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

DEFENDANT'S RESPONSE OPPOSING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, formerly known as Lance Oil & Gas Company, Inc. (Lance), by and through its attorneys Holland & Hart, LLP, submits this response to Plaintiff's Motion for Partial Summary Judgment.

INTRODUCTION

Plaintiff's Motion for Partial Summary Judgment seeks judgment for breach of contracts on a class basis without proof of damages, a critical element of breach of contract. In an attempt to shortcut this failure of proof of underpaid royalties on Class Members' contracts,[1] Plaintiff detours the Court into red herring discussions about the Wyoming Royalty Payment Act (WRPA) and mischaracterizes Lance's contract defense as a claim for setoff or recoupment.

Plaintiff misunderstands the proper role of the WRPA as it affects the breach of contract issue in this case but spends three pages discussing it, as if the WRPA decides breach of contract in this case. The WRPA supplies gap-filler provisions that define the royalty payment obligation if the royalty contract does not expressly provide otherwise. However, the WRPA gives parties the ability to contract for different terms of royalty and the use of deductions "if otherwise expressly provided for by specific language."[2] Despite the many "undisputed" facts proposed by Plaintiff that are disputed, **it is undisputed** that over 80% of Class members' oil and gas lease contracts do expressly provide for royalty payment obligations such that the WRPA provisions do not apply.

Plaintiff then devotes seven pages in support of his motion memorandum (Pl.'s Mot.) to building up and tearing down the strawman argument that Lance's defense to Plaintiff's breach of contract claim is a claim for setoff or recoupment. Plaintiff tries to avoid his burden to prove

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[1] To help the Court unravel Plaintiff's attempt to shortcut required proof, Lance has also provided the Court with a listing of the many errors and/or immateriality of Plaintiff's so-called undisputed facts in his Rule 56.1 Statement (Pl.'s SOF), including but not limited to Plaintiff's incorrect explanation of the role of the Wyoming Royalty Payment Act in this case.

[2] Wyo. Stat. 30-5-305(a). For a full discussion of the WRPA and how it does and does not apply to this case, *see* Def.'s Mem. in Supp. of its Mot. to Decertify the Damages Class 9-11; and Def.'s Mem. in Supp. of Mot. for Summ. J. 8-9.

a breach of contract by asserting that Lance's defense of overpayment on most Class Members' contracts is somehow a setoff or recoupment claim by Lance. However, the fact remains that Plaintiff pled and must prove a breach of contract and must prove a breach of contract for the Class Members. Lance has shown that such a breach did not occur for most Class Members, and Plaintiff wants the court to turn a blind eye to that defense by calling it a setoff or recoupment claim that it simply is not.

Finally, by page 13 of Plaintiff's brief in support of his motion, Plaintiff gets to the heart of the legal dispute that is the subject of Defendant's Motion for Summary Judgment: what is the meaning of the production tax statute at issue, Wyo. Stat. 39-14-203(c)? Plaintiff's analysis of this statute is wrong, and to bootstrap his erroneous argument, Plaintiff again invokes the WRPA to try to graft the legislative intent of the WRPA onto the tax statute at issue. In doing so, Plaintiff again avoids the controlling nature of the contracts that Lance's defense focuses on: Lance must fail to pay royalties in breach of the contracts before the WRPA's penalty provisions apply. *See ANR Prod. Co. v. Kerr-McGee Corp.*, 893 P.2d 698, 705 (Wyo. 1995). Plaintiff cannot prove he was underpaid royalties or has suffered any damages.

SUMMARY OF THE ARGUMENT

Plaintiff mischaracterizes Lance's contract defense as setoff or recoupment claims throughout his Motion. In reality, Lance's defense is simply that Plaintiff cannot prove a critical element of his breach of contract claim – damages. Mutuality of obligations between Plaintiff and Defendant that would constitute the logical underpinning of a setoff or recoupment counterclaim by Lance are missing. Lance is obligated to pay Plaintiff and Class Members royalties according to the terms of their contracts. Plaintiff and royalty owners do not have an

obligation to Lance, and Lance is not seeking to recover the overpayments it has made to Class Members. When Lance's contract language defense is properly viewed as a defense under the contracts to Plaintiff's breach of contract claims, the arguments raised in Plaintiff's Motion become irrelevant and without merit. For example, Lance is not asserting a compulsory or permissive counterclaim, and therefore the requirements of Wyo. R. Civ. P. 13 are irrelevant. And, because Lance is not raising a counterclaim: it does not matter what counterclaims were released in the *Lange* settlement; collateral estoppel does not apply to the different issues raised in this case; and the voluntary payment doctrine is inapplicable.

The law of the case doctrine also does not prohibit Lance from raising its defense to Plaintiff's contract claim. The Court has not decided the merits of Lance's defense, but rather has ruled that the defense is outside the scope of Plaintiff's declaratory relief claim for class certification purposes. However, even if the Court were to rule that individualized lease language is not relevant to determining Lance's liability, such a ruling would be erroneous under the recent Supreme Court decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 185 L. Ed. 2d 515 (2013), rejecting the rationale relied upon by this Court to certify the Damages Class in this case, and by the Tenth Circuit's recent decisions in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3176, 2013 WL 3389469 (10th Cir. July 9, 2013) and *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. 12-7047, 2013 WL 3388629 (10th Cir. July 9, 2013).[3]

Plaintiff's theory regarding Lance's recovery from royalty owners of ad valorem, severance, and conservation taxes ("production taxes") Lance pays on their behalf is similarly

[3] The Tenth Circuit only selected the *Roderick* decision for publication. The *Chieftain* decision, however, is equally applicable and incorporates by reference much of the *Roderick* decision.

misguided. Plaintiff focuses on the words "taxes paid" in Wyo. Stat. 39-14-203(c)(iii)[4] and assumes that Lance withholds more taxes from royalty owners than it pays. There is no factual basis for this assumption, and Plaintiff fails to focus on the real issue of what is meant by the phrase "in proportion to the interest ownership." The fallacy of Plaintiff's theory is apparent from the question left unanswered in his argument: **what is the proportionate share?** Lance pays royalty owners' taxes **based on royalty owners' tax liability.** This simple concept is absent from Plaintiff's theory. Instead, Plaintiff argues that Lance should pay royalty owners' taxes based on Lance's tax liability. This result cannot be right because it gives royalty owners a tax deduction for costs they never paid, an untenable result that Plaintiff never tries to explain.

ARGUMENT

I. Plaintiff Must Prove, and Lance is Entitled to Defend Against, Every Element of Plaintiff's Breach of Contract Claim

A. Plaintiff Bears the Burden of Proving His Breach of Contract Claim

Plaintiff alleges that he is "entitled to Royalties pursuant to the terms of the leases or other instruments creating or reserving his interest" (Compl. ¶ 3) and that Lance "breached the leases or other agreements with the Plaintiff and has violated the Wyoming Royalty Payment Act" (*Id.* ¶ 24). The controlling oil and gas leases and other instruments creating Plaintiff's and the Class Members' royalty interests are contracts, which are subject to the general principles of contract construction. *Wolff v. Belco Dev. Corp.*, 736 P.2d 730, 732 (Wyo. 1987); *Wolter v. Equitable Res. Energy Co.*, 979 P.2d 948, 951 (Wyo. 1999).

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[4] In pertinent part, Wyo. Stat. 39-14-203(c)(iii) provides: "Any taxpayer paying severance taxes on any…natural gas production may deduct the taxes paid from any amounts due or to become due to the interest owners of such production **in proportion to the interest ownership.**" (emphasis added).

To recover damages for underpayment of royalties under the contracts or to recover 18% penalty interest under the WRPA on a class-wide basis, Plaintiff must demonstrate a breach of contract for all royalty owners.[5] A claim for breach of contract includes the following elements: "the existence of a contract, a breach and damages." *Cathcart v. State Farm Mut. Auto. Ins. Co.*, 2005 WY 154, ¶ 25, 123 P.3d 579, 589 (Wyo. 2005); *Scherer, II v. Laramie Reg'l Airport Bd.*, 2010 WY 105, ¶ 9, 236 P.3d 996, 999 (Wyo. 2010) ("The elements for a breach of contract claim consist of a lawfully enforceable contract, an unjustified failure to timely perform all or any part of what is promised therein, and entitlement of injured party to damages.") (citation omitted).

Plaintiff bears the burden of proving the terms of the contract, as well as all the elements of a breach of contract claim, including damages. *See Cathcart*, ¶ 25; *Madrid v. Norton*, 596 P.2d 1108, 1119 (Wyo. 1979). Plaintiff, however, is attempting to recover on a breach of contract theory while ignoring the applicable contract terms. Ex. 1, Deposition of James S. Wilson (S. Wilson Dep.) 55:13-25, 56:1-11, 71: 1-4. Though a class has been certified, Plaintiff cannot ignore the various contracts of individual Class Members: "[P]laintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts. . . [where the contracts] contain[] materially [] different language." *Roderick*, 2013 WL 3389469, at * 4 (quoting *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 3d 331, 340 (4th Cir. 1998)).

B. Individual Royalty Contract Terms Must Matter to Whether a Breach of Contract Occurred

[5] 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." *Ultra Res. v. Hartman*, 2010 WY 36, ¶ 154, 226 P.3d 889, 936 (Wyo. 2010).

By ignoring the contract terms, Plaintiff cannot meet his burden of proving a breach of contract or recover damages under the WRPA. This is no accident – Plaintiff does not want his lawsuit to be based on the contracts because that would destroy his effort to maintain this class action. *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1107-08 (10th Cir. 2005) (Plaintiff in that case purposely avoided pleading the relevant contract to bolster effort to frame the case for class certification under Rule 23).

Under Wyoming law, **the Court must examine contract language** to resolve Plaintiff's breach of contract claim and corresponding claim for damages under the WRPA. In cases where the Wyoming Supreme Court determined whether a breach of the contract occurred, and thus whether WRPA damages were appropriate, the Court first examined the governing contract language to determine the lessor's proper royalty entitlement and whether there has been a nonpayment or underpayment.[6] It is settled law that contract royalty clauses provide the "proper method of determining [the party's] royalty share." *Cities Serv.*, 838 P.2d at 151. The ultimate conclusion regarding each contract may vary on a case-by-case basis based on the intent of the

[6] *E.g., Cities Serv. Oil & Gas Corp. v. State*, 838 P.2d 146 (Wyo. 1992) (analyzing lease language before affirming award of interest for underpayment); *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 979 (Wyo. 1994) (examining language in contract before reversing denial of statutory interest for underpayment); *Moncrief v. Harvey*, 816 P.2d 97 (Wyo. 1991) (examining lease language to determine plaintiff's proper royalty share); *Hartman*, 2010 WY 36 (examining language in contract to determine operators' obligation to pay royalties).

parties as expressed by the language they used. *Caballo Coal Co. v. Fidelity Exploration & Prod. Co.*, 84 P.3d 311, 320 (Wyo. 2004).[7]

Examination of the applicable contract language is required in royalty underpayment cases because the contracts creating the royalty obligation are "the very foundation" of the parties' relationship, "giving rise to any duties, including the core duty of royalty payment." *Elliott*, 407 F.3d at 1108.[8] In order to determine whether a lessee "breached its duty to pay royalties," the Court's "inquiry begins with the gas royalty clause of . . . [the] lease." *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1229 (10th Cir. 1996).

Obviously, a basic defense to a breach of contract claim is that, under the contract terms, there were no damages and therefore no breach. Thus, in royalty underpayment claims, the court should consider a defendant's interpretation of contract terms and corresponding position that defendant's royalty payments were made in accordance with the contract. *See Exxon Mobil Corp. v. Alabama Dep't of Conservation & Natural Res.*, 986 So. 2d 1093, 1103 (Ala. 2007) (defendant may defend against a royalty underpayment claim by pointing out that, under the lease terms, there was no underpayment). Lance has defended this case on that basis. Plaintiff

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[7] Not only is Plaintiff's position contrary to WRPA precedent, but it is also contrary to general oil and gas contract principles. *See Leonard v. Barnes*, 404 P.2d 292, 302 (1965) ("An oil and gas lease is merely a contract between the parties and is to be tested by the same rules as any other contract."); *Clough v. Williams Prod. RMT Co.*, 179 P.3d 32, 42 (Colo. App. 2007) ("The measure of damages for breach of contract is the same for oil and gas leases as it is for other contracts.").

[8] Lance's obligation to pay royalties "inextricably derive[s]" from the lease, and imposition of WRPA penalties for underpayment of royalties necessarily requires that there has been a breach of the lease. *Hartman*, 2010 WY ¶ 71. *See ANR Prod. Co.*, 893 P.2d at 705 (WRPA limited to cases where preexisting legal obligation for payment exists). *See also Tana Oil & Gas Corp. v. Cernosek*, 188 S.W.3d 354, 360 (Tex. App. 2006) ("royalty payments must be determined from provisions of oil and gas lease") (citation omitted).

does not dispute Lance's defense that it paid most of the royalty owners more than they were owed under the terms of their contracts. However, Plaintiff wants the Court to join him in ignoring that defense in the name of the WRPA[9] and by mischaracterizing Lance's defense as a claim for setoff or recoupment that Lance is not seeking.

It would be reversible error if Lance is not permitted to raise the terms of the contracts as a defense to Plaintiff's breach claim—that, under many of the leases, there is no breach or damages resulting from Lance's tax deductions because many class members are already overpaid by virtue of Lance's decision to forgo taking other allowable deductions. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (U.S. 1962) (a defendant "has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is"). Plaintiff's Motion for Partial Summary Judgment improperly seeks to preclude Lance from arguing its contract language defense against the elements of breach and damages, which specifically arise from the contract terms.

II. Lance is Not Asserting a Claim for Setoff or Recoupment

Lance is not seeking to recover any overpayment of royalties through a claim for recoupment, nor is Lance seeking to diminish Plaintiff's potential recovery by offsetting the amount Lance chooses not to deduct from royalties due. Rather, Lance is raising the defense that there is no underpayment of royalties, and accordingly, there are no damages and no valid claims

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[9] Plaintiff's misplaced reliance on the WRPA for his breach of contract claims glosses over a critical feature of the WRPA applicable to 80% of the leases in this case. The Legislature elected to allow parties to provide for their own manner of royalty calculation and left unaffected their right to negotiate and employ "**specific language in an executed written agreement**" defining royalties that would control over the WRPA. Wyo. Stat. 30-5-305(a)(emphasis added). "The (cont.) Court cannot change the parties' agreement by 'liberally' construing the WRPA." *Hartman*, ¶ 73.

for breach. Therefore, Lance's position in no way implicates the doctrines of setoff or recoupment or the Rule 13 requirements for pleading counterclaims for setoff or recoupment.

As Plaintiff concedes, setoff applies when there are "**mutual liabilities**" between the parties and the defendant asserts a "counterdemand" against plaintiff for the "right to reduce" the amount owed by defendant. Pl.'s Mot. 8 (quoting Black's Law Dictionary). Recoupment applies when defendant seeks to "recover[ ] or regain[ ]," an amount from plaintiff by "withholding" all or a part of an amount due to plaintiff. *Id.*; *see also 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"). By contrast, there is no mutual obligation between Lance and the Class Members – Lance is not trying to recover an overpaid amount or asserting that the Class Members owe an obligation to Lance that offsets Lance's underpayments, if any.

In a similar breach of contract class action, the defendant also asserted that because it was allowed to take certain deductions from payments due under the contracts, in some cases there was no breach but rather overpayments. *Cowden v. Parker & Associates, Inc.*, No. 5:09-323-KKC, 2013 WL 2285163, *4, *6 (E.D. Ky. May 22, 2013). The court properly analyzed defendant's argument, not as a counterclaim for setoff or recoupment, but as a defense to plaintiffs' claim for breach of contract. The court found that an analysis of each proposed class member's account would be required to determine, not only what defendant was required to pay under the contracts, but also whether any permissible deductions (if taken) **would eliminate the**

alleged breach of defendant's obligation to pay. *Id.* at *5-*6. The court recognized that a showing that defendant underpaid amounts due to one proposed class member would have no bearing on whether defendant "breached its obligation to pay another" because the other proposed class member "may well owe [defendant] money" because of deductions not taken by defendant. *Id.* *7.

Like the defendant in *Cowden*, Lance is pointing out its authority to take additional deductions under the terms of certain contracts, not as a means of proving entitlement to monetary relief, but as a defense to show that Lance has not breached the contracts at issue. Because Lance is not raising a counterclaim for setoff or recoupment, Rule 13's pleading requirements simply do not apply. Lance is not barred from raising a contract language defense to the elements of breach and damages due to Plaintiff's mischaracterization of the defense.

III. Lance is Not Barred From Raising its Contract Language Defense by the Doctrine of Collateral Estoppel

Plaintiff's collateral estoppel argument is also based on the false premise that Lance is asserting a counterclaim for setoff or recoupment. Plaintiff argues that Lance is barred by collateral estoppel from raising any counterclaim that was or could have been asserted in the *Lange* settlement. Pl.'s Mot. 10-11 (relying on the release of "Settled Claims" in the *Lange* settlement agreement). But, again, Lance is not asserting any counterclaim in this case; therefore, it is irrelevant which counterclaims were released in the *Lange* settlement. Lance's contract language defense merely shows that Plaintiff has failed (because he has not attempted) to establish breach or damages under his or Class Members' contracts.

Moreover, collateral estoppel bars the relitigation of issues where, among other things, the issues litigated are "identical." *Goodman v. Voss*, 2011 WY 33, ¶ 23, 248 P.3d 1120, 1126

(Wyo. 2011). The issues in this case are not identical to the issues in the *Lange* case. *Lange* involved the issue of whether Lance could deduct a stranded gas fee from royalty payments; it did not resolve the issue of whether Lance could have deducted specific costs authorized by individual leases.[10] Lance did not raise its current contract language defense in the *Lange* case because it was not implicated. Additionally, any issues raised in this case were specifically excluded from the *Lange* settlement. *See* ¶¶ 1.40.4 and 2.4.3.4 of the *Lange* settlement agreement, Ex. 8 to Pl.'s SOF. Thus, collateral estoppel does not preclude Lance from raising its contract language defense not resolved on the merits in the *Lange* settlement.

IV. The Voluntary Payment Doctrine Does Not Bar Lance's Lease Language Defense

Similarly, Plaintiff's voluntary payment argument is based on the false premise that Lance is asserting a counterclaim for setoff or recoupment. The voluntary payment doctrine prevents a party, either by way of setoff or recoupment, from "recover[ing] back money which he has voluntarily paid." *Commercial Union Ins. Co. v. Postin*, 610 P.2d 984, 989 (Wyo. 1980). While Lance has overpaid some class members by not taking allowed deductions, Lance is not seeking to recover those overpayments in this case. In other words, Lance is not seeking to "recover back money . . . voluntarily paid." Lance is simply demonstrating that most Class Members' contract royalty obligations have not been breached because they have not suffered damages. Therefore, the voluntary payment doctrine does not apply, and Lance's contract language defense is not barred.

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[10] The *Lange* Settlement only resolved the specific deductions that Lance could take from royalty owners in that case **on a prospective basis** as "Royalty Payment Methodology" that will not commence until no later than 120 days after the Court's August 1, 2013 approval of the *Lange* Settlement. *See* ¶¶ 2.4.1 and 2.5.1. In other words, Lance's contract language defense as it applies in Geer to show that most Class Members suffered no breach of contract was not resolved or affected in any way by the *Lange* settlement.

V. The Law of the Case Doctrine Cannot Bar Lance's Defenses

Lance's lease language defense is not barred by the law of the case doctrine. The law of the case doctrine prevents repetitious litigation of an issue that has been decided by the court in an earlier stage of the proceedings. *Goodman*, 2011 WY 33, ¶25. However, "[t]he law of the case doctrine is a discretionary rule which does not constitute a limitation on the court's power but merely 'expresses the practice of courts generally to refuse to reopen what has been decided.'" *In re Guardianship & Conservatorship of Parkhurst*, 2010 WY 155, 243 P.3d 961, 966 (Wyo. 2010) (citation omitted).

A. The Law of the Case Doctrine Does Not Apply to Lance's Contract Language Defense Against Plaintiff's Rule 23(b)(3) Claim for Damages

This Court has not ruled on the merits of Lance's contract language defense in the context of whether it precludes Plaintiff from establishing the elements of breach or damages for his breach of contract claim. Though the Court's Order ruled that disparate lease language did not defeat commonality for purposes of certifying a class under Wyo. R. Civ. P. 23(b)(2) and (b)(3), (Order, ¶ 54(b)(ii)), the Court recognized that individualized analysis is appropriate for money damages under a 23(b)(3) class. Order, ¶¶ 80, 90. Indeed, an individualized analysis of contract language is critical for Plaintiff to prove the contract terms and any corresponding breach or damages. *See Cowden*, 2013 WL 2285163, at *5-*6; *Roderick*, 2013 WL 3389469, at *4.

Though the Court granted class certification in rejecting Lance's contract language defense[11] (*see* Order at ¶¶ 52, 58, 81), Lance believes the Court did not rule on the underlying merits of Lance's defense. Order, ¶¶ 47, 74, 82(b)(ii). Lance believes that ¶¶ 52, 58, 81 and

[11] This certification should be reviewed and reversed now that a fundamental change in class certification law has occurred, as explained in Lance's Mot. to Decertify the Damages Class.

other language in the Order explained the Court's reasoning for rejecting Lance's arguments that contract language should defeat class certification, but did not rule on the merits of this or other claims and defenses. Similarly, the Court's May 10, 2013 Decision Letter on Proposed Class Notice did not rule on the merits of Lance's contract language defense, but rather concluded that "individualization of each oil and gas lease provision is beyond the main issue raised by the complaint." Because the Court has not ruled on the merits of Lance's contract language defense as it is raised to defeat Plaintiff's breach of contract claim (as opposed to being raised to defeat class certification), this Court should not employ the law of the case doctrine to foreclose Lance from raising its legitimate defense to Plaintiff's breach of contract claims and corresponding Rule 23(b)(3) claim for monetary damages. *Parkhurst*, 243 P.3d at 966 ("the law of the case doctrine applies only to issues actually decided, not to issues left open").

B. There Has Been an Intervening Change in the Law

Even if the Court did rule on Lance's contract language defense, that ruling should not inhibit the Court from reviewing that ruling in light of changed law on certifying a class for damages. A court should depart from the law of the case doctrine "when there has been an intervening change of law outside the confines of the particular case." 18B Fed. Prac. & Proc. Juris. § 4478 Law of the Case (2d ed.). After this Court certified a class for damages, the Supreme Court issued *Comcast*, forcefully rejecting the rationale relied upon by this Court to certify the Damages Class in this case. In addition, after this Court ruled that individualized contract language was outside the scope of Plaintiff's breach of contract case, the Tenth Circuit issued two decisions reversing class certification in royalty underpayment cases, holding that the plaintiff and the court must evaluate contract language to determine if individualized language negates the defendant's liability. *Roderick*, 2013 WL 3389469, at *4; *Chieftain*, 2013 WL

3388629, at *3. Therefore, even if this Court previously rejected Lance's contract language defense for class certification purposes, such rejection either does not extend to the merits of Lance's defenses or such rejection is no longer valid. Contract language bears directly on Plaintiff's breach of contract claim and cannot be ignored despite Plaintiff's efforts to do just that.

VI. Lance Pays Royalty Owners' Taxes *Based on Royalty Owners' Tax Liability*, not Lance's Tax Liability, Which Plainly Complies with Wyo. Stat. § 39-14-203

Plaintiff's theory that Lance retains more money from royalty owners than Lance pays in taxes on royalty owners' behalf is elegantly simple, but patently untenable. Plaintiff strains to frame the issue in a manner that correlates to his theory, leaving open questions that demonstrate the inaccuracy inherent in Plaintiff's theory. Plaintiff states the issue in the following result-oriented fashion: "Does W.S. § 39-14-203(c)(iii) permit Lance to deduct more than the interest owners' proportionate share of taxes actually paid?" Pl.'s Mot. 14. This rhetorical phrasing **assumes** that Lance deducted more money from royalty owners than Lance paid to taxing authorities on their behalf. But Plaintiff points to no evidence of record that shows that Lance deducted from royalty owners more tax liability than Lance paid to the taxing authorities on their behalf. There is none. Undaunted, Plaintiff then reorganizes the words of Wyo. Stat. 39-14-203(c)(iii) to make his argument on what royalty owners' "proportionate share" of taxes should be – **without** addressing what "interest ownership" means in the phrase "in proportion to the interest ownership." That is the issue for the Court to decide, as framed by Lance in its Memorandum in Support of its Motion for Summary Judgment at 4.

A. Lance and Royalty Owners Have Different Tax Liabilities Because They Pay Different Tax-Deductible Costs

Although Plaintiff is careful not to frame his case in this manner, Plaintiff's argument is essentially as follows: Royalty owners' tax liability is not derived from applying the tax rate to what royalty owners actually get, their royalty interest payment – rather, royalty owners' tax liability should be a percentage, generated by their interest in gross proceeds, of the collective tax liability of Lance and royalty owners. The reality that this theory fails to appreciate is that Lance and royalty owners are not identically situated because they do not pay the same tax-deductible costs.

Lance is the producer that pays tax-deductible costs to transport **and** process the gas. Royalty owners generally only pay their share to transport **but not** to process the gas because Lance does not deduct processing costs from royalty even though it is deductible under most leases and the WRPA.[12] Thus, a disparity in the royalty owners' favor exists between what Lance and royalty owners pay regarding tax-deductible costs. If Lance and royalty owners equally shared all tax-deductible costs, there would be no dispute, because the proportionate share of costs, taxes, and gross proceeds would all be the same proportion. The reality that alters the equation is that Lance pays certain costs that are tax deductible and royalty owners do not. Accordingly, the parties' collective tax liability is not evenly shared because of the different taxable proceeds they receive. Although Lance must pay taxes on behalf of royalty owners, it is still the royalty owners' tax liability that Lance withholds **proportionally**, based on royalty

[12] Under most of its leases with royalty owners, Lance could deduct processing costs. *See* Def.'s Mem. in Supp. of Mot. for Summ. J., Ex. 5, Terry Report ¶¶ 45-46, and Ex. 6, Excerpts of Dep. of James S. Wilson, 71-73. The fact that Lance does not deduct most processing costs from royalty owners should not entitle royalty owners to a double benefit of a tax deduction for processing costs too.

received after costs paid. Lance's responsibility to pay royalty owners' tax liability does not mean an equal, non-proportionate sharing of the total taxes owed.

Lance's procedure is simple and recognizes different tax liabilities based on different taxable proceeds.[13] Each month, Lance calculates the amount of royalty proceeds each owner is entitled to be paid, and then Lance applies the production tax rates to the amount royalty owners are **actually** paid. The amount of tax so calculated is then deducted from each monthly royalty payment check. In this fashion, each owner **pays the amount of tax owed on the revenues they actually receive** each month. Royalty owners are taxed on their interest in production, i.e., their royalty interest. Royalty owners pay taxes on, and only to the extent of, what they own. The importance of this proposition is that royalty owners are responsible for taxes on an interest that takes into account costs deducted from royalty.

Certain costs paid by Lance (processing) are not deducted from royalty, and therefore any tax benefit associated with those costs is allocated to Lance and not shared with royalty owners who do not bear these costs. Plaintiff downplays the correctness of this approach articulated by Lance's expert, Ms. Deborah Liller, a CPA with over 30 years' experience, a Masters in Taxation degree, and Wyoming production tax payment experience for another oil and gas operator. Plaintiff calls her opinion "unsupported", but notably fails to attack her qualifications or relevance.[14] Unlike Plaintiff's "expert" Mr. Wilson who tries to interpret the tax statute at

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[13] This procedure and examples to illustrate Lance's accounting for taxes "in proportion to the [royalty] interest ownership" is further explained in Def.'s Mem. in Supp. of Mot. for Summ. J. 6-11, 13-15.

[14] Plaintiff filed a motion to strike four other Lance experts, but not Ms. Liller.

issue with no basis or experience,[15] Ms. Liller has the tax experience and qualifications to render her opinion on tax deductions and tax principles.[16]

B. Lance's Withholding Ensures Taxes "in Proportion to [Royalty Owners'] Interest Ownership"

Lance's approach achieves the appropriate tax treatment, as it "proportion[s] the interest ownership," which is royalty value. Mr. Geer "owns" a royalty, not a "taxable value." The statutes governing taxes assessed on the gross product of a well provide the framework to ensure that "both the lessee and lessor are responsible for payment in proportion to their ownership shares." *Ashland Oil Co. v. Jaeger*, 650 P.2d 265, 268 (Wyo. 1982). Royalty owners own a share of production, or royalty, which is the ownership interest that is taxed. *See also Hearing No. 11,660*, 1982 WL 12798, *13 (Tex.Cptr.Pub.Acct.) (attached as Ex. 10 to Def.'s Rule 56.1) (holding that the operator and royalty owners "should share the natural gas severance tax burden in the same proportion they share the net proceeds from a downstream sale of the gas, not the respective fractional interests in the mineral estate").

Applying the tax rates to royalty actually received ensures that both parties are taxed equally on what they actually get, the most sensible, fair and logical result. In contrast, Plaintiff's theory to apply the tax rates to "taxable value," which is something nobody owns, gives royalty owners a double benefit: they do not pay their share of certain costs to market the gas, and then the costs they do not have to pay also would become their tax deduction. Plaintiff's approach also leads to different effective tax rates and higher tax burdens than the

[15] *See* Def.'s Mot. to Strike Pl.'s Rule 26(a)(2) Designation of James Steven Wilson 5-8.

[16] Ms. Liller's qualifications are summarized in her resume at Ex. A to Def's Rule 56.1 Ex. 7.

producer when Class Members' contracts provide for a lower "royalty value" compared to taxable value. None of these consequences is logical.

C. The WRPA Fails to Rescue Plaintiff's Erroneous Tax Theory

Since Plaintiff cannot really refute that his reading of the tax statute is illogical, Plaintiff resorts to bootstrapping the purpose of the WRPA onto the tax statute: "Lance's unilateral calculation of deductions for taxes that exceed royalty owners' proportionate share of taxes Lance actually paid 'would inject the arbitrariness that the legislature intended to defeat by enactment of the Act [the WRPA].'" Pl. Mot. 16. However, the WRPA has nothing to do with the calculation of taxes – the tax statute defines that. Thus, the WRPA's legislative purpose is equally inapplicable to this case.[17]

Plaintiff's improper mixing of the WRPA and the tax statute at issue effectively highlights why Plaintiff does not want to deal with individual contract language that defeats most Class Members' breach of contract claims. Wyoming tax statutes do not create a private cause of action for Plaintiff.[18] The WRPA does not define how to calculate taxes either, and thus there is no claim associated with tax withholding unless the tax withholding causes an actual underpayment of royalties required by a contract.[19] This reality explains why Plaintiff's claim and Lance's defense are both governed by the individual contracts at issue, further illustrating that Lance's defense under the contract is not a setoff or recoupment claim as Plaintiff wants to believe given Plaintiff's failure of proof.

---

[17] *See Wold v. Hunt Oil Co.*, 52 F. Supp. 2d 1330, 1335-36 (Wyo. 1999) (remedial statutes like the WRPA should be liberally construed but "in construing tax statutes, the court does not attempt to accomplish legislative intent").

[18] *See* Def.'s Mem. in Support of its Mot. to Decertify the Damages Class 7-8.

[19] *Id.* 8-10.

CONCLUSION

Plaintiff conveniently ignores that this is a breach of contract action he filed, has failed to prove a breach of contract for each of the Class Members, and yet asks this Court to enter summary judgment on liability for breach of contract when the only credible evidence shows that most Class Member have suffered no damages, even if Plaintiff's tortured and illogical reading of the tax statute is correct. Plaintiff's Motion for Partial Summary Judgment should be denied.

DATED August 22, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, I served the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** 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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John C. McKinley
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Cheyenne, WY 82003

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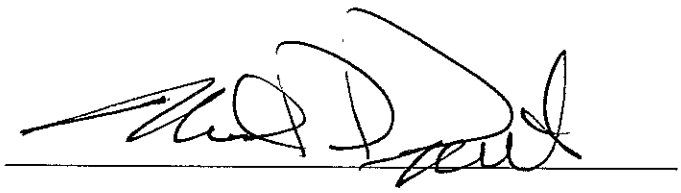

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DISTRICT COURT, CAMPBELL COUNTY, WYOMING

Civil Action No. 32940

DEPOSITION OF JAMES S. WILSON July 25, 2013

KENNETH B. GEER,

Plaintiff,

vs.

ANADARKO E & P ONSHORE, L.L.C.,
Successor to Lance Oil & Gas Company, Inc.,
a Delaware corporation,

Defendant.

APPEARANCES:

DAVIS & CANNON, L.L.P.
By Kate M. Fox, Esq.
and
John C. McKinley, Esq.
422 West 26th Street
P.O. Box 43
Cheyenne, Wyoming 82003
Appearing on behalf of Plaintiff.

HOLLAND & HART, L.L.P.
By Mark R. Ruppert, Esq.
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, Wyoming 82001-1347
Appearing on behalf of Defendant.

ANADARKO PETROLEUM COMPANY
By Thomas P. Goresen, Esq.
1201 Lake Robbins Drive
The Woodlands, Texas 77380
Appearing on behalf of Defendant.

ALSO PRESENT: Mike Zeeb

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A Yes.
Q And that's based on the royalty that a royalty owner receives, right?
A Actually, it's the value upon which the taxes were based on from the check stub.
Q It's basically based on the gross proceeds minus costs taken from a royalty owner times an owner's interest.
A Yes.
Q So royalty value for a royalty owner like the First Presbyterian Church is going to be different than royalty value for someone whose lease doesn't allow these deductions, right?
A Right.
Q In other words, royalty value of royalty owners depends on the lease and it varies?
A Yes.
Q Did you look at Ms. Terry's (phonetic) report in this case?
A Briefly.
Q And did you look at her conclusions about varying lease language in terms of what the royalty should be?
A I didn't pay much attention to her report. It didn't address the issues that...

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Q You weren't asked to look at that?
A I focused primarily on Mike Zeeb's.
Q Okay. Let's go back to your report then. When you say at the bottom of Page 1, going over to Page 2, that Lance's incorrect methodology to calculate taxes resulted in underpayment for all Campbell County royalty owners, what you really mean, I think, is underpayment based on tax overwithholding.
A Yes.
Q Is that correct?
A Yes.
Q You're not saying they're 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

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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 You say you did focus on Mr. Zeeb's report though, correct?
A I reviewed Mr. Zeeb's report.
Q Did you review it very carefully?
A Second part, not necessarily the first part.
Q All right. But you did review the first part?
A I looked at his calculations of specific leases.
Q For his first part, even though you weren't asked to do this, do you have any criticism of his methodologies?
A Not at this time, no.

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Q I'm looking at Page 2 of your report again, going over to Page 3, and there's a list of additional requested information that seems to be reprinted from your original report from March. I've asked you this before, but I just want to make sure we are all on the same page. And that is that whatever you requested from Lance or from Mr. McKinley to do your calculations you have received; is that correct?
A I believe I have all the information.
Q And you believe you had it at the time this report was issued? By this report, I mean the June 7th report.
A Well, I'm going to have to recreate some of it myself since it was not, you know, specifically in the -- in one document.
Q Like a well cross reference, for example?
A Yes.
Q You have everything --
A Like tax --
Q -- you need to do that?
A -- tax districts not provided in journal entries. Counties not provided in the journal entries.
Q But you didn't do that at the time of

A No, I do not.
Q Do you explain what that statute says or means anywhere?
A I have not.
Q Do you indicate at all your reliance on that statute anywhere in either report?
A I may have placed it in my affidavit. I'm not sure.
Q What affidavit was that?
A My original affidavit on this matter.
Q In this case?
A Yes.
Q Before we go on and talk more about taxable value, I didn't see it in your report and I'm assuming -- but I don't want to assume, I want to ask you. You're not saying that Lance is using the wrong taxable value in this case, are you?
A No, I did not.
Q And you're not saying that Lance is paying the wrong amount of taxes to the state overall, are you?
A I did not, no.
Q That's not part of your opinions in this case.
A No.

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.
Q I'm still on Page 7 and I'm in that same paragraph toward the bottom of that paragraph. You say, "The State of Wyoming allows, by statute and rule, certain deductions to determine taxable value which are not allowed to be deducted to calculate royalty value."
Do you see that?
A Yes.
Q What deductions are allowed to be taken for taxable value which are not allowed to be deducted for royalty value?
A I guess I'd have to look at the rules.
Q You can't explain the statement in your report?
A Not without looking at the rules.
Q Well, you don't mean processing obviously, do you? Because processing is deductible from taxable value and as we discussed earlier, it's also deductible depending on the lease or depending on the Royalty Payment Act, it's deductible from royalty as well. So you don't mean processing, do you?

A No.
Q You don't mean transportation, do you?
A No.
Q Do you mean gathering?
A Gathering's not allowed for royalty value.
Q Well, hold on a second. The First Presbyterian lease that we looked at, it is for that lease, right?
A For that lease.
Q Or a lease like it?
A Not under the Royalty Payment Act, but provisions if it's expressly otherwise stated.
Q Right. Is gathering deductible for taxable value?
A I'm not quite sure on that.
Q So you really can't tell me what you mean, sitting here at this point, by this sentence? You don't know what you meant?
A Well, obviously there's certain deductions that are taken under the taxable value that aren't taken under the royalty value. If there was, they were -- they'd be the same value.
Q But when you say not allowed to be

deducted to calculate royalty value, we've already discussed transportation and processing would be allowed to be deducted to calculate royalty value, correct?
A Yes.
Q All right. I'll move on then.
I'm going to turn to Page 8 in the middle of the page, the bottom of that long paragraph starting, Taxable value, you have quoted apparently an affidavit from Janis Wallner in terms of how Lance calculates its taxable value. Do you see that?
A Yes.
Q Do you know if Lance ever deducted gathering to arrive at taxable value?
A I do not know if they did or not.
Q Would that be important for you to know in your opinions in this case?
A In this case, I was strictly looking at the tax -- certified taxable values versus the royalty value calculated on the check.
Q And you're looking at the difference between taxable value and royalty value, right?
A Right.
Q Are you seeing that the difference varied

allowed to make all the corrections and adjustments that you've testified are necessary today and just based on your current report, would you rely on that report if you were the court?

A There needs to be an adjustment to some values, yes.

Q Would you rely on that report if you were the court?

A There -- there's some adjustments that need to be made.

Q Are you having a problem answering my question yes or no?

A There -- I guess no.

Q Thank you.

One last question. On the effective tax rate issue that we'd talked about today, before -- just a few minutes ago when I brought that to your attention, is that something you ever thought about or considered before?

A No, I considered what Lance actually did.

Q All right. Thank you.

MR. McKINLEY: Done.

THE REPORTER: Reading and signing?

Mr. McKINLEY: Yeah.

(The deposition concluded at 3:54 p.m.,

July 25, 2013.)

I, JAMES S. WILSON, do hereby certify that I have read the foregoing transcript and that the same and accompanying amendment sheets, if any, constitute a true and complete record of my testimony.

_____
Signature of Deponent

( ) No Amendments
( ) Amendments Attached

Acknowledged before me this
_____ day of _____, 2013.

Notary Public:_____

My commission expires_____
Seal:

MFS

STATE OF COLORADO)
) ss. REPORTER'S CERTIFICATE
COUNTY OF DENVER)

I, Marlene F. Smith, do hereby certify that I am a Registered Professional Reporter and Notary Public within and for the State of Colorado; that previous to the commencement of the examination, the deponent was duly sworn to testify to the truth.

I further certify that this deposition was taken in shorthand by me at the time and place herein set forth, that it was thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

In witness whereof, I have affixed my signature this 29th day of July, 2013.

My commission expires June 29, 2017.

_____
Marlene F. Smith, RPR
216 - 16th Street, Suite 600
Denver, Colorado 80202

AGREN BLANDO COURT REPORTING & VIDEO, INC.
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4450 Arapahoe Avenue, Suite 100
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August 5, 2013
John C. McKinley, Esq.
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Re: Deposition of JAMES S. WILSON
07/25/2013
Geer vs. Anadarko, et al.
Civil Action No. 32940

The aforementioned deposition is ready for reading and signing. Please attend to this matter by following BOTH of the items indicated below:

_____ Call the number listed above and arrange with us to read and sign the deposition in our office

XXX Have the deponent read your copy and sign the signature page and amendment sheets, if applicable; the signature page is attached

_____ Read the enclosed copy of the deposition and sign the signature page and amendment sheets, if applicable; the signature page is attached

XXX WITHIN 30 DAYS OF THE DATE OF THIS LETTER

_____ By _____ due to a trial date of _____

Please be sure the signature page and amendment sheets, if any, are SIGNED BEFORE A NOTARY PUBLIC and returned to Agren Blando for filing with the original. A copy of these changes should also be forwarded to counsel of record.

Thank you.

AGREN BLANDO COURT REPORTING & VIDEO, INC.

cc: All Counsel

- AMENDMENT SHEET -
Deposition of JAMES S. WILSON
07/25/2013
Geer vs. Anadarko, et al.
Civil Action No. 32940

The deponent wishes to make the following changes in the testimony as originally given:

Page	Line	Should Read	Reason

Signature of Deponent: _____

Acknowledged before me this ____ day of _____, 2013.

Notary's signature _____
(seal)

My commission expires _____.

AGREN BLANDO COURT REPORTING & VIDEO, INC.
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Denver, Colorado 80202
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Boulder, Colorado 80303

JAMES S. WILSON
07/25/2013
Geer vs. Anadarko, et al.
Civil Action No. 32940

The original deposition was filed with Mark R. Ruppert, Esq., on approximately the 29th day of July, 2013.

_____ Signature waived

_____ Unsigned; signed signature page and amendment sheets, if any, to be filed at trial

_____ Reading and signing not requested pursuant to C.R.C.P. Rule 30(e)

XXX Unsigned; amendment sheets and/or signature pages should be forwarded to Agren Blando to be enclosed in the envelope attached to the sealed original.

Thank you.

AGREN BLANDO COURT REPORTING & VIDEO, INC.

cc: All Counsel