppose this definition because it requests a broad, non-cohesive class that is not limited to the specific lease provisions at the heart of plaintiffs' case against the defendants, which fails to demonstrate commonality, typicality, and adequacy. Pl.'s Resp. Opp'n SEECO's Mot. Cert. Counter-Def. Class 2, Doc. No. 128.

The defendants' motion is denied because Smith's claim will not be typical of the class. As previously stated, typicality requires the representative to have the same claims or defenses of the class that are based on the same legal theory. *Paxton*, 688 F.2d at 561–62. Here, the defendants seek to certify a class to declare that its scheme is appropriate for all royalty owners with wells in Arkansas, which is a common theory in spirit, but requires analysis of the contractual relationships between the defendants and individual class members. As Smith point out, SEECO's leases contain a host of different royalty provisions. *See* Doc. No. 128 at 5 (citing to records describing different lease provisions). This is problematic because contract interpretation requires analyzing the words the parties have used to outline their obligations. The plaintiffs' leases all contain the same royalty provisions, which will determine whether SEECO's activities violated the contracts *as to them*. The defendants' class contains no such restriction, and lease provisions in other agreements may change the analysis as to SEECO's activities.

Therefore, defendants' motion for certification of a counter-defendant class is denied.

IV. CONCLUSION

For the reasons set forth above, defendants' motion for a certification of a counter-defendant class [Doc. No. 116] is denied, and plaintiffs' second motion for class certification [Doc. No. 113] is granted. Pursuant to Rule 23(c), the following plaintiffs' class is certified for the claims alleged in the complaint:

> All royalty owners of SEECO, Inc., now known as SWN Production (Arkansas), L.L.C. ("SEECO") (i) in wells producing natural gas from the Fayetteville Shale Field in Arkansas that was gathered by DeSoto Gathering Company, L.L.C. ("DeSoto") and purchased by Southwestern Energy Services Company ("SES"), (ii) from whose royalty payments on such gas SEECO took deductions for gathering, compression and/or treating at any time since January 1, 2006, and (iii) who were paid such royalty payments under oil and gas leases which provide for the payment of royalty as follows:
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> a. "Lessee shall pay Lessor [stated fraction or %] 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 of 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"
>
> b. "Lessee shall have the right to use, free of cost, gas, oil and water found on said land for its operations, except water from the wells of the lessor."
>
> *Exclusions:* Excluded from the Proposed Class are: (a) overriding royalty interest owners who derive their interest through the oil and gas lease; (b) all governmental entities, including federal, state and local governments and their respective agencies, departments, or instrumentalities; (c) Southwestern Energy Company, SEECO, DeSoto, and SES and their subsidiaries and affiliates; (d) owners of any interests and/or leases located on or within any federally creatd units, including the Ozark Highlands Unit; (e) owners of any non-operating working interest for which SEECO or its agents or representatives, as operating working interest for which SEECO or its agents

or representatives, as operator, disburses royalty; (f) SEECO's counsel, their firms, and members of their firms; and (g) members of the judiciary and their staff to whom this action is assigned.

Smith is named class representative, and the lawyers representing her are appointed class counsel. *See* Fed. R. Civ. P. 23(g). Plaintiffs are directed to submit a proposed notice plan within thirty days of this order. The current final scheduling order [Doc. No. 174] is vacated. A new scheduling order will issue.

IT IS SO ORDERED this 11th day of April 2016.

Brian S Miller

UNITED STATES DISTRICT JUDGE