

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

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

**AMENDED ANSWER AND COUNTERCLAIM  
OF SWN PRODUCTION (ARKANSAS) LLC,  
(f/k/a SEECO, INC.)**

SWN Production (Arkansas) LLC (f/k/a SEECO, Inc.) (hereinafter “SWN Production”)<sup>1</sup> files the following Amended Answer and Counterclaim to Plaintiff Connie Jean Smith’s Complaint—Class Action (hereinafter “Complaint”):

**AMENDED ANSWER**

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint does not plead allegations of fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

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<sup>1</sup> SWN Production (Arkansas), Inc., has been converted into a Texas limited liability company.

THIRD DEFENSE

Production answers the specific allegations in the Complaint as follows:

1. SWN Production denies all allegations in Paragraph 1 of the Complaint.
2. SWN Production admits the allegations in Paragraph 2 of the Complaint.
3. SWN Production admits the allegations in Paragraph 3 of the Complaint.
4. SWN Production admits the allegations in Paragraph 4 of the Complaint.
5. SWN Production admits the allegations in Paragraph 5 of the Complaint.
6. SWN Production admits the allegations in the first and third sentences of Paragraph 6 of the Complaint. SWN Production denies the allegations in the second sentence of said Paragraph 6.
7. SWN Production is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint.
8. SWN Production is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint.
9. SWN Production denies the allegations in Paragraph 9 of the Complaint.
10. SWN Production admits the allegations in Paragraph 10 of the Complaint.
11. SWN Production admits only the allegations made as to SWN Production in Paragraph 11 of the Complaint. SWN Production is without knowledge or information sufficient to form a belief as to truth of those allegations against the other Defendants.
12. SWN Production admits only the allegations made as to SWN Production in Paragraph 12 of the Complaint. SWN Production is without knowledge or information sufficient to form a belief as to truth of those allegations against the other Defendants.

13. SWN Production is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentence of Paragraph 13 of the Complaint. In answer to the allegations in the third sentence, SWN Production denies the allegation that it operates exclusively in Arkansas, but admits the remainder of the third sentence.

14. In answer to the allegations in the first sentence of Paragraph 14 of the Complaint, SWN Production admits only that it finds and brings natural gas to the surface through exploration and production activities in the Fayetteville Shale under oil and gas leases and the Orders of the Arkansas Oil and Gas Commission. Said oil and gas leases and Orders speak for themselves. SWN Production denies the remaining allegations in said first sentence. In answer to the allegations in the second sentence of Paragraph 14, SWN Production admits only that it acts as both an operator and non-operating working interest owner, and denies the remaining allegations in said second sentence.

15. SWN Production admits the allegations in Paragraph 15 of the Complaint.

16. SWN Production admits the allegations in Paragraph 16 of the Complaint.

17. SWN Production admits the allegations in Paragraph 17 of the Complaint.

18. SWN Production denies all allegations in Paragraph 18 of the Complaint.

19. SWN Production denies all allegations in Paragraph 19 of the Complaint.

20. SWN Production admits the allegations in the first sentence of Paragraph 20 of the Complaint, and denies the allegations in the second sentence of said paragraph.

21. In answer to the allegations in the first sentence of Paragraph 21, SWN Production admits that there exists a contract between SWN Production and DeSoto that is titled the Amended and Restated Dedicated Field Services Agreement, that said Agreement was entered into in 2006 and has been amended. SWN Production states that the Agreement speaks

for itself. Except as said Agreement expressly states, SWN Production denies all remaining allegations in Paragraph 21 of the Complaint.

22. SWN Production is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 of the Complaint.

23. In answer to the allegations in the first sentence of Paragraph 23, SWN Production admits only that there exists a contract between SWN Production and SES that is titled Base Contract for the Sale and Purchase of Natural Gas, dated in 2006. SWN Production states that the Base Contract speaks for itself. Except as said Base Contract expressly states, SWN Production denies all remaining allegations in said first sentence. SWN Production is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 23.

24. SWN Production denies all allegations in Paragraph 24 of the Complaint.

25. In answer to the allegations in Paragraph 25 of the Complaint, SWN Production states that its Amended and Restated Field Services Agreement, as amended, with DeSoto speaks for itself. Except as that Agreement expressly states, SWN Production denies all remaining allegations in Paragraph 25.

26. SWN Production denies all allegations in Paragraph 26 of the Complaint.

27. In answer to the allegations in the first and second sentences of Paragraph 27 of the Complaint, SWN Production states that its Amended and Restated Field Services Agreement, as amended, with DeSoto speaks for itself. Except as that Agreement expressly so states, SWN Production denies all remaining allegations in the first and second sentences. SWN Production denies the allegations in the third and fourth sentences of Paragraph 27.

28. In answer to the allegations in the first sentence of Paragraph 28 of the Complaint, SWN Production states that its Amended and Restated Field Services Agreement, as amended, with DeSoto speaks for itself. Except as that Agreement expressly so states, SWN Production denies all remaining allegations in the first sentence. In answer to the allegations in the second sentence of Paragraph 28, SWN Production denies that “blending” is accurately described, but admits the remaining allegations.

29. SWN Production denies all allegations in Paragraph 29 of the Complaint.

30. SWN Production denies all allegations in Paragraph 30 of the Complaint.

31. In answer to the allegations in Paragraph 31, SWN Production admits that a deduction is shown for royalty owners whose leases permit it for Compression, but denies all allegations about that deduction in Paragraph 31 are accurate.

32. SWN Production denies all allegations in Paragraph 32 of the Complaint.

33. SWN Production denies all allegations in Paragraph 33 of the Complaint.

34. SWN Production denies all allegations in Paragraph 34 of the Complaint.

35. SWN Production denies all allegations in Paragraph 35 of the Complaint.

36. SWN Production denies all allegations in Paragraph 36 of the Complaint.

37. In answer to the allegations in Paragraph 37 of the Complaint, SWN Production states that Plaintiff’s oil and gas lease speaks for itself, and except as that lease expressly so states, the allegations in Paragraph 37 are denied.

38. SWN Production denies all allegations in Paragraph 38 of the Complaint.

39. SWN Production denies all allegations in Paragraph 39 of the Complaint.

40. SWN Production denies all allegations in Paragraph 40 of the Complaint.

41. SWN Production denies all allegations in Paragraph 41 of the Complaint.

42. SWN Production denies all allegations in Paragraph 42 of the Complaint.

43. SWN Production denies all allegations in Paragraph 43 of the Complaint, including all allegations in subparts (a) through (g) of said Paragraph 43.

44. SWN Production denies all allegations in Paragraph 44 of the Complaint.

45. SWN Production denies all allegations in Paragraph 45 of the Complaint.

46. SWN Production denies all allegations in Paragraph 46 of the Complaint.

47. SWN Production denies all allegations in Paragraph 47 of the Complaint.

Without limiting the generality of the foregoing, Plaintiff has not complied with the requirements of Paragraph 11 of her Oil and Gas Lease.

48. SWN Production denies all allegations in Paragraph 48 of the Complaint.

49. SWN Production denies all allegations in Paragraph 49 of the Complaint.

50. SWN Production denies all allegations in Paragraph 50 of the Complaint.

51. SWN Production denies all allegations in Paragraph 51 of the Complaint.

52. SWN Production denies all allegations in Paragraph 52 of the Complaint.

53. SWN Production denies all allegations in Paragraph 53 of the Complaint.

54. SWN Production denies all allegations in Paragraph 54 of the Complaint, including any allegations in subparts (a) through (n) of said Paragraph 54.

55. SWN Production denies all allegations in Paragraph 55 of the Complaint.

56. SWN Production denies all allegations in Paragraph 56 of the Complaint, including all allegations in subparts (a) through (e) of said Paragraph 56.

57. In answer to the allegations in Paragraph 57, SWN Production admits only that Plaintiff Connie Jean Smith has a direct contractual relationship with SWN Production. SWN

Production is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 57.

58. SWN Production denies all allegations in Paragraph 58 of the Complaint.
59. SWN Production denies all allegations in Paragraph 59 of the Complaint.
60. SWN Production denies all allegations in Paragraph 60 of the Complaint.
61. SWN Production denies all allegations in Paragraph 61 of the Complaint.
62. SWN Production denies all allegations in Paragraph 62 of the Complaint.
63. SWN Production denies all allegations in Paragraph 63 of the Complaint.
64. SWN Production denies all allegations in Paragraph 64 of the Complaint.
65. SWN Production denies all allegations in Paragraph 65 of the Complaint.
66. SWN Production denies all allegations in Paragraph 66 of the Complaint.
67. SWN Production denies all allegations in Paragraph 67 of the Complaint.
68. SWN Production denies all allegations in Paragraph 68 of the Complaint.
69. SWN Production denies all allegations in Paragraph 69 of the Complaint.
70. SWN Production denies all allegations in Paragraph 70 of the Complaint.
71. SWN Production denies all allegations in Paragraph 71 of the Complaint.
72. SWN Production denies all allegations in Paragraph 72 of the Complaint.
73. SWN Production denies all allegations in Paragraph 73 of the Complaint.
74. SWN Production denies all allegations in Paragraph 74 of the Complaint.
75. SWN Production denies all allegations in Paragraph 75 of the Complaint.
76. SWN Production denies all allegations in Paragraph 76 of the Complaint.
77. SWN Production denies all allegations in Paragraph 77 of the Complaint.

78. SWN Production admits the allegations in the first sentence of Paragraph 78 of the Complaint. SWN Production denies all remaining allegations in said Paragraph 78.

79. SWN Production denies all allegations in Paragraph 79 of the Complaint.

80. SWN Production denies all allegations in Paragraph 80 of the Complaint.

81. SWN Production denies all allegations in Paragraph 81 of the Complaint.

82. SWN Production denies all allegations in Paragraph 82 of the Complaint.

83. SWN Production denies all allegations in Paragraph 83 of the Complaint.

84. SWN Production denies all allegations in Paragraph 84 of the Complaint.

85. SWN Production denies all allegations in Paragraph 85 of the Complaint.

86. No answer is required to Paragraph 86 of the Complaint. SWN Production denies that a jury trial may be had on Plaintiff's alleged claims for equitable relief.

87. SWN Production denies that Plaintiff is entitled to any of the relief Plaintiff seeks in Section VIII, page 22, of the Complaint.

88. SWN Production denies all allegations in the Complaint that are not expressly admitted above.

#### FOURTH DEFENSE

Plaintiff's claims (and those of any alleged class) are barred in whole or part by statutes of limitations.

#### FIFTH DEFENSE

Plaintiff's equitable claims are barred by laches.

#### SIXTH DEFENSE

Plaintiff's claims are barred by estoppel.



SEVENTH DEFENSE

Plaintiff's claims (and those of any alleged class) are barred by the express terms of oil and gas leases, and other instruments or agreements by which they are bound.

EIGHTH DEFENSE

Plaintiff has not pleaded alleged items of special damages with specificity, as required by Fed. R. Civ. P. 9(g), and thus cannot recover any such alleged damages.

NINTH DEFENSE

Plaintiff's claims are barred in whole or part by the economic loss rule.

TENTH DEFENSE

Any award of punitive or exemplary damages or alleged statutory penalties in this action would violate the Due Process Clauses of the United States and Arkansas Constitutions.

ELEVENTH DEFENSE

Plaintiff has failed to join necessary or indispensable parties.

TWELFTH DEFENSE

If this action were allowed to proceed as a class action as alleged, SWN Production will be deprived of its rights under the respective Due Process clauses of the United States and Arkansas Constitutions.

THIRTEENTH DEFENSE

Plaintiff has failed to properly give notice of any alleged breach of SWN Production's obligations under the lease at issue in this lawsuit.

FOURTEENTH DEFENSE

SWN Production pleads comparative fault to the extent Plaintiff seeks recovery on the basis of tort.

FIFTEENTH DEFENSE

SWN Production pleads the defenses of offset and recoupment.

WHEREFORE, PREMISES CONSIDERED, Defendant SWN Production (Arkansas), Inc. (f/k/a SEECO, Inc.) prays that the relief requested in Plaintiff Connie Jean Smith's Complaint—Class Action will be denied in all respects; that Plaintiff take nothing by this action; that no class will be certified; and that said Defendant be awarded its costs and a reasonable attorneys' fee to the extent the Court determines the same are recoverable in this proceeding. Said Defendant also prays that the Court will grant it all other and further relief to which it may be entitled.

**COUNTERCLAIM BY DEFENDANT  
SWN PRODUCTION (ARKANSAS), LLC.**

1. Defendant SWN Production (Arkansas), LLC (formerly known as "SEECO, Inc." and referred to in this Counterclaim as "SWN Production"), acting pursuant to Fed. R. Civ. P. 13, files the following Counterclaim against Plaintiff Connie Jean Smith ("Smith") individually. Conditionally, as described below, SWN Production also files this Counterclaim against Smith as the representative of the class of SWN Production's royalty owners in wells in the Fayetteville Shale Field in Arkansas from whose royalty payments SWN Production has deducted since January 1, 2006, or is now deducting, post-production gathering, compression, or treating costs.

2. This Counterclaim is within this Court's jurisdiction for the same reasons alleged in Paragraph 10 of Smith's "Complaint—Class Action" filed in this action ("Complaint"). Smith chose this Court as the forum and venue for this action.

3. As set forth in its Amended Answer on file in this action, SWN Production has denied and continues to deny all of the allegations of wrongdoing that Smith alleges in her Complaint.

4. In her Complaint, Smith sues SWN Production in her individual capacity and also purports to sue as the sole proposed representative of a putative class. In her Complaint, Smith defined her proposed class differently from the way she now defines the proposed class in her Motion for Class Certification, Appointment of Class Representative, and Appointment in Class Counsel (Doc. No. 45) (“Certification Motion”). The most recent iteration of Smith’s class definition, which is in her Certification Motion, defines her would-be class as:

“All persons or entities who, from or after January 1, 2006, are or were royalty owners in wells producing gas from the Fayetteville Shale that was gathered by DeSoto Gathering Company, L.L.C., and purchased by Southwestern Energy Services Company where SEECO, Inc., n/k/a SWN Production (Arkansas), Inc., is or was the operator and/or working interest owner/lessee under oil and gas leases that provide for the payment of royalty as follows:

- a. 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 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.”

5. In the next part of the proposed class definition in Smith’s Certification Motion, after the heading, “*Exclusions,*” Smith requests this Court to exclude from her class “(a) members of the class certified in *Eldridge [sic] Snow v. SEECO, Inc.*, Circuit Court of Conway County, Arkansas, Case No. CV-2010-126; and (b) members of the class certified in *Sarah Stewmon v. SEECO, Inc., et al.*, Circuit Court of St. Francis County, Arkansas, Case No. 62CV-13-141-2.” (Doc. No. 45, p. 2). These are more complicated proposed exclusions from her class than the exclusion Smith proposed in her Complaint. There, she proposed to exclude all of SWN Production’s royalty owners who are citizens of the State of Arkansas. It appears,

nevertheless, that by the more complicated exclusions she includes in her Certification Motion, Smith wants to accomplish the same end. She says that in her Memorandum of Law in Support of Plaintiff's Motion for Class Certification ("Class Certification Memorandum"), although she is not completely accurate in what she says. In her Class Certification Memorandum, Smith tells this Court that the two Arkansas state cases "limited their class definition to Arkansas citizens." (Doc. No. 48, p. 2). Although Smith's statement is not correct for the *Stewmon* case, which as certified, limits its class to "residents," not "citizens," of Arkansas, it appears that however clumsily Smith is trying to express the "exclusions" in her Certification Motion, she still is trying to limit her class in this case to SWN Production's royalty owners who are citizens of states other than the State of Arkansas.

6. Nowhere in Smith's Complaint, Certification Motion, or Certification Memorandum does she allege or cite any facts that could show that SWN Production's royalty owners who are not citizens of Arkansas are situated or treated differently in any respect from SWN Production's royalty owners who are citizens of Arkansas. Indeed most of the paragraphs in Smith's Complaint and her Certification Memorandum purport to describe operations in the Fayetteville Shale and how SWN Production deducts post-production costs from royalties paid to Fayetteville Shale royalty owners whose leases expressly authorize those deductions, without drawing distinctions in any alleged facts between royalty owners who are not citizens of the State of Arkansas, and those who are. Indeed, Smith specifically argues in her Certification Memorandum that there should be no distinction between Arkansas citizens and non-citizens by telling this Court it should certify a class in her case in order to prevent what Smith says would be an "unfair and unjust outcome" in which SWN Production's royalty owners *not* citizens of

Arkansas would be treated differently from those royalty owners who are citizens of Arkansas. (Certification Memorandum, Doc. No. 48 p. 2).

7. Smith does not allege, for example, that SWN Production has entered into forms of oil and gas leases with lessors who are not citizens of the State of Arkansas, whom she seeks to represent, that are different from leases it has entered into with lessors who are citizens of the State of Arkansas, whom Smith seeks to exclude from her class. Although SWN Production holds several different forms of leases, it has not drawn, and does not draw, distinctions in lease forms between lessors who are not citizens of the State of Arkansas and those who are Arkansas citizens.

8. Smith correctly alleges in her Complaint that her oil and gas lease with SWN Production contains the two provisions that she quotes in the proposed class definition contained in her Certification Motion. (*See* Paragraph 4, above). Even though Smith's Complaint purports to allege several different causes of action, her claims turn on whether these two provisions give SWN Production the right to deduct the post-production costs it has deducted from her royalties.

9. Although not all of SWN Production's oil and gas leases contain the two provisions quoted in the class definition in Smith's Certification Motion, many do. (In some of SWN Production's oil and gas leases, the quoted provisions may have been modified or amended by other lease provisions.) The question whether an individual SWN Production royalty owner is a citizen of the State of Arkansas or not cannot be determined from records that SWN Production maintains. SWN Production knows the addresses to which it has been instructed to send checks and the banks to which it has been instructed to send electronic transfers, but those addresses do not establish "citizenship." SWN Production no doubt has leases containing the

quoted provisions with lessors who are not citizens of the State of Arkansas, as well as leases containing the same provisions with lessors who are Arkansas citizens.

10. Indeed, it is likely that some of the royalty owners under individual leases held by SWN Production are not citizens of the State of Arkansas, while other royalty owners under *the same lease* are citizens of the State of Arkansas. SWN Production knows there are royalty owners with addresses inside and outside of Arkansas claiming under many of its leases. Consequently, Smith's proposed class definition will result in some royalty owners under an individual lease being in her putative class, but other royalty owners under the same lease not in her putative class. Consequently, the artificial distinction Smith seeks to have the Court draw in her class—limiting it to SWN Production's royalty owners in the Fayetteville Shale Field who are not citizens of Arkansas—creates the potential for inconsistent interpretations of the very same oil and gas lease, inconsistent obligations for SWN Production in calculating royalty to different royalty owners under the same lease, as well as obligations that may change as individual royalty owners change their domiciles to, or out of, the State of Arkansas.

11. Smith makes a number of allegations in her Complaint about the proper interpretation of the two sentences that she includes in the proposed class definition in her Certification Motion. (See Paragraph 4, above). SWN Production disagrees with each of Smith's allegations. For examples, Smith appears to contend:

A. That despite the plain language of the first provision quoted in Smith's proposed class definition in Paragraph 4, above, SWN Production may not deduct gathering, treatment, and compression costs from Smith's royalties (or royalties paid to other putative class members who are not "citizens of the State of Arkansas") because defendant DeSoto Gathering Company, L.L.C., ("DeSoto"), which (as Smith alleges in Paragraph 20 of her Complaint) provides those

post-production services, is a corporate affiliate of SWN Production. As Smith alleges, both SWN Production and DeSoto are wholly-owned subsidiaries of Defendant Southwestern Energy Company. (Complaint ¶ 3). Smith asserts that because SWN Production pays DeSoto for gathering, treating, and compression services each month by means of inter-corporate transfers of funds, rather than a check, wire transfer, or cash, SWN Production does not actually “incur” these costs given the meaning Smith seeks to have this Court give the word “incurred” in the provision quoted from her lease.

B. That in the alternative, any part of the price for gathering, treating, or compression that SWN Production pays DeSoto that constitutes a rate of return, profit, or payment for the cost of capital for DeSoto is not a cost “incurred” within the meaning of the sentence quoted in the lease provision lettered (a) in Paragraph 4, above, or else is not “reasonable,” and thus cannot be deducted from Smith’s royalties (or royalties paid to the other putative class members who are not citizens of the State of Arkansas).

C. That even though the requirement that post-production costs deducted from royalties must be “reasonable” is imposed by individual oil and gas leases expressly covering different and widely-dispersed tracts of land, the Court must ignore all differences such as the distance and terrain over which gas gathering must occur, the dates wells were connected to DeSoto’s gathering system, the specific compression required, and the differing volumes of production from wells in order to ascertain the “reasonableness” of the gathering charge on a field wide, or “postage stamp” basis, as alleged in Paragraph 25 of Smith’s Complaint.

D. That even though Smith’s oil and gas lease states that all reasonable costs incurred by SWN Production for “treating” may be deducted when calculating Smith’s royalty, treating costs may not be deducted unless DeSoto has employed amine units to condition gas

from Smith's wells. Specifically, Smith alleges that the "blending" of gas to meet pipeline quality specifications is not "treatment" within the meaning of the provision quoted in the lease provision lettered (a) in Paragraph 4, above.

E. That even though Smith's lease states that SWN Production may deduct post-production costs for "compression," and even though gas produced from wells on Smith's lease requires substantial compression before it can be sold, SWN Production is not entitled to deduct compression costs from Smith's royalty and is required to pay royalty on gas used for compression, because DeSoto, instead of SWN Production, provides the necessary compression.

F. That even though SWN Production calculates Smith's royalty based on the volumes produced from wells in the unit that contains her lease, it must deduct post-production costs only on the volumes of that gas that are sold.

G. That SWN Production is required by law to provide additional information on its royalty check stubs that such statements do not provide and the information SWN Production provides to its royalty owners on check stubs is misleading.

12. Smith's claims create actual controversies between Smith and SWN Production concerning SWN Production's rights and legal relations under its oil and gas lease with Smith. Smith alleges that the same actual controversies regarding proper interpretation of oil and gas leases exist between SWN Production and SWN Production's Fayetteville Shale Field royalty owners described by her proffered class definition of royalty owners, but then she seeks to exclude from that class all royalty owners who are citizens of the State of Arkansas.

13. There is, nevertheless, no distinction in the actual controversies Smith's claims create between SWN Production and its Fayetteville Shale Field royalty owners depending on whether they are, or are not, citizens of the State of Arkansas. Consequently, Smith's claims



create actual controversies, and resulting uncertainty for SWN Production in its payment of royalties and its other business operations between SWN Production and *all* of its Fayetteville Shale Field royalty owners from whose royalties it deducts costs of gathering, compression, and treating. This is true regardless whether individual royalty owners are, or are not, citizens of the State of Arkansas.

14. Pursuant to 28 U.S.C. § 2201(a), SWN Production is entitled to a declaratory judgment that resolves the controversies and provides certainty as to its rights and legal relations under leases with its royalty owners, regardless of the state or states of which those owners are citizens. The declaration of SWN Production's rights under the provisions of its oil and gas leases that Smith places into controversy in one forum—this forum, selected by Smith—is a *bona fide* necessity for SWN Production to carry on with its business in the Fayetteville Shale Field.

15. SWN Production denies Smith's class action allegations. As SWN Production will brief in its opposition to Smith's Motion for Class Certification, SWN Production does not believe Smith can or will prove that she has described an ascertainable or logical class in this action, or prove the other requirements of Fed. R. Civ. P. 23(a) and 23(b)(3). Nevertheless, Smith alleges and seeks to prove that she is an adequate representative of the class she seeks to represent, and that her proposed class action meets the other requirements of Rules 23(a) and (b)(3).

16. Consequently, if after conducting a rigorous analysis, this Honorable Court concludes that Smith establishes that a class should be certified in this action, SWN Production then moves the Court to certify, for declaratory relief pursuant to Rules 23(a), (b)(1), and (b)(2),

as a counter-defendant class, the logical class of SWN Production's royalty owners similarly situated to Smith, which is properly described as follows:

*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.

*Exclusions:* The only persons or entities excluded from the class are (a) overriding royalty 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, and instrumentalities; (c) the States and territories of the United States and any foreign states, territories, or entities; (d) royalty owners in wells located on or within any federally-created units, including the Ozark Highlands Unit; (e) owners of any non-operating working interests for which SWN Production, or its agents or representatives, as operator, disburses royalty; (f) any persons or entities that Smith's counsel is, or may be, prohibited from representing under the Arkansas Rules of Professional Conduct, including SWN Production's counsel, their firms, and members of their firms; and (g) members of the Judiciary and their staff to whom this action is assigned.

17. As stated above, it is SWN Production's view that no class should be certified in this action, but if any class is certified, the class of counter-defendants described in Paragraph 16, above, will be the logical class for this Court to certify. Smith's purported class, which seeks to exclude citizens of Arkansas by purporting to exclude members of two Arkansas state court classes would be an illogical class not defined consistently with Smith's allegations, the facts of the case, or Smith's obligations to those she seeks to represent. Furthermore, the membership of those two competing Arkansas state court classes has not yet been ascertained, and if it were even possible to ascertain who is in those state court classes, the membership of those two classes will not be ascertained for a long time. As described above, Smith's proposed class, defined in Paragraph 4, above, consisting essentially of royalty owners who are not citizens of Arkansas would likely result in some lessors or royalty owners under individual oil and gas leases being included within Smith's proposed class and this action, while other lessors or

royalty owners under the same lease are excluded, thus leading to potentially inconsistent results, and conflicting obligations for SWN Production, under the same oil and gas lease.

18. Consequently, if after a rigorous analysis the Court finds, on Smith's evidence, that a class should be certified in this action, then:

A. The Court will have found that the class proposed by Smith is so numerous and geographically dispersed that joinder of all members is impracticable, as required by Rule 23(a)(1). In that event, SWN Production's proposed class of counter-defendants, defined in Paragraph 16, above, will also meet the requirements of Rule 23(a)(1) because it will include all of SWN Production's Fayetteville Shale royalty owners from whose royalty payments gathering, compression, and treating deductions have been taken, without limiting the class to persons who are not "citizens of the State of Arkansas." SWN Production's proposed class of counter-defendants will contain even more members and be more geographically dispersed.

B. The Court will have found there are questions of law or fact common to Smith's proposed class of SWN Production's royalty owners who are not citizens of Arkansas. SWN Production disagrees, but if the Court finds "commonality," as required by Rule 23(a)(2) and the United States Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), to be satisfied, the same questions of law or fact will be common to SWN Production's proposed class of counter-defendants. There are no meaningful distinctions with respect to common questions, if any the Court has found, between SWN Production's Fayetteville Shale royalty owners who are not citizens of the State of Arkansas, *vis-a-vis* those who are Arkansas citizens. If SWN Production is to litigate those questions with Smith and its royalty owners in this action, SWN Production should have to litigate the questions only once, and all of SWN Production's

royalty owners, regardless of their State citizenships, should be bound by this Court's rulings on those questions.

C. The Court will have found that the claims and defenses of Smith are typical of the claims or defenses of the class of non-Arkansas citizens she seeks to represent. SWN Production disagrees, but if the Court does find the typicality required by Rule 23(a)(3) to exist for Smith's claims, there will be no distinctions between the claims and defenses of SWN Productions' Fayetteville Shale royalty owners who are not citizens of the State of Arkansas *vis-a-vis* those who are Arkansas citizens, so "typicality" will also be satisfied for the more complete and logical class of counter-defendants that SWN Production defines in Paragraph 16, above.

D. The Court will have found that Smith will fairly and adequately protect the interests of the royalty owner class she proposes, including, for examples, that there is no intra-class antagonism between Smith and other members of her putative class, and that she has selected, and is represented by, adequate counsel. SWN Production disagrees, but if the Court finds Smith to meet Rule 23(a)(4)'s requirement of adequacy for her proposed class of royalty owners who are not citizens of Arkansas, she will also be an adequate representative of SWN Production's proposed counter-defendant class of Fayetteville Shale Field royalty owners that includes both those who are, and those who are not, citizens of Arkansas.

19. Smith alleges that the Court should certify her proposed class of non-Arkansas citizens under Fed. R. Civ. P. 23(b)(3), which requires her to prove that questions of law or fact common to her proposed class predominate over questions involving only individual class members, and Smith purports to plead a long list of questions she claims are "common questions." (Complaint ¶ 54). SWN Production denies that Smith will be able to establish "predominance," as required by Rule 23(b)(3) and the Supreme Court's decision in *Comcast*

*Corp. v. Behrend*, 133 S.Ct. 1426 (2013), or that Smith's proposed class would be ascertainable or manageable. Nevertheless, Smith alleges throughout her Complaint that SWN Production has engaged in courses of conduct that are common to its Fayetteville Shale royalty owners and that her claims may and should be resolved on a Fayetteville Shale Field-wide basis.

20. If the Court finds Smith carries her burden to prove "predominance" under Rule 23(b)(3), Smith will also have established that Rule 23(b)(2)'s requirement that SWN Production, as the "party opposing the class" acted or refused to act on grounds that apply generally to the class SWN Production has defined in Paragraph 16 of this Counterclaim, above, so that final declaratory relief is appropriate respecting that class of royalty owners will be appropriate, regardless whether the royalty owners are, or are not, citizens of the State of Arkansas. In addition, by excluding citizens of Arkansas from her class of royalty owners, Smith's actions have left similarly situated royalty owners in jeopardy of receiving different rulings governing the same lease language. Furthermore, Smith will have established Rule 23(b)(1)'s requirement that prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with individual class members that would establish incompatible standards of conduct for SWN Production, which is the party opposing the class.

21. Smith also alleges that the Court should find that a class action in this forum is superior to other available methods for fairly and efficiently adjudicating the controversy she seeks to present before this Court, as also required by Fed. R. Civ. P. 23(b)(3). SWN Production alleges that it is certainly neither superior nor efficient, and not in keeping with SWN Production's Due Process rights, to have three class actions of SWN Production royalty owners pending in three separate courts, so if the Court concludes, over SWN Production's objection,

that there should be a class certified, SWN Production says the only superior and efficient procedure would be to certify the class described in Paragraph 16, above, and thereby concentrate litigation of these claims in this forum.

22. Accordingly, SWN Production files this Counterclaim against Smith, individually. Also, conditioned upon the Court's conclusion that a class should be certified in this action, SWN Production hereby counterclaims against Smith as class representative of the counter-defendants' class described in Paragraph 16, above, for one or more declaratory judgments that resolves all controversies between SWN Production, Smith, and the members of said counter-defendants' class, including:

A. That for all royalty owners under leases with SWN Production contain the provisions that Smith seeks to put in controversy, SWN Production had the right to deduct in the past, and may deduct in the future, reasonable gathering, compression, and treating costs when calculating royalties due;

B. That for all such royalty owners, SWN Production has incurred in the past, and will incur in the future the prices, amounts, and fees of gas-in-kind it pays to DeSoto for gathering, compression, and treating services;

C. That if the amounts SWN Production pays to DeSoto are to be determined on a field wide basis, those amounts have been in the past, and are now, reasonable;

D. That neither the oil and gas leases nor any rule of law has prohibited in the past, or prohibit in the future, DeSoto from making a rate of return or profit, or recovering its cost of capital as it provides gathering, compression, and treating services, or has prohibited or will prohibit SWN Production from deducting the amounts it pays to DeSoto for such services;

E. That SWN Production has been entitled, and will be entitled in the future, to deduct treating expenses from royalties on production that contains two percent or greater CO<sub>2</sub> content;

F. That SWN Production's check stubs comply with Arkansas law and are not misleading;

G. That even though SWN Production has not done so in the past, it has the legal right under the leases to deduct reasonable "marketing" costs from Plaintiff's and other putative class members' royalties. The oil and gas lease provisions Plaintiff quotes in Paragraph 4, above, expressly state that SWN Production may deduct reasonable marketing costs. SWN Production incurs marketing costs, but to date has not deducted such costs from royalties. Nevertheless, as part of this action, SWN Production requests the Court to declare that it may deduct marketing costs in the future, and may offset or recoup marketing deductions it was entitled to take from any amounts the Court finds are due Plaintiff or the putative class; and

H. Declarations resolving all other matters placed into controversy by Smith's claims as between SWN Production and all of its royalty owners, including those who are, and who are not, citizens of the State of Arkansas.

WHEREFORE PREMISES CONSIDERED, Defendant SWN Production (Arkansas), LLC, prays that this Court will deny class certification in this case, but in the event the Court concludes that a class should be certified over SWN Production's objections, that the Court certify the counter-defendants' class described in Paragraph 16, above.

Defendant SWN Production also prays for the declaratory judgments requested above, recovery of its costs, and all other relief to which it is entitled by this Counterclaim.

Respectfully submitted,

Rex M. Terry  
Ark. Bar No. 76128  
HARDIN, JESSON & TERRY, PLC  
P. O. Box 10127  
Fort Smith, AR 72917-0127  
Telephone: (479) 452-2200  
Facsimile: (479) 452-9097

/s/ Michael V. Powell

Michael V. Powell  
Texas Bar No. 16204400  
Elizabeth L. Tiblets (admitted pro hac vice)  
Texas Bar No. 24066194  
LOCKE LORD LLP  
2200 Ross Avenue, Suite 2200  
Dallas, Texas 75201-6776  
Telephone: (214) 740-8520  
Facsimile: (214) 740-8800

ATTORNEYS FOR SWN  
PRODUCTION (ARKANSAS), LLC

### **CERTIFICATE OF SERVICE**

I hereby certify that, on July 29, 2015, this brief was filed electronically through the Court's CM/ECF system and served on Plaintiff by transmission of the Notice of Electronic Filing through the Court's CM/ECF system to Plaintiff's counsel of record.

/s/ Michael V. Powell

Michael V. Powell