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. 4:14-CV-00435 BSM**

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

ORDER

Defendants' emergency motion to continue trial and stay the case [Doc. No. 342] is denied, and the class's motion to continue and for sanctions [Doc. No. 372] is denied with respect to the continuance. A decision on the class's request for sanctions and other relief will be held in abeyance pending defendants' response.

This case was filed in federal court on July 25, 2014. Doc. No. 1. At first, class representative Connie Jean Smith, a non-Arkansas resident, asked to certify classes of royalty interest owners that excluded Arkansas citizens/residents. Presumably, she excluded these royalty owners because they were already represented in state court class actions. Class Cert. Hr'g (Oct. 1, 2015) Tr. 37:14-37:25, Doc. No. 96; Doc. No. 45 at 1–2 (first motion to certify a class excluding state court class action class members); Doc. No. 113 at 2 (second motion to certify a class excluding owners with Arkansas addresses). In response, the defendants opposed the exclusions, most notably arguing "[t]his case, which Plaintiff Smith commenced in federal court, is the proper vehicle–indeed, the *only* forum–for obtaining that prompt, once-and-for-all, judicial resolution." Doc. No. 117 at 2 (emphasis in original). The

defendants got their wish: a single, nationwide class action, in federal court, to decide "once-and-for-all" the claims presented.

The order certifying this federal class action noted the concerns with certifying a broad class overlapping other proceedings. *See, e.g.,* Rhonda Wasserman, *Article: Dueling Class Actions*, 80 B.U.L. Rev. 461 (2000); Geoffrey P. Miller, *Symposium: Overlapping Class Actions*, 71 N.Y.U.L. Rev. 514 (1996). Nevertheless, at the time certification occurred, the state court cases were in limbo; the federal case was further along and close to resolution; and legal issues had already been narrowed. *See* Doc. No. 186 (order certifying class). Of course, the questionable chain of events over the past several days added complexity to what was actually a very simple and straight-forward case.

The defendants' motion for a continuance and for a stay ultimately asks that the federal case (*i.e.*, the "only" forum they had to decide these claims "once-and-for-all") be held in abeyance because the state court might approve a settlement. Should final approval not occur, the delay would have perpetuated the same concerns the defendants previously expressed. *See, e.g.,* Doc. No. 106 at 1 (arguing Smith's request for continuances were "designed to delay adjudication of [Smith's] own (and absent class members') rights"); Doc. No. 212 at 2 (staying the case "will cause real and significant harm to the parties and the public interest"); Doc. No. 241 at 3 ("This Court is trying to keep the case on track for an efficient, timely, and fair resolution for both the class and defendants[.]"). In keeping with defendants' theme that federal court was the best forum for this dispute, the defendants also

commented that the plaintiff's delays would result in the federal case playing "second-fiddle to the state-court cases." Doc. No. 106 at 1-2. The irony that defendants now want the federal case to play second-fiddle is duly noted.

The chain of events over the past several days is indeed troubling. As other federal courts have noted, retreating to state court to negotiate a settlement without notice to the federal parties creates "havoc" and represents an "end-run around [the court's] supervisory authority." *In re Federal Skywalk Cases*, 97 F.R.D. 370 (W.D. Mo. 1983), *reconsideration granted and contempt order vacated* (Jan. 13, 1983). Other similar situations have occurred elsewhere with courts taking a strong stance to protect the rights of those involved. *See e.g.*, *Romstadt v. Apple Computer, Inc.*, 948 F Supp. 701, 708 (N.D. Ohio 1996) (ruling that continuing forward with a state court settlement while a federal case was pending would not have full faith and credit after noting "[the defendant] was able to pick and choose among its adversaries who were, at least in theory, representing the same client"); *Breswick & Co. v. Briggs*, 135 F. Supp. 397 (S.D.N.Y. 1955) (barring use of *res judicata* because the defendants "are not in equity entitled to utilize a judgment based on a settlement negotiated behind the backs of the active plaintiffs here").

The defendants' request to postpone trial until after the state court can provide final approval must be met with extreme skepticism. Although there are certainly strong policy arguments favoring amicable settlements, *see Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("[A] strong public policy favors agreements, and courts should

approach them with a presumption in their favor."), there are also strong policy reasons for not deferring to state courts simply out of convenience. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("[A]s between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[.]"). The transcripts from state court proceedings acknowledge issues with the *Snow* case moving forward under the circumstances. *See, e.g.,* State Tr. 68:6-68:25, Doc. No. 373-8 ("And so we think the only members of that potential class that [the *Snow* lawyers] in this courtroom today could establish an attorney-client relationship with are those who opted out of the federal class and who did not accept the attorney-client relationship they had with the other lawyers who were named by the federal court."). Nevertheless, after the defendants' motions for summary judgment were largely denied in federal court, the defendants worked with *Snow* counsel to negotiate a settlement for a class much larger than originally certified – a class without the Arkansas citizenship exclusion.

Under the circumstances, the defendants have clearly worked the system in both courts to obtain the best result for themselves. There is no need to question the state court's judgment, albeit there are certainly concerns after considering whether due process was afforded considering the quick turnaround time for the final fairness hearing. Regardless, the state court judge preliminarily approved settlement, but a trial on the merits here could very well reach a conclusion before that final fairness hearing. The defendants invited a

"race to judgment" by advocating for overlapping class actions, and there is nothing standing in the way of allowing that race to continue as has been the case all along.

As it stands now, there has been no order deciding any claims for any class members, and thus nothing interferes with a federal court, with jurisdiction, from moving forward with the case in front of it. *See Colorado River Water Conservation Dist.*, 424 U.S. at 813 ("Abstention from the exercise of federal jurisdiction is the exception, not the rule."). Contrary to defendants' position, the practical effect of staying the case does not mean that the case will "go away." Rather, the case will morph into one representing Smith, who will presumably opt out of the state court settlement, and all others who opted out. There is certainly a need to avoid piecemeal litigation, *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942), and delaying trial will only delay the inevitable: a trial with some royalty interest owners in a federal court in Little Rock. Rather than delay the inevitable, a federal trial must move forward. Should other events occur between now and the conclusion of trial warranting action, those events will be considered when they occur.

Finally, the class's motion for sanctions and other relief [Doc. No. 372] is held in abeyance pending the defendants' response. There are very serious concerns about defendants' behavior here, and the settlement terms and chain of events leading to the state court judge's preliminary approval must be thoroughly briefed and analyzed. As has been expressed by other courts, the integrity of the defendants' actions here turn on the facts. *See, e.g., Romstadt*, 948 F. Supp. At 705-06 (noting concern with not informing state court judge

of events in other cases). For example, in March 2017, there were concerns expressed in *Snow* that there had been no discovery on the merits, State Tr. 91:22-92:23, 92:2 (describing the amount of information *Snow* counsel must digest as "a huge amount of information") and expert reports had not yet been prepared, *id.* 92:12-92:15; yet, *Snow* counsel was able to attend what appears to be a one-day mediation in May 2017 and agree to a fair and reasonable settlement for thousands of royalty owners that he did not yet represent (*i.e.*, the non-Arkansas citizens). The defendants also criticized sending any notice at all in *Snow* because it would interfere with *Smith*, either on constitutional grounds or because notice would be misleading or otherwise defective. *See* Doc. No. 373-7. Nonetheless, with a settlement in hand, the defendants were apparently willing to dispense all of these (and many others) concerns and push forward a settlement in record-setting time. *Compare, e.g.,* Doc. No. 373-7 at 33 (defendants arguing a sixty-day opt out period is required), *with* Doc. No. 373-13 at 25 (jointly moving for only a thirty-day opt out period for settlement purposes).

Under the circumstances, continuing trial is not warranted. Accordingly, defendants' motion to continue trial [Doc. No. 342] and the class's request for a continuance [Doc. No. 372] is denied. The remaining portions of the class's motion for sanctions and other relief [Doc. No. 372] remains pending.

IT IS THEREFORE ORDERED that:

1. The motion to continue trial and stay the case [Doc. No. 342] is denied.

2. Defendants are directed to file notice to the Arkansas state court in *Snow* with

copies of this order, the order denying the temporary restraining order [Doc. No. 370], and the order setting trial on June 5, 2017 [Doc. No. 289] attached. Defendants must file a certified copy of that filing to the docket in this case within three days of the date of this order.

3. The parties are directed to obtain a copy of the transcript, if available, of the hearing where the Arkansas state court judge preliminarily approved settlement and submit it to chambers before June 5, 2017.

4. The class's motion for sanctions and other relief [Doc. No. 372] is held in abeyance pending defendants' response. If a hearing is necessary, one will be set by separate notice.

5. Trial will begin on June 5, 2017, as scheduled.

DATED this 23rd day of May 2017.

Brian S Miller

UNITED STATES DISTRICT JUDGE