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ANADARKO E&P ONSHORE LLC

STATE OF WYOMING	)	IN THE DISTRICT COURT
	) ss	
COUNTY OF CAMPBELL	)	SIXTH JUDICIAL DISTRICT

KENNETH B. GEER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 32940
	)	
ANADARKO E&P ONSHORE LLC, Successor to Lance Oil & Gas Company, Inc., a Delaware Corporation,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DECERTIFY THE DAMAGES CLASS

Defendant Anadarko E&P Onshore LLC, formerly known as Lance Oil & Gas Company, Inc. (Lance) respectfully submits this memorandum in support of its Motion to Decertify the Rule 23(b)(3) damages class.

INTRODUCTION

On January 29, 2013, this Court entered an Order certifying a class of more than 3,000 persons so that each could pursue a breach of contract claim for damages against Defendant Lance under Plaintiff's legal theory that Lance improperly withholds too much tax each month from each royalty recipient's check. *See* Findings of Fact, Conclusions of Law and Order Granting Pl.'s Mot. for Class Certification (Order). Several months after this Court's Order, however, the United States Supreme Court issued a new class certification decision construing the same language found in Wyoming's class action rule. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 185 L. Ed. 2d 515 (2013) (attached as Ex. 1). *Comcast* forcefully rejects the rationale this Court relied upon to certify the damages class.

In addition, on July 9, 2013, the Tenth Circuit, relying in part upon *Comcast*, issued two more decisions reversing class certification in royalty underpayment cases, and overruled one of the decisions this Court expressly relied upon for its certification Order. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3176, 2013 WL 3389469 (10th Cir. July 9, 2013) (attached as Ex. 2); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 12-7047, 2013 WL 3388629 (10th Cir. July 9, 2013) (attached as Ex. 3).[1] In doing so, the Tenth Circuit held that oil and gas royalty underpayment cases are not properly certified when there are widely varying lease terms, contrary to this Court's holding that certification can occur "despite the existence of individual lease language." (Order ¶ 87.) Because the law this Court relied on has been

[1] The Tenth Circuit only selected the *Roderick* decision for publication; therefore, this Brief will cite to the *Roderick* decision throughout. The *Chieftain* decision, however, is equally applicable and incorporates by reference much of the *Roderick* decision.

reversed, Lance moves for an Order decertifying the damages class under Wyo. R. Civ. P. 23(c)(1).[2]

SUMMARY OF THE ARGUMENT: WHY THE CERTIFIED DAMAGES CLASS SHOULD BE DECERTIFIED

Plaintiff alleges that Lance over-withholds taxes from its royalty owners and has therefore caused them damage. But it does not follow that tax withholding practices create a claim for damages. If Lance is already overpaying the royalty share by more than the disputed tax amount, then it is not breaching the lease agreement and no cause of action exists even if Plaintiffs' tax theory is correct. Nothing in Wyoming law creates an independent cause of action for improper "tax withholding" practices. Such practices would create a claim only where they cause an actual underpayment of royalty, and that depends on the terms of the royalty contract and how much Lance is paying under it. If Lance's tax withholding practices do not cause a breach of the lease agreement then there is no claim, regardless how Lance withholds taxes. And, since a claim for breach of the lease agreement cannot be adjudicated without consideration of the terms of that agreement and whether, based upon the facts, it has actually been breached, no commonality exists to support a class certified for damages. Thousands of mini-trials would be required. *Roderick*, 2013 WL 3389469, at *4. *Ultra Res. v. Hartman*, 2010 WY 36, ¶ 157, 226 P.3d 889, 937 (Wyo. 2010) ("the breach of contract claim . . . [must] be litigated in order to recover under the WRPA [Wyoming Royalty Payment Act]").

[2] Lance does not move for decertification of the class as it relates to declaratory relief on the law under Wyo. R. Civ. P 23(b)(2). Lance instead moves for a declaration of the law in its favor on the legal issue.

Whether individual Class Members have suffered a breach of their disparate Contracts depends on the royalty payment they received **compared to** the Royalty Payment Obligation agreed to in their Contracts. These factual issues cannot be determined on a classwide basis using a common methodology.[3] There is no common formula capable of calculating the difference between the various contractual Royalty Payment Obligations (i.e., what was owed) and what was paid.[4] Plaintiff must prove that Lance's alleged over-deduction of taxes actually breaches Class Members' Contracts, *Roderick*, 2013 WL 3389469, at *4, and that cannot be done without consideration of thousands of separate contracts.

The individualized inquiry necessary to determine Class Members' damages, if any, is fatal to certifying the Damages Class. *Comcast* clarifies that where damages are not measurable on a classwide basis, through a classwide methodology, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," thereby negating Rule 23(b)(3)'s predominance requirement. *Comcast*, 133 S.Ct. at 1433. *Roderick* makes clear that Plaintiff may not rely on an alleged common payment methodology, such as the alleged improper tax deduction, to establish commonality under Rule 23(a)(2) or predominance under Rule 23(b)(3). *Roderick*, 2013 WL 3389469, at *3-*4. Rather, Plaintiff must "affirmatively demonstrate commonality," especially in light of "known variations in lease language." *Id.* at

[3] Lance designated three experts whose reports demonstrate these individualized factual issues fatal to class certification: an expert in valuation and payment of royalties based on lease agreements Terry Expert Report ("Terry"), an expert CPA who calculated the value of overpayments to and deductions Lance did not take from Class Members (Ex. 4, Zeeb Expert Report ("Zeeb")), and a chemical and petroleum engineer who reviewed gas processing (Ex. 14, Enick Expert Report ("Enick")). Plaintiff has not designated any expert to opine on these subjects.

[4] Ex. 5, Terry ¶ 50.

*4. Because damages in this case cannot be calculated on a classwide basis through a common classwide methodology[5] as required by *Comcast* and because Plaintiff has not satisfied his burden of establishing commonality or predominance under *Roderick*, the Damages Class must be decertified.

ARGUMENT

I. Statement of the Facts

This case arises under the circumstance where Lance is typically paying royalty owners more than their leases require, and in amounts that exceed the disputed tax calculation. Where this is occurring, Plaintiff's so-called "tax claim" does not create a legal cause of action for damages. For example, Lance pays royalties to the First Presbyterian Church of Gillette pursuant to the Church's lease.[6] Paragraph 3(b) of that Lease provides for a royalty payment of 1/6th "after deducting from such royalty Lessor's proportionate amount of all post-production costs (i.e., all costs incurred once Gas is brought to the wellhead from the surface), **including but not limited to**, severance, ad valorem and conservation taxes, **treating, dehydration, compression, processing, gathering, transportation (intrastate and interstate) costs** and all associated fuel costs."[7] (Emphasis added.) Under this lease language, Lance is entitled to deduct the costs of treating, dehydration, compression, processing or gathering. But, Lance is actually only deducting transportation costs and taxes. Lance does not deduct the costs of treating,

[5] Ex. 5, Terry ¶ 50.

[6] Oil, Gas, and Coalbed Methane Lease made June 1, 2008, attached as Ex. 6.

[7] It is important to note that this lease expressly defines dehydration, compression and gathering as costs **deductible from royalty**, contrary to the Wyoming Royalty Payment Act's (WRPA) provisions that would otherwise not allow these deductions from royalty. Wyo. Stat. Ann. § 30-5-304(a)(vi) and (vii). Ex. 5, Terry ¶ 5.

dehydration, compression, processing or gathering, even though it could. As a result, Lance is overpaying the First Presbyterian Church every month, and Lance is overpaying the Church by more than the entire amount of Plaintiff's tax claim.

For sample months August 2007, August 2009 and August 2011, Lance **overpaid** the Church $70.23, $61.78 and $77.10 in royalties by not taking deductions it could have. Ex. 4, Zeeb, Ex. I. For sample months August 2007, August 2009 and August 2011, Lance **overpaid** the Church $67.19, $58.02 and $72.42 in royalties even after subtracting the full value of Plaintiff's claims. Ex. 4, Zeeb, Ex. I. As a result, even assuming Plaintiff's tax claims were correct, Lance still significantly overpays the Church, and therefore, it has not breached the Church's lease. The Church has no damages claim, and it should not be in a damages class.

Review of the hundreds of different contracts at issue in this case reveals that, like the First Presbyterian Church of Gillette, most Class Members have no damages and no breach of contract claim based on Lance's overpayments to them even if their taxes were over-deducted as Plaintiff contends.[8] Ms. Terry's expert report demonstrates at least 10 different lease forms that contain royalty payment terms that allow deductions from royalty that were not taken by Lance.[9]

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[8] As Zeeb computes and demonstrates in his Ex. C using Terry's opinion on whether gathering, compression, dehydration, transportation, and processing/treating are deductible, the 3 cent value of Plaintiff's claims (per mmbtu of gas) is overwhelmed by either the 36 cent Gathering or 9 cent Processing deductions (per mmbtu of gas) not taken resulting in overpayments on most Contracts. Ex. 4, Zeeb Ex. C.

[9] Terry selected these 10 categories based on her opinion that they "expressly provide otherwise" for deductions not allowed under the WRPA. Ex. 5, Terry ¶¶ 22-25. These categories alone represent 80% of the leases with royalty owner Class Members. Ex. 5, Terry Ex. E. The Court would have to rule on the meaning of these 10 and all other categories of lease language to determine the Royalty Payment Obligation against the royalty actually paid, a difficult and time-consuming exercise. Ex. 5, Terry ¶¶ 12-15.

Mr. Zeeb's expert report demonstrates that deductible costs not taken by Lance for these 10 categories of leases means that "**most Class Members have not sustained any damages even if Lance did over withhold taxes because most Class Members were paid more [than] their leases required.**"[10] Any further payments to these Class Members[11] who are already overpaid would simply result in them being further overpaid.[12]

II. Plaintiff's Damages Claims Arise from the Lease Contracts, not the Tax Statutes

Plaintiff tries to avoid the problem created by hundreds of different leases by asserting that his cause of action does not really arise from the leases themselves, but instead arises merely from his assertions about allegedly improper tax withholding methods. But this unsupportable premise is false.

Wyoming tax statutes do not create a private cause of action. *See* Wyo. Stat. Ann. § 39-14-201 through 39-14-212 (governing taxes on oil and gas production), and this Court cannot imply a private cause of action. A statute can create a cause of action only if the legislature clearly intended to create such action. *Julian v. New Hampshire Ins. Co.*, 694 F. Supp. 1530, 1531 (D. Wyo. 1988); *Herrig v. Herrig*, 844 P.2d 487, 493 (Wyo. 1992); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (cited by *Tidwell v. HOM, Inc.*, 896 P.2d 1322, 1326 (Wyo.

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[10] Ex. 4, Zeeb 4 and Ex. C (emphasis added).

[11] This lack of damages under varying leases applies to the named Plaintiff Geer as well. Ex. 5, Terry ¶¶ 30-33 and Ex. G; Ex. 4, Zeeb 3 and Exs. E and F.

[12] The Court would have to make its own determination of breach and damages for all Class Members on a lease category basis, as this work was only started by Ms. Terry for 80% of Lance's almost 2,000 leases and only applied to a handful of royalty owners who are Class Members. Ex. 5, Terry ¶ 27; Ex. 4, Zeeb 3-4 and Exs. D through I.

1995)). There is no evidence of legislative intent to imply a private cause of action into the Wyoming tax statutes.

Thus, in the present case, Plaintiff's claims for monetary damages turn on breach of contract and the corresponding relief provided by the WRPA. *See* Order ¶ 49 (holding "[t]he core claims of improper Production Tax deductions arise from the WRPA . . ."). To recover under the WRPA on a classwide basis, Plaintiff must demonstrate a breach of contract for all royalty owners. This is because the WRPA only builds upon the pre-existing lease contract that creates the payment obligation. "The right to bring an action under the [WRPA] is contingent upon the existence of a pre-existing contractual obligation. In other words, the only way to bring a WRPA claim is in the course of bringing an action on the document which creates the right to the mineral royalty." *Hartman*, 2010 WY 36, ¶ 154.

A. Plaintiff Does Not Claim Underpayment under the Applicable Leases and Other Contracts

Plaintiff has intentionally ignored the underlying Contracts prescribing the Royalty Payment Obligation. Plaintiff's designated damages expect, Mr. Steve Wilson, testified that he did not review the underlying leases contrary to his normal practice. Ex. 7, Deposition of James S. Wilson (S. Wilson Dep.) 50:9-25; 51:1-5. Moreover, despite the fact that Plaintiff's Complaint alleges that Plaintiff and Class Members were all underpaid based on Lance's tax methodology, Mr. Wilson testified repeatedly and explicitly that he had no opinion whether any royalty owners were actually underpaid under their governing leases:

> Q: You're not saying they're [royalty owners] underpaid under their lease, are you?
> A: No.
> Q: Because you didn't look at that.

A: That's correct.
Q: If you compare the tax overwithholding to the royalty overpayment based on leases, you don't come up with underpayment for all royalty owners, do you?
A: I haven't looked at that.
Q: Right. So again, when you say underpayment -- I just want to make sure I understand this term underpayment -- you're not saying royalty owners are underpaid under their leases, are you?
A: No.
Q: Because you didn't look at that.
A: I didn't look at it.
Q: In fact, you were told not to look at that.
A: Yes.
Q: Contrary to your common practice of looking at that.
A: Yes.

* * *

Q: And you're not giving an opinion on the amount of royalty that Lance pays to any of its royalty owners, are you?
A: No.

Id. 55:13-56:11, 71: 1-4; *see also* 55:1-17; 59:1-5; 67:1-10. Without first establishing underpayment of royalty under royalty owners' leases, Plaintiff cannot establish a breach of contract or recover damages under the WRPA.

B. The WRPA Does Not Impose Specific Royalty Payment Obligations into Contracts

The WRPA is a remedial statute designed to ensure royalty owners are paid in compliance with their contracts. The WRPA is a short statute that contains five distinct sections: a timing provision, an escrow provision, a penalties provision, a definitions provision, and a final provision that preserves the validity of underlying leases and imposes royalty reporting requirements. The plain language of the WRPA and Wyoming court precedent make clear that the WRPA does not impose substantive and specific payment requirements. Rather, the WRPA

provides statutory penalties and gap filler provisions to penalize violation of underlying oil and gas Contracts. *See e.g., ANR Prod. Co. v. Kerr-McGee Corp.*, 893 P.2d 698, 705 (Wyo. 1995) ("[T]he Legislature's intent . . . was to limit the application of the Act to cases where a preexisting legal obligation for payment of the proceeds of the sale of hydrocarbons exists."); *Cities Serv. Oil & Gas Corp. v. State*, 838 P.2d 146, 151 (Wyo. 1992) (holding that the royalty clauses themselves provide the "proper method of determining the [party's] royalty share").

Under Wyoming law, oil and gas leases and assignments are contracts, which are subject to the general principles of contract construction. *Wolff v. Belco Dev. Corp.*, 736 P.2d 730 (Wyo. 1987); *Wolter v. Equitable Res. Energy Co.*, 979 P.2d 948, 951 (Wyo. 1999) (An assignment of an oil and gas lease is contract). Penalty interest under the WRPA for underpayments cannot be recovered without first determining what payment requirements were imposed by the underlying Contract. *See, e.g., Indep. Producers Mktg. Corp. v. Cobb*, 721 P.2d 1106 (Wyo. 1986); *Moncrief v. Harvey*, 816 P.2d 97, 101-102 (Wyo. 1991) (court imposed WRPA penalties only after analyzing terms of controlling lease); *Cities Service*, 838 P.2d at 151 ("We examine the royalty clause portion of the lease agreements to determine the proper method of determining the State's royalty share."). In *Ultra Resources v. Hartman*, the Wyoming Supreme Court balanced the need to construe the WRPA liberally with the controlling language of the underlying oil and gas contracts:

> The Court cannot change the parties' agreement by "liberally" construing the WRPA. The district court properly concluded, as a matter of law, that under the Unit NPI Contract the plaintiffs were obligated to provide sufficient notice of their ownership to the operator before they were entitled to payment of the NPI and **the WRPA did not change that responsibility.**

Hartman, 2010 WY 36, ¶ 73 (emphasis added).

The WRPA does not prescribe any specific tax calculation methodology or specific payment requirement. Rather, the WRPA penalizes only the non-payment or underpayment of royalties to "persons legally entitled thereto." Wyo. Stat. Ann. §§ 30-5-301(a) and 303(a). Therefore, as Plaintiff concedes, "[t]he act takes effect when the lessee discovers a royalty payment deficiency." Br. in Support of Pl.'s Mot. for Class Certification 6 (quoting *Hartman*, 2010 WY 36, ¶ 71).

As a result, there is no claim associated with tax withholding unless the tax withholding causes an actual underpayment of royalties required by Contract, and the determination of whether a royalty payment deficiency has occurred requires a lease-by-lease analysis of each Class Member's Contract royalty clause. Ex. 5, Terry ¶¶ 8-13; *see also Roderick*, 2013 WL 3389469, at *3-*4.

C. A Classwide Methodology for Determining Liability and Damages Under Class Members' Contracts Does Not Exist

Plaintiff cannot establish Rule 23(b)(3) predominance under *Comcast* because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433.

The determination of whether a royalty payment deficiency has occurred requires a lease-by-lease analysis of each Class Member's Contract royalty clause. Ex. 5, Terry ¶¶ 8-13; *see also Roderick*, 2013 WL 3389469, at *3-*4. The process for determining whether each Class Member has a breach of their Contract requires several steps and analysis: (1) review the Class Member's Contracts to identify the Royalty Payment Obligation; (2) determine the deductions

allowed by the Contract and WRPA; (3) compare the royalty paid to the royalty owed; and (4) compare royalty overpayments to tax over-deductions to determine whether a royalty underpayment under the royalty owners' Contract exists. Ex. 5, Terry ¶¶ 5-13.[13]

Ms. Terry knows best the intensive effort required to analyze some Contracts and tie some Contracts to the top ten most highly paid Class Members. Her work proves both the individualized nature of the inquiry to determine damages and her conclusion that, "Based on lease language differences, **there is no 'one size fits all' method** to determine which owners' leases may have been breached or what damages may have been suffered." Ex. 5, Terry ¶¶ 14-15, 49 (emphasis added). Despite her thorough work demonstrating that, she says, "We have barely scratched the surface." *Id.* ¶ 14.

Each of these steps would be accompanied by disputes and "mini-trials" over the issues: What does lease language mean? Is lease language express enough to allow deductions not

[13] These steps and analysis are further complicated by: (1) determining the royalty obligation for ORRIs and which ORRIs of federal leases are excluded from the WRPA (Ex. 5, Terry ¶¶ 11 and 37-43); (2) determining the different royalty obligations from multiple contracts that cover a single well (Ex. 5, Terry ¶¶ 34-36); and (3) determining the different Contracts and royalty obligations to Class Members like Plaintiff who have multiple Contracts with different requirements (Ex. 5, Terry ¶¶ 30-31).

allowed in the WRPA? What deductions could be taken for various services?[14] Was there an overpayment and how much?

Under these circumstances, where each individual class member's own unique circumstances must be considered to determine whether a claim for damages for that class member exists, the decisions of *Comcast* and its progeny hold that certification of a damages class must be denied, because the commonality and predominance prongs of Rule 23 cannot be established.

III. *Comcast* Requires Decertification of the Class

In *Comcast*, the district court certified a class of current and former Comcast subscribers who alleged that Comcast had committed federal antitrust violations. The plaintiffs contended that Comcast and its subsidiaries "clustered" their cable television systems by swapping their operations outside a particular region with competitor operations located within the region, allowing Comcast to monopolize services within the cluster and charge supra-competitive prices. 133 S.Ct. at 1430. The class action ran aground in the Supreme Court, however, because the plaintiffs could not show that a single common damages theory could be applied to the entire class. The plaintiffs offered four different damages theories, but the plaintiffs' damages expert

[14] These services and the movement of gas from the wellhead to downstream markets for ultimate sale are described in detail by Mr. Chris Wilson in his attached Affidavit, Ex. 8 ("Chris Wilson"). One such service is the removal of carbon dioxide at three plants in Wyoming (Ex. 8, Chris Wilson ¶¶ 8-12) which represents the "processing costs" generally not deducted from royalty but deducted to calculate taxable value. Ex. 9, Affidavit of Janis Wallner, ¶¶ 4, 7. Dr. Enick concludes that this carbon dioxide removal is "processing of gas in a processing plant" under the WRPA (Ex. 14). This is an example of an issue that Plaintiff may dispute even without expert testimony, thus requiring the Court to determine the meanings of "treating" and "processing" in various Contracts and in the WRPA on the way to determining deductions that may be taken, royalty owed, and overpayment or underpayment for each Class Member.

could not isolate damages resulting from the only theory accepted for class treatment by the district court. *Id.* at 1431. Although the district court nonetheless certified the class, and the Third Circuit affirmed, the Supreme Court reversed, holding that the class was improperly certified under Rule 23(b)(3).[15]

A. Under *Comcast*, Individualized Damage Issues are Relevant to the Predominance Inquiry

The *Comcast* decision represents an important clarification in class action law that necessitates reconsideration of this Court's previous certification of the Damages Class. The Supreme Court's decision clarifies that Rule 23(b)(3)'s predominance requirement is no longer satisfied when individualized damages calculations predominate over alleged common issues. *See Cowden v. Parker & Associates, Inc.*, No. 5:09-323-KKC, 2013 WL 2285163, at *6 (E.D. Ky. May 22, 2013)[16] (denying class certification under *Comcast's* clarification of Rule 23(b)(3) where "individual analysis of each agent's accounts would have to be done not just to determine each agent's damages but to determine whether [defendant] breached its obligation to pay the agents commissions"); *Roach v. T.L. Cannon Corp.*, No. 3:10-CV-0591 (TJM/DEP), 2013 WL 1316452, at *3 (N.D.N.Y. March 29, 2013) (rejecting plaintiffs' argument that individualized

[15] *Comcast* is not limited to antitrust cases. *See Comcast*, 133 S.Ct. at 1433 ("This case . . . turns on the straight forward application of class-certification principles; it provides no occasion for the dissent's extended discussion . . . of substantive antitrust law.") (citation omitted). Moreover, in light of *Comcast*, the Supreme Court vacated and remanded for reconsideration two pending cases challenging class certification rulings in non-antitrust cases. *RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722 (2013) (wage claim challenging multiple types of alleged overtime underpayments); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (product liability claim, where the class includes purchasers who did not experience the alleged defect and thus suffered no injury or damages).

[16] Attached for the Court's convenience at Ex. 10, this case applying *Comcast* has very similar facts and circumstances requiring decertification under Rule 23(b)(3).

damages need not be considered at class certification stage because "[t]his position is in contravention of the holding [in *Comcast*]").

The *Comcast* court held that under the proper standard for evaluating class certification, when a damages model is not capable of measuring damages on a classwide basis, and absent a classwide methodology, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S.Ct. at 1433.

B. The *Comcast* Ruling Reinforces the Lack of Predominance Here

The same dynamic exists here. While it is true that Plaintiff has a common **liability** theory, **damages** can only be determined on a case-by-case, lease-by-lease, and payment-by-payment basis. There is no single damages theory that proves damages for everyone in the class. Individualized issues predominate over common issues when it comes to damages. *Comcast* holds that this prevents certification of a damages class, ending the long-standing practice of many courts, including this one, of certifying "now" and sorting out damages claims "later." *Id.* Where individualized inquiries on damages are required, as is the case here, Comcast requires decertification of the damages class.

In a recent case involving similar facts applying *Comcast*, the court denied class certification finding predominance was not satisfied. *Cowden*, 2013 WL 2285163. In *Cowden*, the proposed class asserted breach of contract claims for unpaid commission payments allegedly due under independent insurance agent contracts. *Id.* at *2. The court began its analysis by noting, "[t]he first issue to resolve in determining whether [defendant] breached any obligation to pay the agents money is to determine what precisely [defendant] promised to pay the agents. For class certification purposes, the critical issue is whether the amount [defendant] promised to pay

each agent can be proved with evidence **applicable to the class as a whole.**" *Id.* at *2 (emphasis added). Next, the court noted that, even if the promised payment amount could be proved across the class, the defendant was entitled to take certain expense deductions from each agent's paycheck **and that deduction amount varied depending on the individualized agreements.** *Id.* at *4. Therefore, the court found that the "individual analysis of each agent's accounts would have to be done not just to determine each agent's damages but to determine whether [defendant] breached its obligation to pay the agents commissions." *Id.* at *6.

After summarizing *Comcast's* holding, the court concluded: "Plaintiffs have offered no manageable way to calculate damages across the entire class and the individual damages calculations that would be required will inevitably overwhelm any questions common to the entire class." *Id.* at *7. The court denied class certification finding Rule 23(b)(3) predominance was not satisfied.

Like plaintiffs in the *Cowden* case, Plaintiff cannot prove liability and damages for all Class Members through evidence common to the Class. As required by the WRPA, **Plaintiff must prove breach of contract by an actual payment deficiency under each Class Member's Contract.** Plaintiff cannot prove a royalty payment deficiency across the entire Class because, depending on the individual Contract language, the payments actually made, and the deductions permitted but not taken, many Class Members simply have no claim for breach. Ex. 5, Terry ¶¶ 8-13, 50; Ex. 4, Zeeb 2-4 and Exs. C through I. In fact, Lance overpaid most Class Members on their Contracts, and even after subtracting the value of Plaintiff's tax claims from that overpayment, most Class Members are still overpaid and suffer no damages. Ex. 4, Zeeb 4

and Ex. C.[17] Just because Plaintiff "never considered the fact that he has been **overpaid under the terms of his leases, and by an amount sufficient to more than offset the amount he claims to have been underpaid**"[18] does not mean the Court should likewise fail to consider that. Plaintiff's claims simply cannot be addressed on a classwide basis because "the individual analysis of one [class member's] account will have *no bearing* on whether [defendant] owes another [class member] money or not." *Cowden* at *6 (emphasis added).

Plaintiff cannot establish Rule 23(b)(3) predominance under *Comcast* because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433. "[T]here is no one formula or method to determine breach of the leases or the WRPA. There must be an individualized inquiry." Ex. 5, Terry ¶ 50. Plaintiff's failure to satisfy Rule 23(b)(3) requires decertification. *See Comcast*, 133 S.Ct. at 1432-35; *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) (plaintiff must "clearly" demonstrate "under a strict burden of proof" that each class action prerequisite is satisfied).

IV. *Roderick* Requires Decertification of the Class

When the damages class in the present case was originally certified, this Court relied significantly upon a decision from the U.S. District Court for the District of Kansas, certifying a class of thousands of Kansas royalty owners under Fed. R. Civ. P 23(b)(3) seeking recovery for

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[17] As Zeeb computes and demonstrates in his Ex. C using Terry's opinion on whether gathering, compression, dehydration, transportation, and processing/treating are deductible, the 3 cent value of Plaintiff's claims is overwhelmed by either the 36 cent Gathering or 9 cent value of Processing deductions not taken **resulting in overpayments on most Contracts**. Ex. 4, Zeeb Ex. C.

[18] Ex. 5, Terry ¶ 33 (emphasis added); *see also* the proof of Plaintiff's lack of damages proven by Ex. 4, Zeeb 3 and Exs. E and F.

XTO's alleged underpayment of royalties. In *Roderick*, the U.S. District Court for the District of Kansas certified a class of thousands of Kansas royalty owners, under Fed.R.Civ.P 23(b)(3), who sought recovery for XTO's alleged underpayment of royalties. There, the plaintiffs claimed XTO violated Kansas law and breached the underlying leases by improperly deducting costs associated with placing gas into marketable condition. *Roderick*, 2013 WL 3389469, at *1. Plaintiffs argued that the implied duty of marketability was implied in every lease and XTO's uniform payment methodology established the requisite commonality. *Id.* at *3-*4. XTO conversely argued that the **legality** of XTO's common payment methodology was not capable of classwide resolution because the implied duty to market may, for some class members, be negated by individual lease language. *Id.* at *4.

On appeal, the Tenth Circuit agreed with XTO, reversing class certification upon finding that plaintiffs failed to prove commonality given the varying lease terms and that predominance was not satisfied simply by virtue of a uniform payment methodology. *Id.* at *4-*6. In so holding, the Tenth Circuit expressly overruled and rejected the rationale this Court relied on to sustain the damages class here.

A. Under *Roderick*, a Uniform Payment Methodology is Not Sufficient; Individual Lease Language Matters

The *Roderick* decision clarifies a plaintiff's burden for establishing commonality and predominance under Rule 23 when seeking to certify a royalty underpayment class action. The Tenth Circuit held that it is the plaintiff's burden to "affirmatively demonstrate commonality" in light of the "known variations in lease language." *Id.* at *4. To satisfy this burden, the plaintiff (not defendant) must examine the lease language to determine if individual lease language

negates liability. *Id.* (quoting *Broussard v. Meineke Disc. Muffler Shops Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) ("Plaintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts where the contracts contain materially different language." (brackets and ellipses omitted))); *see also Chieftain*, 2013 WL 3388629, at *3 ("the legal validity of XTO's uniform payment methodology might differ greatly among class members if certain leases negate or abrogate the [implied duty to market]"; "the legal effect of lease language" is "an issue that bears directly on [Federal] Rule 23's criteria"; and "[t]herefore, the district court must address the lease language issue as it relates to Rule 23 **before** certifying the class.") (footnote and citations omitted) (emphasis in original).

Lease language is also relevant to satisfying Rule 23's predominance requirement. *Roderick*, 2013 WL 3389469, at *6; *Chieftain*, 2013 WL 3388629, at *4. Predominance is "not established simply by virtue of a uniform payment methodology." *Roderick*, 2013 WL 3389469, at *5. Lease language must be examined to determine the legal obligations between proposed class members and defendant: "A plaintiff may claim that every putative class member was harmed by the defendant's conduct, but if fewer than all of the class members enjoyed the legal right that the defendant allegedly infringed, or if the defendant has non-frivolous defenses to liability that are unique to individual class members, any common questions may well be submerged by individual ones." *Id.* (quoting *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010)).

B. Under *Roderick*, Plaintiff Cannot Prove Commonality or Predominance

This Court applied a less demanding standard for class certification than that required by law under the recent cases of *Comcast* and *Roderick*. This Court did not require Plaintiff to

affirmatively demonstrate commonality despite the varying lease language, and this Court did not address the lease language issue as it relates to Rule 23 **before** certifying the class. Rather, this Court, like the District Court in *Roderick*, certified the class upon finding a common payment methodology without regard to whether there were common damages to be proven. Order ¶¶ 51, 53, 54 (citing *Roderick*, 281 F.R.D. 477 (D. Kan. 2012)), and 54a.ii. And, like the district court in *Roderick*, this Court found that commonalty was satisfied despite Lance's evidence showing that its liability, if any, may be negated by individual lease language. *Id.* ¶ 48. In fact, this Court **presumed** an underpayment existed for all class members despite "alleged differences in underlying lease language." *Id.* ¶ 53. Such a presumption has now been squarely rejected by the Tenth Circuit in *Roderick*. 2013 WL 3389469, at *3 ("actual, not presumed, conformance with Rule 23(c) remains . . . indispensable."); *see also Chieftain*, 2013 WL 3388629, at *3 ("the legal effect of lease language" is "an issue that bears directly on [Federal] Rule 23's criteria").

In this case, Lance's experts' analysis of the individual lease language shows that not all class members have a claim for breach, disproving commonality.[19] Plaintiff's expert substantially agrees.[20] Moreover, the lease analysis shows that Lance has "non-frivolous defenses to liability that are unique to individual class members" – Lance can show that under many of the leases, there is no underpayment. *See supra* at 5-6 (Church example). Thus, any

[19] Ex. 5, Terry ¶¶ 30-33 and Ex. G; Ex. 4, Zeeb 3-4 and Exs. C, E and F.

[20] When questioned about royalty owners' leases such as the Church's allowing deductions for gathering costs from royalty, and the perverse result of royalty owners then paying a higher tax and higher tax rate under Plaintiff's theory of calculating taxes, Mr. Wilson opined that such royalty owners "should not be a member of the class." Ex. 7, S. Wilson Dep. 106-111.

alleged common questions are "submerged by individual ones," negating predominance. *Roderick*, 2013 WL 3389469, at *5.

Plaintiff has failed to meet his burden of establishing Rule 23(a)(2) commonality and Rule 23(b)(3) predominance as clarified under *Roderick*; thus decertification is warranted.

V. A Court May Decertify a Class at Any Time Prior to a Decision on the Merits

Rule 23(c)(1) provides that an order granting class certification "may be altered or amended before the decision on the merits." Wyo. R. Civ. P. 23(c)(1). The U.S. Supreme Court has held that "a district court's order denying or granting class status is inherently tentative" and an "order involving class status may be 'altered or amended before the decision on the merits.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) (quoting Fed. R. Civ. P. 23(c)(1)); *see In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) ("[A] trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.").

Sometimes developments in the litigation, such as changes in substantive or procedural law, will necessitate reconsideration of an earlier class certification order. *Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 477 (D. Colo. 1998). "Decertification is warranted where materially changed or clarified circumstances have been shown that would make the continuation of the class action improper." *Id.* at 478.

In evaluating whether to decertify a class, a court applies the same standard used in deciding whether a class should be certified in the first instance. *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000). Plaintiff bears the burden of proving each

requirement for class certification. *See Reed*, 849 F.2d at 1309 (a plaintiff must demonstrate "under a strict burden of proof" that the case "clearly" satisfies each class action prerequisite). Moreover, the rigorous requirements imposed on the court considering class action certification may, by necessity, require some consideration of the merits of the action. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

The *Comcast* and *Roderick* decisions represent material changes or clarifications of substantive class action law, making the continuation of this class action improper. Pursuant to Rule 23(c)(1), the Court should decertify the Damages Class. Wyo. R. Civ. P. 23(c)(1).

VI. Lance is Not Asserting Claims for Setoff or Recoupment

Plaintiffs in royalty cases always cite *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 979 (Wyo. 1994), as Plaintiff does in this case, for the proposition that the WRPA is designed to "stop oil producers from retaining other people's money for their own use." If royalty owners are being overpaid, as most Class Members are, it is false to say that Lance is taking their money. Plaintiff will argue that Lance's damages argument as set forth above represents Lance's attempt to recover royalty overpayments through unasserted counterclaims for setoff or recoupment. Lance is not seeking to recover its overpayment. Lance is merely pointing out that where there is no underpayment, there are no damages and no claim for breach.

Lance's position in no way implicates the doctrines of setoff or recoupment. Both doctrines apply when a defendant is asserting a **right of payment** from the plaintiff or to reduce the **amount of payment** owed to the plaintiff under mutual obligations. *See, e.g., Spratt v. Sec. Bank of Buffalo, Wyo.*, 654 P.2d 130, 136 (Wyo. 1982) (describing setoff as a mutual obligation "due to and from the same persons"); *Minneapolis Nat'l Bank of Minneapolis, Kan. v. Liberty*

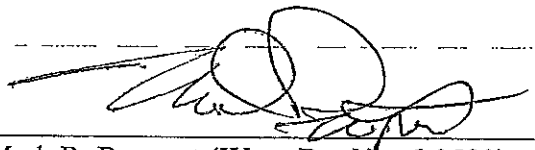
Nat'l Bank of Kansas City, 72 F.2d 434, 436 (10th Cir. 1934) ("the doctrine of set-off or counterclaim usually implies and rests upon the existence of reciprocal demands"); 3-13 *Moore's Federal Practice - Civil* § 13.11 (describing recoupment as a claim seeking relief in an amount not in excess of the opposing claim). By contrast, Lance is asserting that there is no mutual obligation between it and many of the class members – that, under most leases, Lance is not liable to the royalty owner for **any** amount. Similar to the defendant's argument in *Cowden*, Lance's damages argument is made merely to show that in many individual cases, there is no claim for breach. *Cowden*, 2013 WL 2285163, at *5-*7 (analyzing defendant's claim that under some contracts the individual agents owed defendant money, not for purposes of setoff or recoupment but to determine "whether [defendant] breached its obligation to pay . . .").

CONCLUSION

The recent decisions in *Comcast* and *Roderick* require reconsideration of this Court's class certification order as to the Damages Class. *Comcast* makes clear that where damages are not measurable on a classwide basis, through a classwide methodology, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," thereby negating Rule 23(b)(3)'s predominance requirement. *Comcast*, 133 S.Ct. at 1433. *Roderick* makes clear that commonality and predominance in royalty underpayment cases are not satisfied simply by virtue of a uniform payment methodology. *Roderick*, 2013 WL 3389469, at *5. Rather, the plaintiff must affirmatively demonstrate commonality is satisfied despite the known variations in lease language. *Id.* at *4. Because Plaintiff failed to satisfy commonality and predominance under *Roderick's* more demanding standards and because both a breach of Class Members' varying Contracts and damages, if any, cannot be calculated on a classwide

basis as required by *Comcast*, class treatment for damages is legally wrong. This Court should decertify the Rule 23(b)(3) class **before** turning its attention to dispositive motions filed by the Parties.

DATED July 31, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I served the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DECERTIFY THE DAMAGES CLASS by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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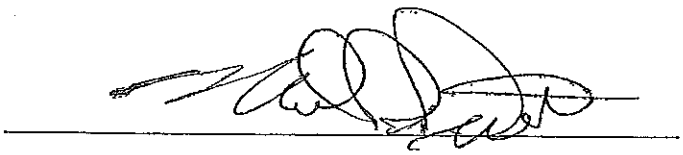

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